STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

Electric Distribution Utilities

Consideration of Changes to the Current Net Metering Tariff Structure, Including Compensation of Customer-Generators

Docket No. DE 22-060

Motion of the Office of the Consumer Advocate for Rehearing

NOW COMES the Office of the Consumer Advocate ("OCA"), a party to this docket, and moves pursuant to RSA 541:3 and N.H. Code Admin. Rules Puc 203.07 for rehearing of certain aspects of the Prehearing Order entered by the Commission on April 24, 2024 (tab 82). In support of this request, the OCA states as follows:

I. Introduction

This contested adjudicative proceeding, commenced in 2022 at the directive of the General Court, is intended to lead to net metering tariffs that would replace those approved by the Commission in 2017. Congenial to the procedural schedule approved by the Commission, the state's three investor-owned electric utilities submitted prefiled testimony on August 11, 2023 (tab 48), followed on December 6, 2023, by prefiled testimony from the OCA (tab 59), the Department of Energy ("Department") (tabs 60 and 62), intervenor Clean Energy New Hampshire (tab 61), and intervenor Community Power Coalition of New Hampshire (tab 63). These

submissions recommended various substantive outcomes, both as to how to structure new net metering tariffs and as to various ancillary issues. On January 30, 2024, the Commission received rebuttal testimony from the Department (tab 66), the utilities (tab 67), Clean Energy New Hampshire (tab 68), and the Community Power Coalition of New Hampshire (tab 69). Thereafter, the parties conducted an extended series of settlement negotiations.

On February 29, 2024, the parties submitted a joint letter (tab 77) reporting that "significant progress" had been made toward settlement but that the then-applicable deadline for settlement submission (March 5) and the scheduled hearing date (March 12) were "premature given the current status of settlement discussions." The letter therefore sought extensions of these deadlines.

In response, the Commission voided the two March deadlines, also scheduling and thereafter conducting a pre-hearing conference on April 11, 2024. At the April 11 prehearing conference, counsel for Liberty Utilities (Granite State Electric) Corp. ("Liberty") indicated that all of the parties, with the exception of the Department and the Community Power Coalition of New Hampshire, had reached a "handshake agreement." Tr. 4/11/24 (tab 83) at 12, lines 19. "There is no signed document, we're working on that," he added. *Id.* at lines 19-20. Thereafter, the Commissioners asked a series of questions about issues of particular concern to them.

At the conclusion of the April 11 prehearing conference, Chairman Golder stated the Commission would issue an order "to just highlight what we talked about

today" and that the Commissioners would "meet . . . and see if [they] would like to issue any kind of record requests to prepare for the hearing." *Id.* at 84, lines 3-9. Apparently, the meeting yielded an energetic response.

Specifically, pages 3 and 4 of the Prehearing Order lay out no fewer than 19 "record requests" (a phrase that, as the OCA has previously reminded the Commission, appears nowhere in the agency's procedural rules) – responding fully to which would require extensive research and analysis. The questions concern not just the present and future of net metering in New Hampshire but also seek to develop an extensive body of information about net metering and its compensation in jurisdictions across the United States. Moreover, at least some of the questions would require parties to take or state certain substantive positions that may or may not align with their previously filed testimony or any settlement agreement that may be presented to the Commission. For the reasons that follow, these interrogatories are ill-advised, inappropriate, and inconsistent with New Hampshire law. Therefore, the Commission should grant rehearing of its Prehearing Order for the purpose of withdrawing the 19 "record requests."

II. Propriety of Pre-Hearing "Record Requests"

On October 12, 2023, the OCA filed a letter in Docket No. DE 23-068 – the contested administrative proceeding opened by the Commission to consider the proposed 2024-2026 Triennial Energy Efficiency Plan – objecting to an order of the Commission in that docket for the OCA's witnesses to respond to certain

interrogatories. *See* Letter of Consumer Advocate Donald M. Kreis (Oct. 12, 2023), tab 80 in Docket No. DE 23-068. The OCA Letter also objected to the Commission's stated intention to take administrative notice of several sets of voluminous interrogatories posed to the utilities that participated in that proceeding. The utilities interposed similar objections, pointing out that their witnesses would not be adopting any of the interrogatory responses during their sworn testimony at hearing. *See* October 16, 2023, Letter from Attorney Jessica Chiavara *et alia*, tab 83 in Docket No. DE 23-068 at 2. The utilities noted: "[T]his process is entirely contrary to administrative law principles. Evidence admitted to the record must be subjected to cross-examination or other contest and this fundamental right is defeated where the Utilities' own witnesses are asked to appear at hearing to sponsor questions and responses that would then be subject to cross-examination by the Utilities themselves." *Id.*

The same infirmities apply here, presuming that the Commission intends to rely on the responses to its "record requests" in deciding the instant case. In DE 23-068, the Commission sidestepped these issues by determining that it was "not necessary to take official notice under RSA 541-A:33 of the record request responses and specific answers in this instance for the purpose of making factual findings." Supplemental Prehearing Order of October 20, 2023 (tab 86) in Docket DE 23-068 at 2. The Commission stated it would "review the record request responses and specific answers a part of our review of the overall record in making our

determinations in this matter, affording this data the weight it deserves." *Id.*

This ruling constituted reversible error, but no appellate proceedings ensued because the Commission ultimately approved – or, at least, allowed to go into effect – the 2024-2026 Triennial Energy Efficiency Plan. Thus, in light of the substantive outcome of the case, concerns about process and about the extent of the evidentiary record were moot.

(A) The Commission may not reinvent the contested case.

The contested case procedures of the New Hampshire Administrative Procedure Act, RSA 541-A, do not contemplate an agency unilaterally migrating its decision-making model from court-like adversarial proceedings to a paradigm that scholars have described as "inquisitorial." *See, e.g.*, David Alan Sklansky, *Anti-Inquisitorialism*, 122 Harvard Law Rev. 1634 (2009) (noting in its initial paragraph that "avoiding inquisitorialism has long been thought a core commitment of our legal heritage"); Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisatorial Administrative Proceedings*, 97 Columbia Law Rev. 1289 (1997) (critiquing the inquisitorial decision-making model applied by the Social Security Administration to disability determinations); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 Harvard Law Rev. 353, 385-391 (1978) (observing *inter alia* that "the integrity of adjudication is impaired if the arbiter not only initiates the proceedings but also, in advance of the public hearing, forms theories about what happened and conducts his own factual inquiries. In

such a case the arbiter cannot bring to the public hearing an uncommitted mind; the effectiveness of participation through proofs and reasoned arguments is accordingly reduced.").

The point here is not to embroil the Commission, or anyone else, in a discussion of the philosophical implications of various approaches to judicial decision-making. Rather, the point is that a transition from an adversarial model, in which the litigants essentially control through their advocacy what is introduced into the evidentiary record, to one in which the decisionmaker builds the record, is a significant paradigm shift. Indeed we believe it is so significant that: (1) the adversarial model is simply presumed rather than explicitly adopted in the relevant provisions of RSA 541-A and any related provisions of the Commission's organic enabling statutes, and (2) shifting to an inquisitorial decision-making model, in which the Commission decides what is in the record and why, is too big a decision to make without explicit authorization from the General Court, whether obtained via the rulemaking process or via the enactment of legislation.

The General Court has explicitly vested the Commission with authority to conduct "such independent investigation as in its judgment as the public good may require" in "any case in which the commission may hold a hearing." RSA 365:19. This statutory provision further provides that when such an investigation "disclose[s] any facts which the commission shall intend to consider in making any decision or order," the Commission must cause such facts to be "stated and made a

part of the record," further requiring "any party whose rights may be affected" to be afforded a reasonable opportunity to be heard with reference thereto or in denial thereof."

This is the only statutory provision that authorizes the Commission to deviate from the contested case procedures otherwise applicable via sections 31 through 35 of the Administrative Procedure Act. It is well-established that the Commission's authority is limited to "that which is expressly granted or fairly implied by statute." *Appeal of Public Service Co. of N.H.*, 130 N.H. 285, 291 (1988) (citation and internal quotation marks omitted). Given that the Legislature foresaw situations in which the Commission would want to venture beyond simple reliance on evidence produced via the adversarial process, and expressly granted the agency the right to introduce factual material into the record on its own motion, it follows that the General Court withheld alternative solutions to this problem such as the one the Commission seeks to use here – in effect, requiring the parties to become the Commission's investigative assistants and research bureau. This approach to contested cases is *ultra vires* and therefore impermissible.

(B) The Commission must follow its own procedural rules.

Even assuming the Commission could lawfully improvise its way to a new and different form of contested case proceeding, there is the separate problem of the agency's obligation to comply with its own rules – in this case, the procedural rules codified as Chapter Puc 200 of the New Hampshire Code of Administrative Rules.

"[I]t is well established that 'an administrative agency must follow its own rules and regulations.'" *Genworth Life Ins. Co. v. Department of Insurance*, 174 N.H. 78, 87 (2021) (quoting *Appeal of Nolan*, 134 N.H. 723, 728 (1991)). In the context of the procedural rules that govern contested case proceedings under the Administrative Procedure Act, the General Court deemed it so important that such cases proceed according to a set of rules that it directed the attorney general to adopt "model' rules for adjudicative proceedings that would apply to agencies that "do not have adopted effective rules" covering adjudicative procedures. RSA 541-A:30-a, II (further providing that the model rules "shall not expire").

As the OCA has noted in previous dockets, what are commonly referred to as "record requests" in Commission proceedings are actually late-filed exhibits (i.e., exhibits entered into evidence after the close of a hearing), a subject covered by N.H. Code Admin. Rules Puc 203.30. This rule allows for the admission of such exhibits into evidence, at the request of a part or on the Commission's own motion, if the proposed evidence will "enhance [the Commission's] ability to resolve the matter in dispute." *Id.* at (a). To admit a late-filed exhibit the Commission must consider both the probative value of the exhibit and "[w]hether the opportunity to submit a document impeaching or rebutting the late filed exhibit without further hearing shall adequately protect the parties' right of cross examination." *Id.* at (c).

In light of the above, it is clear that the Commission may not depart from the Chapter Puc 200 rules even when, as is potentially the case here, those rules do not adequately take into account the transition (created in 2021 via the advent of the

Department of Energy) away from having Commission employees shape the development of the record by participating in proceedings as if they were a party. *See* Rule Puc 203.01 ("When participating in an adjudicative proceeding, commission staff shall be subject to the rules in this part in the same manner and to the same extent as a party"). Puc 203.30 is the only available procedure by which the Commission can, subject to due-process limitations, shape the development of the written record beyond what the parties generated themselves via the adversarial process. If the agency wants to broaden such opportunities in the manner contemplated here by its Prehearing Order, it must amend its procedural rules to that effect and subject such changes to the rigors of scrutiny by the Joint Legislative Committee on Administrative Rules as specified in RSA 541-A:3 *et seq.*[1]

(C) The statutory authority to conduct investigations is not applicable.

Further, presuming the Commission may have authority to proceed under RSA 365:19 (which it may well not for the reasons stated on page 2 of the utilities' October 16, 2023 letter in Docket No. DE 23-068, *supra*), the Commission's inquiries do not appear to align with the type of information the General Court understood the Commission would gather under that law. RSA 365:19 permits the Commission to conduct an investigation to "disclose any facts" that may become part of the record. Contrary to this limited search for facts, the Commission's interrogatories

[1] The Puc 200 rules do reserve to the Commission the right to waive "the provisions of any of its rules," including the Puc 200 rules themselves, in certain circumstances. But this applies "except where precluded by statute." Rule Puc 201.05(a). As explained, *supra*, the Administrative Procedure Act precludes what the Commission is attempting to do here via implicit waiver of its rules.

seek legal and policy determinations from the various parties. For example, Question E asks about whether cross-subsidies are "appropriate and acceptable," the response to which would undoubtedly require parties to state positions of policy rather than matters of fact. Similar afflictions attend Questions G and H.

Lastly, it is unclear that providing responses to at least some of the questions would provide any facts that would be useful in the analysis the Commission is tasked with undertaking here. In particular, Question O seeks a ranking of "the most expensive to least expensive sources of energy for new construction in New Hampshire" but any response would require such an extensive set of assumptions that the answer would be meaningless, confusing, misleading, or worse. By what measures is the Commission presuming this ranking will be made? What factors would be counted in determining the relevant expenses, and over what time-horizon? What kind of "new construction" counts in this analysis? Must all parties agree on the ranking, or can each party conduct its own analysis and ranking? Ultimately, any response would not yield any "facts" for the Commission but rather a laundry list of untested assumptions resulting in a ranking that is, in effect, arbitrary.

III. Special Circumstances Related to this Proceeding at this Juncture

In addition, there are reasons unique to this case and its present procedural posture that make the Commission's written interrogatories inappropriate.

The directive at page 3 of the Prehearing Order states, specifically: "The Commission requests that the Settling Parties provide answers to these record

requests by June 14, 2024. Any non-settling parties may also file answers to the record requests by June 14, 2024. Any party may file responses to the initial record request answers by June 28, 2024." There are not, at present, actually any "Settling Parties" – just a group of parties that have entered into what was descried at the latest prehearing conference as a "handshake agreement." It is therefore premature at best for the Commission to direct various parties to collaborate on so monumental an undertaking as responding to all of the research the Commission has demanded of the settling parties. Arguably, the Commission has inappropriately inserted itself into the settlement negotiations by, in effect, requiring agreement on joint responses as a precondition to signing the settlement. The questions themselves have every likelihood of affecting any settlement negotiations that occur in quest of reducing the "handshake agreement" to paper, inasmuch as they unambiguously convey to the parties what issues loom largest for those parties hoping to gain Commission approval of any agreement they might sign. Further, the investment of both time and effort in answering and/or responding would only grow should one or more of the "Settling Parties" or other parties change its position on settlement in the coming weeks as the inclusion or exclusion of any party may well alter each response. In these circumstances, particularly given that two key parties to the proceeding (the Department of Energy and the Community Power Coalition of New Hampshire) have already indicated they will not be signing whatever document emerges from the "handshake

agreement," the OCA will likely decline to sign as well in an effort to avoid compulsory collaboration on responses to the Commission's interrogatories.

IV. Conclusion

The Office of the Consumer Advocate reiterates here what it had stated in numerous proceedings since the General Court created the Department of Energy in 2021 and thereby reconfigured public utility regulation in New Hampshire such that the Department assumed policy development and investigative responsibilities while the Commission's authority narrowed to adjudicative responsibilities. This updated division of the responsibilities poses special difficulties for the Commission because it limits the agency's ability to direct the course of the contested cases it must decide and shape the record of those proceedings. The Commission lacks the authority to solve these problems on its own on a case-by-case basis. Rather, the agency must either update its procedural rules or seek remedial legislation. The OCA is enthusiastic about assisting the Commission with such endeavors, but we regrettably must object to the invention of new approaches to contested case adjudication that do not enjoy the imprimatur of the General Court.

For the reasons stated above, the Commission should grant rehearing of its Prehearing Order and withdraw the "record requests" issued via that order.

WHEREFORE, the OCA respectfully request that this honorable Commission:

A. Grant the motion of the Office of the Consumer Advocate for rehearing of the Prehearing Order entered in this docket on April 24, 2024, as described more particularly above, and

B. Grant such further relief as shall be necessary and proper in the circumstances.

Sincerely,

Donald M. Kreis
Consumer Advocate
Office of the Consumer Advocate
21 South Fruit Street, Suite 18
Concord, NH 03301
(603) 271-1174
donald.m.kreis@oca.nh.gov

May 6, 2024

Certificate of Service

I hereby certify that a copy of this pleading was provided via electronic mail to the individuals included on the Commission's service list for this docket.

Donald M. Kreis