STATE OF NEW HAMPSHIRE

CONSUMER ADVOCATE
Donald M. Kreis

ASS'T CONSUMER ADVOCATE
Matthew J. Fossum

TDD Access: Relay NH
1-800-735-2964

Tel. (603) 271-1172

OFFICE OF THE CONSUMER ADVOCATE
21 S. Fruit Street., Suite 18
Concord, New Hampshire 03301-2429

Website:
www.oca.nh.gov

August 26, 2024

Chairman Daniel C. Goldner
New Hampshire Public Utilities Commission
21 South Fruit Street
Concord, New Hampshire 03301 via e-mail to: ClerksOffice@puc.nh.gov

Re: Docket No. DRM 24-085
Proposed Chapter Puc 100 Rules

Docket No. DRM 24-086
Proposed Chapter Puc 200 Rules

Dear Chairman Goldner:

As you know, the Office of the Consumer Advocate ("OCA") filed extensive comments on July 12, 2024 in the two above-captioned rulemaking dockets. Since then, the Commission has been kind enough to extend the deadline for written comments to August 26, which has provided us with additional opportunities to discuss the Commission's proposed rules with other stakeholders and to reflect further on the enormous task the Commission has undertaken to update its procedural rules. Therefore, we are taking this opportunity to offer some brief additional comments, which we ask the Commission to consider as supplemental to our July 12 filing.

Party Status of the Office of the Consumer Advocate

Attached is a Memorandum of Understanding ("MOU") entered into between the Commission and the OCA in 2000. The MOU has for the past 24 years successfully addressed two potentially competing imperatives: (1) the right of the OCA, pursuant to RSA 363:28, to participate in Commission proceedings as a party without seeking intervenor status, and (2) the need of the Commission (and other parties participating in Commission proceedings) to know with certainty when the OCA is a party to a proceeding (as opposed to simply monitoring the proceeding or not participating at all). This arrangement has not been controversial, or otherwise problematic. We therefore respectfully request that the Commission enshrine this arrangement in its procedural rules with this language: *The OCA shall be a party to any proceeding of the Commission in which the OCA has filed written notice of its intent to participate*.

We are agnostic about where in the rules this provision should appear but believe that such a rule should cover all PUC proceedings, not simply those that are deemed to be adjudicative. We are also agnostic about whether the rules should contain a similar provision applicable to the Department of Energy.

Whether proceeding under the MOU or by rule, the OCA anticipates continuing its present practice of filing our notice of intent to participate immediately after the Commission commences a proceeding, on or before the deadline for seeking intervenor status. On rare occasions we file notices of intent to participate at a later stage in a proceeding, subject to our understanding (as noted in the MOU) that we will work within the previously approved procedural schedule for the docket. This, too, is implicit in the succinct language we propose above for inclusion in the Puc 200 rules.

At page 26 of our July 12 comments, we discuss proposed Rule Puc 204.08, which concerns settlements and stipulations in adjudicative proceedings. On further reflection we believe the Commission should narrow the scope of the discretion it applies to the question of whether to approve settlements. We propose the following language for insertion into what is codified in the initial proposal as Rule Puc 204.08(b): *The commission shall approve a disposition of any contested case by settlement, if it determines that the result is consistent with applicable law.*[1]

In other words, when all of the parties to a contested case agree on a proposed resolution of the proceeding the Commission should defer to the collective wisdom of those who have taken the time and effort to participate as parties – provided that the parties have not proposed something that is inconsistent with applicable law. The notion that the Commission enjoys vast discretion to review settlements according to the commissioners' own judgment as to what the public interest requires was, perhaps, appropriate when the Commission had dual roles as adjudicator and policy avatar. But the General Court transferred the 'policy avatar' role to the Department of Energy in 2021, and in these circumstances the Commission should treat fully settled contested cases the way a court would. This is particularly true given that, in most instances, settlements will enjoy the imprimatur of the Department of Energy – which is, pursuant to RSA 12-P:2, II tasked with providing "unified direction of policies, programs, and personnel in the field of energy and utilities."

Transcription of Commission Proceedings

Recent weeks have seen the Commission (and those appearing before the Commission) confronting a crisis arising out of the sudden non-availability (and presumptive retirement) of the Commission's long-serving, contractually engaged court reporter. At the risk of pointing out the obvious, the jury-rigged solution that has emerged –in which it is necessary for every speaker to identify themself by name every time they say anything, to allow remote transcription of an audio recording of the proceedings – is awkward and unworkable. Beyond the certainty that the Commission cannot be the only tribunal to have confronted this problem, the OCA has not had an opportunity to form opinions about potential solutions. Obviously, however, repromulgation of the Commission's procedural rules is an opportunity to incorporate a new paradigm that will allow modern technologies to meet the evolving needs of stakeholders for a usable and searchable record of what is said in the Commission's hearing room. Accordingly, and as requested more fully below, the OCA requests that the Commission delay its rulemaking to

[1] The proposed reference to "applicable law" notwithstanding, the OCA agrees with the comments filed on August 22 by Lakes Region Water Company to the effect that the proposed definition of "applicable law" in the initial proposal is overbroad and unnecessary. We made a similar point at page 10 of our July 12 comments.

provide time to evaluate potential solutions to this and other issues before enshrining cumbersome and unworkable processes into the rules.

Some Final Thoughts

As the initial comment period in this docket concludes, it seems appropriate to add some personal reflections.

I have been immersed in the Commission's procedural rules since 1999. Many of the keystrokes embedded in the 2007 comprehensive update of the Puc 200 rules originated on my computer during my tenure as the Commission's general counsel, and few people have participated in Commission proceedings as much as I have during the past quarter-century. I've taught the basic course in administrative law at a law school. And by virtue of five years as a judicial law clerk at two state supreme courts and one federal district court, I have a working knowledge of the principles that guide decision-making in judicial settings.

This background gives me a visceral understanding of the enormity of the task you[2] confront in these two rulemaking dockets. I would have been reluctant to undertake such a task in isolation. As I reviewed what others have had to say about your initial proposal I was surprised – perhaps even astonished – to discover the absence of any collaboration with anyone outside the Commission, particularly the lack of any contact with anyone associated with the Department of Energy. As the Department noted at the July 16, 2024 public comment hearing, the General Court has vested the Department and the Commission with complementary and potentially overlapping roles with respect to the regulation of public utilities. It is therefore essential that these two executive branch agencies, in particular, coordinate their rulemaking efforts. These are rulemakings, not contested cases, and therefore no *ex parte* principles or other limitations constrain our collective ability to avoid the unseemly spectacle of state agencies arguing with each other in public settings like, e.g., the Joint Legislative Committee on Administrative Rules.

During my tenure as general counsel at the Commission, with the indulgence of the Commissioners to whom I reported I used the bully pulpit of that position to urge my colleagues at all times to think of the Commission as the servant of those who had business before the agency. Everyone who appears at the PUC is there because they need a product from the agency – decisions on matters of importance to them, that they could then rely upon (or, on rare occasions, appeal from). I therefore urged my colleagues to think of themselves as working at a decision factory, the imperative being to get the product out the door as efficiently and correctly as possible while incurring as little inconvenience and delay among the 'customers' as possible. That approach contrasts with the perspective I have observed in some judicial contexts, where judges occasionally make the mistake of thinking that litigants exist to serve the needs, preferences, and even the whims of the deciders. It is not clear to me whether, in formulating its initial proposals in these dockets, the Commission has adequately considered the extent to which the agency's procedural rules meet the reasonable needs of those the Commission exists to serve.

[2] For purposes of this discussion, I am assuming *arguendo* that you enjoy exclusive authority to promulgate these rules for the reasons stated by the presiding officer at the July 16, 2024 public comment hearing in these dockets. The OCA reserves the right to argue otherwise at appropriate junctures.

For these reasons, I respectfully but emphatically urge you to return to square one with these rulemakings. As I said in my July 12 submission, the Office of the Consumer Advocate is ready, willing, and able to work with the Commission on a set of procedural rules that will help the agency discharge its responsibilities fully, fairly, creatively, and honorably. We see that others with business before the Commission are eager to do the same. Please allow us to do so.

Sincerely,

Donald M. Kreis
Consumer Advocate

Cc: Service Lists in both dockets
Attachment