BEFORE THE NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DOCKET DE 22-060

ELECTRIC DISTRIBUTION UTILITIES

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

Motion of CLF, CENH, CPCNH, and GSHA for Rehearing

NOW COMES Conservation Law Foundation ("CLF"), Clean Energy NH ("CENH"), the Community Power Coalition of New Hampshire ("CPCNH"), and Granite State Hydropower Association ("GSHA") (collectively, the "Joint Intervenors") and move pursuant to RSA 541:3 and N.H. Code Admin. Rules Puc 203.07 for rehearing of the Prehearing Order entered by the Commission on April 24, 2024 ("April 24 Order").

The Joint Intervenors support the Office of Consumer Advocate's ("OCA") May 6, 2024 Motion for Rehearing ("OCA Motion") and all of the arguments raised therein. In addition to the arguments raised in the OCA Motion, the Joint Intervenors are particularly concerned with the effect of the April 24 Order on ongoing settlement efforts, as well as the violation created by the record requests included in the April 24 Order.

The April 24, 2024 Order Interferes with the Settlement Process

The Puc 200 rules encourage parties to reach settlement in contested matters. *See* Puc 203.20. Although nearly all of the parties to this docket have engaged in settlement discussions and many of whom have attained a "handshake agreement," there is currently not a written settlement agreement or finalized settlement terms. The Commission's request "that the Settling Parties provide answers to these record requests by June 14, 2024" seems to require that each

party interested in settlement join with other like-minded parties to agree to and submit joint responses to record requests. This apparent expectation of settling parties interferes with the settlement process and makes settlement less likely. In effect, the Commission is putting the cart before the horse by requiring the parties that are interested in settlement to not only commit to settling, but also to supplement the record with a unified position as if joined by a settlement, even though there is not yet a written agreement. Because parties are unlikely to agree to commit to settling without having reviewed a written agreement, the Commission's order may dissuade parties from further engaging in settlement negotiations. The Puc 200 rules require that settlement be encouraged rather than hindered; for this reason and the reasons that follow, the Commission should withdraw its improper record requests.

<u>The April 24 Order Violates the Puc 200 Rules</u>

The Commission's procedural rules do not allow record requests in the manner required by the April 24 Order. To the extent that record requests are considered analogous to data requests, the Puc 200 rules do not permit the Commission to issue them or introduce them as evidence at hearing. Puc 203.09 provides that the "petitioner, the staff of the commission, the office of consumer advocate and any person granted intervenor status shall have the right to conduct discovery in an adjudicative proceeding pursuant to this rule" and that "[u]nless inconsistent with an applicable procedural order, any person covered by this rule shall have the right to serve upon any party, data requests." *Id.* Similarly, Puc 203.22(a) mandates that only *parties* may present evidence in exhibit form at a hearing and Puc 203.23(a) provides that the "*parties* entitled to offer evidence at hearing in an adjudicative proceeding shall be the petitioner, the staff of the commission, the office of consumer advocate and any person intervenor status." *Id.* (emphasis added). With the elimination of Commission staff's specific statutory role and

party status in Commission proceedings upon the creation of the Department of Energy, the Commission lacks the authority under the procedural rules to issue its own data/record requests to parties in advance of hearings, present its own evidence at hearings, or, specific to this request, compel parties to offer certain "new" evidence at hearings in the form of "record requests" that are outside of their own testimony. The creation of the Department of Energy did not create any corresponding avenue for the Commission to compel parties to a docket, over which it presides as neutral arbiter, to supplement the record with evidence the Commission would like to see in the record, as if it were an adversarial party to that docket whose rights, duties and obligations were at stake.

The Commission is not at liberty to set aside its own rules. As explained in the OCA's Motion, "it is well established that 'an administrative agency must follow its own rules and regulations.'" *Genworth Life Insurance Co. v. New Hampshire Department of Insurance*, 174 N.H. 78, 87 (2021) (quoting *Appeal of Nolan*, 134 N.H. 723, 728 (1991)); *see also Appeal of Gielen*, 139 N.H. 283, 288 (1994) (same). Additionally, the New Hampshire Supreme Court will set aside an agency's decision where a procedural irregularity results in material prejudice to a party. *In re Coffey*, 144 N.H. 531, 535 (1999); *Appeal of Concord Natural Gas Corp.*, 121 N.H. 685, 691 (1981); *see also Morton v. Ruiz*, 415 U.S. 199, 235 (1974) (holding that "[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures"); *State of Maine v. Thomas*, 874 F.2d 883, 890 (1st Cir. 1989) (same).

In *Appeal of Nolan*, the New Hampshire Supreme Court explained that the law requires administrative agencies to follow their own rules and regulations and that "an agency may not undertake *ad hoc* rulemaking." 134 N.H. at 728. The Supreme Court also stressed that an unwritten or verbally promulgated rule is without effect and that "State agencies must comply

with the Administrative Procedures Act if their 'rules' are to have effect." *Id.* With regard to the Commission itself, in *Appeal of Marmac*, 130 N.H. 53, 57-58 (1987), the Supreme Court explained that a "decree, pronouncement, statement, etc. only becomes a rule when it has formally met all the requisites of RSA 541-A:3." *Id.* Thus, to establish a rule, the Commission must follow the precise rule-making procedures required by RSA 541-A:3. *Id.* Here, not only was that process not followed, but arguably such a rule allowing the Commission to build the record like an adversarial party in an adjudication over which it presides as neutral arbiter would be improper and violative of due process.

Accordingly, in issuing the record requests the Commission has failed to follow its own procedural rules, as required by *Genworth Life Insurance Co.*, *Appeal of Dolan*, etc. If this violation of the Commission's procedural rules were to result in material prejudice to the parties, it would likely be considered a reversible error by the New Hampshire Supreme Court on appeal. *See In re Coffey,* 144 N.H. at 535. Specifically, in issuing the records requests, the Commission appears to be attempting to develop an alternative record for the hearing. If this alternative record were used to form the basis of the Commission's decision in this matter, it would likely result in material prejudice to the parties in this proceeding. As such, the April 24 Order's record requests must be withdrawn.

Conclusion

For the foregoing reasons and the reasons from the OCA Motion incorporated by reference, the Commission should grant the Joint Intervenors' motion for rehearing and withdraw the record requests included in the April 24 Order.

WHEREFORE, the Joint Intervenors respectfully request that the Commission:

A. Grant the motion of the Joint Intervenors for rehearing of the Prehearing Order entered in this docket on April 24, 2024, and withdraw the record requests, as described above, and

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

Sincerely,

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