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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:

On behalf of the state's residential utility customers, the Office of the Consumer Advocate ("OCA") is pleased to provide the following responses to the Commission's request for public comment on the Initial Proposals it has filed for revision of its organizational and procedural rules (N.H. Code Admin. Rules Chapter Puc 100 and Puc 200, respectively). Because of the interrelated nature of the organizational and procedural rules, we have drafted a combined set of comments, which we are filing in each of the separate rulemaking dockets the Commission has opened for the purpose of considering the two proposals.

I. Procedural Concerns

As a preliminary matter, we note for the record our concerns about the process the Commission has used to adopt its initial proposals. Both sets of proposed rules appear in the June 20, 2024 edition of the Rulemaking Register published by the Office of Legislative Services, following the receipt from the Legislative Budget Assistant of the requisite Fiscal Impact Station. Although it is difficult to prove a negative, the OCA is unable to find any evidence that the Commission held a public meeting for the purpose of issuing these proposed rules. If the Commission did not convene at a public meeting for the purpose of adopting the initial proposals by a quorum of the agency, this is in violation of the relevant provision of the New Hampshire Drafting and Procedure Manual for Administrative Rules, published by the administrative Rules Division of the Office of Legislative Services and approved by the Joint Legislative Committee on

Administrative Rules ("JLCAR")[1] and is also in violation of the relevant provision of the Administrative Procedure Act itself. *See* RSA 541-A:3, I (authorizing "an agency" to adopt new rules by following the enumerated procedure). The relevant provision of the the Commission's enabling statute, RSA 365:8, authorizes "the commission" and not "the chairman" to adopt rules pursuant to RSA 541-A. Moreover, as a "public body" within the meaning of the Right-to-Know Law, see RSA 91-A:1-a, VI (defining "public body" as, *inter alia*, "[a]ny board or commission of any state agency or authority"), the Commission was obliged to deliberate and adopt the initial proposal at a duly noticed public meeting pursuant to RSA 91-A:2.

We urgently request the Commission conduct additional preliminary proceedings, beyond those already scheduled, prior to finalizing both sets of proposed rules and transmitting them as Final Proposals to the Office of Legislative Services for review by the JLCAR. The Commission has proposed wide-ranging changes to the longstanding parameters under which it has conducted business. Yet the Commission has scheduled only one opportunity for written comments and one public hearing, on an ambitious and expedited schedule after taking no action in the more than three years since the creation of the Department of Energy and the attendant restructuring of the Commission. I will be out of state on a long-planned vacation on the date of the scheduled July 16 hearing; it is important that I participate personally in the process, and interact personally with the Commissioners, as both the public official tasked with advancing the interests of a major Commission constituency (residential utility customers) and as a former general counsel of the Commission who played a significant role in a previous comprehensive effort to update and revise the Puc 100 and Puc 200 rules.[2]

II. Major Issues Implicated by the Proposed Rules

Our office has conducted a detailed review of the two proposals and, accordingly, we offer comments on specific provisions of the initial drafts *infra*.[3] However, there are two major

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[1] *See* section 2.3 of the Drafting and Procedure Manual at page 34, clearly reciting that "[o]nce the proposed rule is drafted, the individual, *or quorum of individuals, with rulemaking authority* must approve the final draft of the rule as the initial proposal," prior to seeking a Fiscal Impact Statement. (Emphasis added.)

[2] My vacation, which runs through July 24, is the reason I am filing these comments well in advance of the July 26 deadline for written submissions. Had these longstanding plans not prevented a more collaborative approach, it is likely the OCA would have undertaken efforts to develop joint comments with other parties that frequently have business before the Commission. The effort to develop these comments was undertaken in haste, without sufficient time for the sort of reflection a task like this deserves. In other words, my filing in advance of the deadline should not be understood as approval of the accelerated timeline with which the Commission apparently intends to undertake such a consequential project as updating its organization and procedural rules. I am aware that numerous other parties intend to ask the Commission not just for more time but for additional opportunities to work collaboratively with the Commission and with each other. The OCA is absolutely in support of these suggestions. We also reserve the right to supplement and update these comments.

[3] Please note that our review detected numerous drafting issues that arise under the New Hampshire Drafting and Procedure Manual for Administrative Rules. The comments we offer here are focused on substantive issues rather than on drafting problems.

themes that inform our comments and we believe it will be helpful if we begin by addressing each of them in holistic fashion.

A. Adjudication Under the Administrative Procedure Act

The proposed Chapter Puc 200 rules, if adopted and then approved by the Joint Legislative Committee on Administrative Rules, would accomplish a fundamental shift in the approach the Commission uses to hear and decide contested cases.[4] At present, and for as long as anyone currently practicing before the Commission can recall, the agency has essentially conducted its adjudicative proceedings in a manner analogous to that which the New Hampshire Superior Court or the U.S. District Court for the District of New Hampshire use to resolve litigation under the state or federal Rules of Civil Procedure. The Commission now proposes – via several provisions scattered through the proposed rules -- to upend those norms by embracing an inquisitorial approach to contested proceedings – i.e., a paradigm in which the tribunal and its presiding officer are not simply neutral decisionmakers but are also assuming a prosecutorial role – i.e., the tasks of conducting discovery and the developing evidence that ultimately becomes the record on which the Commission must base its decision.

In the opinion of the Office of the Consumer Advocate, the inquisitorial approach to administrative decisionmaking is not consistent with the Administrative Procedure Act ("APA"). All of the applicable APA provisions – sections 31 through 35 of RSA Chapter 541-A – proceed from the premise that contested cases will be conducted before a presiding officer, and a tribunal, that is a neutral recipient of evidence and argument adduced by parties and their representatives. Additionally, the Commission is tasked with acting as the "arbiter between the interests of the customer and the interests of the regulated utilities," RSA 363:17-a. Having the Commission develop a decision-making record based upon its own interests or concerns, which may or may not align with one or more of the entities between whom it is to be arbiter, undercuts that obligation.

Moreover, the General Court has adopted a statutory code of ethics for the Commission that counsels against commissioners, as deciders, embroiling themselves in discovery processes and the development of the record. *See* RSA 363:12, II (requiring commissioners to perform duties "impartially"), IV (requiring "[a]bstention from public comment about a matter pending before the commission"), and VII (requiring a commissioner to "disqualify himself [sic] from proceedings in which his [sic] impartiality might be reasonably questioned"); see also *Appeal of Seacoast Anti-Pollution League*, 125 N.H. 465, 472 (1984) ("in recognizing the need for neutrality and impartiality and thus mandating disqualification where impartiality can reasonably be questioned, the legislature sought to avoid partiality concerning issues of fact involved in *pending matters*") (citation omitted, emphasis added).

The Commission must be mindful of the changes made by the General Court to the scope and nature of the agency's authority in 2021, via the creation of the Department of Energy and the transfer of personnel previously referred to as the "Staff" of the Commission – authorized to

[4] We rely here on the definition of "contested" case in the Administrative Procedure Act, RSA 541-A:1, IV, i.e. "a proceeding in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after notice and an opportunity for hearing."

participate in Commission proceedings as if it were a party pursuant to Rule Puc 203.01 – to the Regulatory Support Division of the Department. The General Court established the Department "to improve the administration of state government by providing unified direction of policies, programs, and personnel in the field of energy and utilities." RSA 12-P, 1, II (also noting that the advent of the Department enables "increased efficiency and economies from integrated administration and operation of the various energy and utility related functions of state government"). The Commission is no longer the fountainhead of the state's energy policy; its role has become much narrower and focuses on deciding cases by applying factual evidence adduced by parties at hearings to applicable New Hampshire law. The OCA is concerned that, overall, the proposed Puc 100 and 200 rules seek to appropriate a significant degree of policymaking authority to the Commission that rightfully belongs to the Department.

A pervasive and valid complaint of 'deciders' – both judges and persons typically referred to as quasi-judicial decisionmakers (i.e., members of independent regulatory agencies lodged in the executive branch of state or federal governments) – is isolation. Those vested with decision-making authority in such systems find it challenging to make wise and reasoned decisions in circumstances where their ability to shape the evidentiary record and oversee the progress of cases as they progress to final hearings is limited. The problem is exacerbated here as the result of the Commission's loss of both its policymaking rule and its ongoing involvement in proceedings as a quasi-party via its Staff.[5]

To the extent it is amenable to being addressed within the constraints of *ex parte* restrictions, the Commission should consider employing techniques historically relied upon by court and judges. In particular:

- The Commission could encourage or even require preliminary motions practice since, under the Rules of Civil Procedure, motions to dismiss and motions for summary judgment are well-established methods for addressing substantive issues early in proceedings, often with the salutary effect of narrowing the issues in dispute.

- The Commission could hold informal workshops (treating them as prehearing conferences under the APA in contested cases) at which key issues are discussed in front of and with commissioners without developing evidence of record).

- The Commission could increase its reliance on hearings and prehearing conferences presided over by individual commissioners or hearings officers, in quest of focusing discovery, narrowing issues, and encouraging factual stipulations.

[5] Though nowhere authorized by statute or rule, and indeed in the face of a state of willful ignorance of the fairness implications having crept into the applicable caselaw, *see Appeal of Atlantic Connections*, 135 N.H. 510, 514-16 (1992) (holding that the "the *ex parte* relationship between the PUC staff and the commissioners" was permissible because the staff was not participating in actual decisionmaking), until July 1, 2021 the worst kept secret in town was that PUC employees were routinely consulting with commissioners on, updating them on the progress of, and receiving guidance from them about, pending cases. Eliminating this problem once and for all was one of the animating purposes of turning the Commission Staff into the Regulatory Support Division of the Department.

- The Commission could increase its reliance on proposed findings of fact, as authorized by RSA 541-A:35, as a means of acquiring insight from parties about what evidence adduced at hearing truly means.

- The Commission could follow the example of other utility regulators and assign all but the most major cases and hearings to hearings officers for purposes of presiding and issuing recommended decisions, reserving direct commissioner participation in hearings for major cases.

In our opinion, active and vigilant case management is the antidote to commissioner isolation. It also promotes efficiency in circumstances where every single cost of utility regulation, including the cost of using time at hearings to indulge commissioner curiosity about policy issues and utility operations, are ultimately borne by ratepayers. Converting to an inquisitorial model, in which commissioners become active participants in developing the body of evidence that will ultimately support their rulings, is bad regulatory policy even if it were authorized under the Administrative Procedure Act.

B. Public Accountability and Access to Records Under the Right-to-Know Law

"Openness in the conduct of public business is essential to a democratic society," the General Court declared in the Preamble to the Right-to-Know Law. RSA 91-A:1. Thus, the General Court continued, the purpose of the Right-to-Know Law is "to ensure both the greatest possible public access to the actions, discussions and records of public bodies, and their accountability to the people." *Id*. Although RSA 91-A does not guarantee "unrestricted access" to public records, questions arising under the Right-to-Know Law must be resolved "with a view to providing the utmost information in order to best effectuate these statutory and constitutional objectives." *Union Leader Corp. v. New Hampshire Dep't of Safety*, 2024 N.H. 35 at 5 (citations omitted). "As a result," it is necessary to "construe provisions favoring disclosure and interpret the exemptions restrictively." *Id*. (citation omitted).

The Office of the Consumer Advocate believes it is particularly in the interests of residential utility customers for the Commission to lean into these precepts when discharging its responsibilities. This leads to more ratepayer-favorable outcomes and bolsters public confidence in the Commission's decision-making – which, after all, naturally engenders public skepticism if only because inflation tends to exert its inexorable upward pressure on rates.

In our opinion, the Commission has a laudable record when it comes to subjecting its actions and discussions to public scrutiny. It is rare indeed for the public to be excluded from Commission hearings; the Commission has a longstanding tradition of minimizing the discussion of nonpublic information in its hearing room. Though the Commission's deliberations in contested cases are non-public by statute, *see* RSA 365:17-c, the resulting orders provide explanations of what the Commission did so that the public can know what action the Commission took and why.

Historically, however, the Commission's approach to public records has been less faithful to the objective of assuring the "greatest possible public access" as required by RSA 91-A:1. The

proposed Puc 100 and 200 rules do not vary significantly from the currently applicable approach to public records. We respectfully suggest a reexamination of the assumptions underlying confidential treatment of Commission records, a subject of particular interest to the OCA because our enabling statute requires us to maintain the confidentiality of all information so designated by the Commission in adjudicative proceedings. *See* RSA 363:28, VI (entitling the OCA to receive all such information, however).

Our perspective on RSA 91-A as it relates to the Puc 100 and 200 rules proceeds from two propositions, both of which are admittedly the source of potential controversy.

The first proposition is that the Right-to-Know Law is a disclosure statute rather than a privacy statute. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 292 (1979) (holding that the federal Freedom of Information Act, on which RSA 91-A is based, is "exclusively a disclosure statute" and thus the exceptions in the statute are not "mandatory bars to disclosure").[6] The second proposition is that the disclosure exemption relied upon to justify keeping information in Commission documents secret – the one covering "confidential, commercial, or financial information," RSA 91-A:5, IV – should be narrowly construed.

Applying these two principles leads to a third: that the "balancing test" adopted in both the current and the proposed rules, which involves comparing the privacy interest against the public's interest in disclosure, is not applicable and should not be enshrined in the Commission's rules. *See Provenza*, 175 N.H. at 130 (noting that "*[c]ourts* must engage in a three-step analysis when considering whether disclosure of public records constitutes an invasion of privacy") (citations omitted, emphasis added). In other words, recourse to the balancing test is appropriate in judicial proceedings, if and only if an agency (or other instrumentality of government covered by RSA 91-A) has decided against disclosure. An agency itself has complete discretion to authorize disclosure of information in the agency files so long as there is no applicable privacy statute.

Historically, the Commission has applied the RSA 91-A:5, IV disclosure exemption covering "confidential, commercial, or financial information" in such a liberal fashion that it has become a *de facto* presumption of confidentiality when invoked by utilities and other regulated entities furnishing information to the Commission and parties participating in Commission proceedings. Such a presumption is plainly at variance with the Right-to-Know Law and, therefore, it is long

[6] The New Hampshire Supreme Court has left this question unresolved under the Right-to-Know Law itself, at least insofar as to whether third parties have standing to challenge a decision by an instrumentality of government to disclose information publicly in spite of an applicable disclosure exemption under RSA 91-A. *Provenza v. Town of Canaan,* 175 N.H. 121, 125-26 (2022) (citing *Brown* and three decisions of other state supreme courts). The Court suggested that the Legislature "may wish to consider whether clarification as to who is entitled to seek relief under RSA 91-A:7 is warranted." *Id*. at 126. The Court's reluctance to weigh in on the question is understandable in the context of the *Provenza* case, in which a rogue police officer was ultimately unsuccessful in blocking public disclosure of records pertaining to an investigation of his misconduct. A decision calculated to annoy every police officer in the state, including those whose conduct is exemplary, may have been a bridge too far for the *Provenza* Court. In scenarios that are typically less fraught – i.e., whether information submitted to the Commission by regulated utilities is subject to non-disclosure as "confidential, commercial, or financial" information under RSA 91-A:5, IV – the plain meaning of the statute, and the pro-disclosure gloss required by the Court, ought to govern.

past time for the Commission to chart a different course when it comes to discharging its statutory obligation to promote transparency and accountability via RSA 91-A.

III. Specific Comments

The remainder of this letter offers specific comments about individual provisions in the proposed Puc 100 and 200 rules. Part and section titles are rendered in **bold type**. When we have suggested alternative rules language, it appears in *italics*.

PART Puc 101 TITLE DEFINITIONS

The word "DEFINITIONS" after "PART Puc 101" appears to be superfluous and should be deleted such that the title of this part reads "PART Puc 101 DEFINITIONS."

Puc 101.01 – "Chairman"

Somewhere the rules should clarify that although RS 363:1 says the chairman has the powers and duties of an executive agency commissioner per RSA 21-G:9, the PUC chair does not report to the governor in the sense of allowing the governor to decide PUC cases. The PUC is constituted as an independent regulatory agency, much like such federal agencies as FERC, the FCC, the Securities and Exchange Commission. It is important for purposes of instilling public confidence in the work of the Commission that the organizational rules clarify what the agency is – independent.

Puc 101.05 – "Customer"

The proposed definition of "customer" limits this designation to "any person in New Hampshire." Not all customers of New Hampshire utilities are located in New Hampshire. Additionally, the references to specific industries and types of service are confusing surplusage (particularly the reference to transmission, something not regulated by the Commission). Therefore, we propose refining the definition as follows: "'Customer' means any Person furnished with service by a Public Utility subject to regulation by the Commission." We would note, further, that defining the term "Customer" in the rules does not seem necessary; it appears only within other provisions we propose for elimination or significant revision.

Puc 101.08 – "Governmental Authority"

This definition is verbose, unduly specific, inconsistent with the definition in the proposed Puc 200 rules, and, arguably, unnecessary inasmuch as the term does not apply anywhere in the substantive Puc 200 rules as proposed (though it is referenced in certain other definitions). The definition includes within it another term – "Commission" – that is defined in the rules as the Public Utilities Commission. Further, the OCA is not familiar with the term "self-regulatory organization" and does not understand what it means. Where the term "governmental authority" is embedded in other definitions those definitions could refer simply to "instrumentality of government" (a broad term whose meaning is sufficiently self-evident) – and thus "governmental authority" could be deleted from the definitions.

Puc 101.09 – "OCA"

The citation to the enabling statute of the Office of the Consumer Advocate, RSA 363:28, is incorrect.

Puc 101.10 – "Person"

The Commission should be cautious about including "unincorporated organization" as something that qualifies as a "person" for purposes of the rules because such an organization is typically not considered an entity and, as such, has no rights or independent significance under New Hampshire law. The only possible exception of which the OCA is aware is a condominium association. *See* RSA 365-B:35, I (noting that condominums must have "a set of bylaws providing for the self-government of the condominium by an association of all the unit owners" that "*may* be incorporated") (emphasis added). It would certainly be reasonable to include "condominium unit owners' association" within the definition of "person" if that is the Commission's preference.

Puc 101.11 – "Public Utility"

To avoid mischief or confusion, this term should be coextensive with the statutory definition appearing at RSA 362:2.

Puc 101.12 – "Service List"

This term should be defined not as a list of entities but (reflecting current practice) as a list of "Persons entitled to receive notice of all filings and Commission issuances in a specific docket."

Puc 102.01 – Jurisdiction

The Commission should redraft this rule so that it does not refer to the "jurisdiction" of the Commission. "Jurisdiction" as the term is commonly understood refers to the exercise of judicial decisionmaking authority – something that is indeed within the powers granted to the Commission by the General Court. But the exercise of "general supervision" of the state's utilities, also a power granted by statute to the Commission, is not properly considered "jurisdiction" per se. The Commission should consider emulating the comparable rules of the Liquor Commission, so they read as follows:

PART Puc 102 DESCRIPTION OF THE COMMISSION

Puc 102.01 <u>General Description</u>

(a) The Commission is an independent state agency comprised of a chairman, two commissioners, and staff members who report to the chairman. The Commission exercises the general supervision of the state's public utilities, serves as the arbiter between the interests of utility owners and utility customers, assures that the rates and terms of service offered by public utilities are just, reasonable, and otherwise

lawful, and determines when it is appropriate for public utilities to take private property for public use. In addition, the Commission exercises other responsibilities as delegated to it by the General Court.

(b) The Commission is independent of both the Department and the OCA, although the agencies are administratively attached pursuant to RSA 21-G:10.

(c) The Commission conducts formal adjudicative proceedings pursuant to the contested case requirements of the Administrative Procedure Act, RSA 541-A:31 et seq. and PART Puc 204 when required by law to do so. The Commission also conducts other proceedings and hearings as necessary pursuant to PART Puc 203, and exercises general supervision of the state's public utilities pursuant to RSA 374.

Puc 103.01 General Inquiries and Requests for Access to Records

The Commission's rules should not state or imply that a request for access to documents in the Commission's files must be in writing to be effective, much less be accompanied by a statement to the effect that the requestor is willing to pay the Commission's per-page copying rate. RSA 91-A:4, I explicitly confers upon "[e]very citizen" a "right to inspect all government records in the possession, custody, or control" of a public body or agency during regular business hours. Paragraph IV of this statute makes clear that when such records are "immediately available" they should be produced. The Right-to-Know Memorandum of the Department of Justice explicitly contemplates situations in which a requestor will refuse to submit a written request (in which case the DOJ's advice is for the agency to create its own written record of the request). DOJ Right-to-Know Memorandum (2024) at 62. Although a person seeking access to records under RSA 91-A:4 is certainly well-advised to submit written requests for document access, the better to assert the rights secured to citizens under the statute, it is not appropriate for an agency to reserve a right to reject requests not made in writing. At the very least the rule should make clear that a person may call on the Commission in person to request document access.

Although RSA 91-A:4, IV(d) authorizes an agency to charge a requestor the "actual cost" of making a copy of any requested document, the proposed automatic minimum fee of $0.25 per page is excessive and, arguably, well in excess of the actual cost incurred by the Commission. A more appropriate rule would be to offer free courtesy copies of up to 25 pages, after which there should be a fee the Commission can justify as its actual cost.[7] It appears that the Commission seeks to impose a fee of at least 25 cents per page as a means of discouraging such requests, an approach that is patently inconsistent with the "greatest possible public access" principle enshrined in RSA 91-A:1. Finally, the Commission must cause its rule governing requests for document access and copying to comport with Chapter 49 of the 2024 New Hampshire Laws, which becomes effective on August 13. Chapter 49 amends the Right-to-Know Law to require that agencies provide cost estimates to requestors and encourages agencies to suggest revisions to document requests that would reduce costs taxable to requestors.

[7] The OCA is unable to estimate what the "actual cost" of making a copy of a document is for the Commission. We note that, as of July 7, 2024, the retail chain Staples was charging 22 cents per copy – a sum that presumably allows the company to recover the costs of both labor and depreciation on machines that are, unlike those at the PUC, not used for other purposes. Moreover Staples, unlike the Commission, presumably includes a return on shareholder equity in its retail prices.

With respect to the "general inquiries" aspect of the rule, we believe it would be helpful to persons with business at the Comission – and ultimately to the Commission itself – if this rule made clear that the public may contact the Commission via telephone or e-mail to the clerk's office without implicating any ex parte prohibitions, for purposes of dealing with ministerial issues like scheduling questions, scheduling conflicts, and other generic queries of the sort that litigants routinely pose to clerk's offices at state and federal courts. The first paragraph of the proposed rule, drafted in passive voice and advising that general inquiries can be "transmitted to the clerk's office" implies that the Commission will not field telephone inquiries. This is not helpful.

We therefore propose redrafting Rule Puc 103.01 to read as follows:

Puc 103.01 General Inquiries and Requests for Access to Records

(a) Persons may direct inquiries about access to public records in the files of the Commission, scheduling, Commission processes and procedures, and other general matters not related to the substance of Commission orders or prospective orders, by contacting the clerk's office by telephone, e-mail, or U.S. Mail pursuant to Puc 102.03(a).

Puc 201.02 – Purpose

The OCA is unable to understand what "fair" processing of filings submitted to the Commission is. Rather than "fair and efficient processing of all filings" we recommend "lawful and efficient" or, perhaps, "correct and efficient."

Puc 202.02 – definition of "Applicable Law"

The Commission should consider deleting this definition as prolix and unnecessary. The term appears later in the proposed rules only in three contexts: applicable law that would require information to be treated as confidential (Puc 203.13 and 203.14), applicable law that would require the disqualification of the presiding officer (Puc 203.25), and settlement of cases (Puc 204.08). We discuss, *infra*, why such a broad definition of "applicable law" is inappropriate in the context of confidentiality determinations. In the other two contexts, the phrase "applicable law" is self-explanatory.

With respect to general inquiries to the Commission, the appropriate cross-reference should be to proposed rule Puc 102.02.

Puc 202.06 – definition of "File electronically"

It is not appropriate for the Commission to determine how a document can be filed electronically with the Department of Energy, which the reference here to "commission or Department portals" appears to do.

Puc 202.07 – definition of "Governmental Authority"

As noted, supra, the proposed definition of this term in Puc 202.07 is inconsistent with the definition of the same term proposed for adoption as Puc 101.08. In either instance, the term and such an elaborate definition of the term are unnecessary surplusage. In the proposed Puc 200 rules, the phrase "governmental authority" appears only within other definitions – i.e., the "Applicable Law" (Puc 202.07) and "Person" (Puc 202.13). As to the latter, it is far from clear that such a broad (and, therefore, vague) definition should become, in effect, part of the definition of what constitutes a "person" for purposes of the Commission's procedural rules. As to the former, the issue is discussed *infra*.

Puc 202.08 -- definition of "Hearing"

In this definition, a prehearing conference is explicitly defined as a "hearing" for purposes of the procedural rules but elsewhere in the rules the terms "hearing" and "prehearing conference" are treated as separate concepts. *See, e.g*., Puc 203.01(d) (rules waivers), 203.08(b) (motions), Puc 204.02 (notice of proceedings), and Puc 204.04 (presiding officer). More significantly, a prehearing conference without an actual hearing is not sufficient to meet due process requirements. Thus it would be preferable if "hearing" and "prehearing conference" remained separate terms (although, for reasons discussed infra, a status conference can be, and likely should be, deemed coextensive with the term "prehearing conference").

Puc 202.10 – definition of "Non-adjudicative proceeding"

The Commission should consider eliminating this as a defined term. It appears nowhere in the proposed rules other than in the immediately following definition of "Participant."

Puc 202.11 -- definition of "Participant"

The definition of this term applies only in the context of non-adjudicative proceedings but there are numerous references to "participants" in the proposed rules governing adjudicative proceedings. The definition itself could be refined to state, simply: *A person, other than a party, participating in a proceeding under these rules.* The reference to standing in the proposed definition is inappropriate; as we have noted elsewhere, the rules are not the right place to determine or delimit who has standing before the Commission.

Puc 202.13 – definition of "Person"

This definition is inconsistent with the one proposed for adoption as Puc 101.10. Both proposed definitions are unhelpfully vague inasmuch as any "entity" would qualify as a person for purposes of the Commission's rules. An online dictionary defines "entity" as "a thing with distinct and independent existence." Under such a definition, a tree would qualify as a person, which raises the possibility of some self-appointed Lorax of Dr. Seuss fame appearing at the Commission to speak for the trees.

Puc 202.16 -- definition of "Presiding Officer"

Proposed Rule 204.04 sets forth a reasonable framework for who may preside at hearings other than the chairman. Thus to the extent a general definition of "Presiding Officer" is necessary, it should refer to Puc 204.04 – *viz*, "'Presiding Officer' means the chairman of the Commission or the person designated to act on his behalf at a hearing pursuant to Puc 204.04."

Puc 202.17 – definition of "Proceeding"

The definition as proposed is not helpful or clarifying. It simply refers to a "docket on the commission's web site" without explaining what a "docket" is or why the Commission's web site is the appropriate and definitive home of "dockets." A better definition might be: *a matter within the Commission's decision-making authority to which the Commission has assigned a docket number, as identified on the Commission's web site.*

Puc 202.22 – definition of "Standing"

This term should simply not be defined in the Commission's rules – particularly given that, in the proposed rules, the term "Standing" only in the definition of the term "Participant" (itself defined as a person who participates in a non-adjudicative proceeding). "Standing" is an iterative concept with constitutional implications; as such, both the Commission and the public should look to the case law of the New Hampshire Supreme Court (and potentially the federal courts) for guidance. Moreover, the proposed definition of "standing" is vastly too narrow since not every person participating in Commission proceedings (as a party or otherwise) is doing so in order to redress an injury. The Commission routinely confers rights and other benefits on parties; such parties clearly have standing to seek such benefits.

Puc 203.01 – Waiver of Rules

This proposed rule, though similar to the existing waiver standard, effectively transforms the procedural rules into mere suggestions. A possible alternative is found in the relevant provision of the Department of Justice's model rules for adjudicative proceedings, Jus 803.03: *The presiding officer, upon his or her own initiative or upon the motion of any party, shall suspend or waive any requirement or limitation imposed by this chapter upon reasonable notice to affected persons when the proposed waiver or suspension appears to be lawful, and would be more likely to promote the fair, accurate and efficient resolution of issues pending before the agency than would adherence to a particular rule or procedure.* Also, "interested party" is not a defined term in the rules and its appearance here, and elsewhere in the rules, is confusing and unhelpful.

Puc 203.03 – Enforcement

This proposed rule is oddly titled since its actual purpose appears to be setting out a standard for when a filing is deemed to be effective. More significantly, the rule is problematic because the Commission appears to reserve the right to reject a filing for fully ten days after submission to the Commission – a period that exceeds some of the time periods allowed for filings. If the Commission is going to reserve the right to reject filings on this basis then the ten-day period

should toll any otherwise applicable deadlines – an idea that is likely problematic in light of the fact that some deadlines are statutory. As the proposed rule is presently drafted it would require parties to make submissions at least ten days in advance of any deadline in order to assure that the item will not end up being rejected as untimely upon a determination that the original filing, though timely, was defective.

Puc 203.04 – Address and Filing Format

The OCA respectfully suggests that the first sentence of subsection (a) of this rule be redrafted to read: *All correspondence intended for the commission shall be addressed to the clerk of the commission.* The practice of requiring parties to address pleadings and other correspondence to the chairman personally, instituted by the predecessor to the current chairman, should be discontinued as unworthy of a quasi-judicial tribunal. Official documents filed with the New Hampshire Supreme Court are addressed to its clerk, Mr. Gudas, and not to Chief Justice MacDonald, so as to avoid the appearance of individual, *ex parte* appeals to judicial authority. Adoption of a similar practice by the Commission – or, more correctly, resumption of the practice that existed prior to the Commission's hasty abolition of the office of Executive Director, three years ago, when pleadings were addressed to that person – would promote a culture of respect for the Commission as an institution that functions much as a court does.

Ideally, the Commission would follow the example of the state's highest court and identify one of its employees, by name, as the Commission's clerk and authorize that person to field inquiries from the public. However, rulemaking is not the optimal place to address organizational issues that are internal to the Commission.

The references to the state's file transfer protocol are problematic, as is the prohibition of submitting documents using flash drives or other storage devices. The rules offer no guidance on how to access or use the state's file transfer protocol. Prohibiting flash drives and the like raises the possibility that the Commission will have no way of receiving large files in the event the file transfer protocol system fails. At the very least, the rules should provide that the Commission will accept flash drives when permitted by the Department of Information Technology to do so.

Puc 203.06 – General Requirements for Written Communications

The Commission should reconsider subparagraph (a)(8) of this proposed rule, which requires all written communications submitted to the Commission to be double-spaced. This is a reasonable requirement for legal briefs, but not letters, reports, or other more routine filings.

Puc 203.07 – Pleading Requirements

There are several issues with this proposed rule. Specifically:

-- The Commission has historically maintained two service lists for each docket, a general service list and a discovery service list. Puc 203.07 does not recognize this distinction (nor do any of the other proposed rules provisions).

-- Neither the current nor the proposed Puc 200 rules require pleadings to be submitted with a cover letter, but Puc 203.07 assumes that all pleadings will be accompanied by such a document and the proposed rule even adds a new requirement (accompanying cover letters with a copy of the service list). Cover letters are unnecessary in the age of e-filing (the e-mail message used to transmit pleadings to the clerk being completely adequate for any purpose previously served by a cover letter) and the requirement to attach a service list to each pleading is unnecessary busy work. It should be sufficient for filers to certify that they have served the document on every party listed in the Commission's service list.

-- The rule should specify how parties can access the Commission's service list in any docket. This is, at present, a mystery to anyone not "in the know" about where to look on the Commission's web site.

-- This rule should include a requirement that petitioners service petitions on the Department and the OCA, at either the litigation e-mail address or the postal address specified on the agencies' web sites.

Puc 203.08 – Specific Pleadings

This proposed rule allows but does not require "prefiled testimony" to accompany petitions. Surely the term "prefiled testimony" is puzzling to people not steeped in the lore of utility regulation. Perhaps a definition is in order, e.g., "Prefiled Testimony" is "a written document in question and answer form, offered by a person who intends to make themselves available to adopt the written answers, at hearing, under oath or under pain and penalty of perjury." In addition, there is a longstanding practice among utilities (and occasionally other parties) of providing written "technical statements" in lieu of what would otherwise be prefiled testimony. This practice, if deemed appropriate, should be reflected in the rules. Finally, the proposed rule requires all petitions to "include a statement of the financial impact the petition will have if granted." This is not a reasonable requirement and should be deleted.

The requirement to include a table of contents for testimony that exceeds 20 pages should specify whether the 20 pages includes or excludes attachments to testimony.

The provision concerning what happens when the scope of a proceeding is expanded or when issues arise that were not reasonably anticipated by the petitioner is unfair and should be redrafted. It is not clear how the Commission would determine which issues were "reasonably anticipated" by the petitioner, nor is it clear why only the expectations of petitioners matter for this purpose. Also, this provision appears to allow the filing of new testimony without a motion to amend a petition; this confers an unfair opportunity on petitioners.

The provision governing intervention should be deleted from the rule. Intervention is a concept relevant only to adjudicative proceedings; thus any rule governing intervention requests should appear in proposed Part Puc 204. Also, "whether the intervention will unduly delay or prejudice the adjudication of the petition" as a basis for denying intervenor status is inconsistent with RSA 541-A:32.

With respect to motions, subsection (b) of the proposed rule requires a non-dispositive motion to include "a certification that a good faith effort has been made to seek the concurrence of all other parties in the docket to the request." This requirement is onerous (except in the context of motions to compel discovery) and should be deleted. Also, we do not understand what the phrase "declaratory statement" means (in relation to what is required in the event "the opposing party" does not assent to a motion).

Subsection (b)(4) refers to "[m]otions to amend." This provision should clarify that it refers (presumably) to motions seeking leave to amend a previously filed petition.

Concerning requests for remote participation in Commission hearings pursuant to subsection (b)(7), the proposed rule requires an explanation of why the individual seeking to participate remotely is "unable to participate in person." Inability to participate is too strict a standard. The rule should require a party requesting remote participation to demonstrate that appearance in person would be impractical or unreasonable in the circumstances.

Regarding subsection (c), it appears that the Commission intends to establish ten days as the period for filing objections to motions, including objections to rehearing motions. It is therefore unnecessary to set forth a separate standard for rehearing motions. A suggestion would be: *Objections to motions, including motions for rehearing, shall be filed within ten days of the date on which the motion is filed.*

Puc 203.09 – Department Position Statements

It is the respectful opinion of the OCA that the Commission lacks authority to require the Department of Energy to submit statements of position or, indeed, any other pleadings. In addition, there is no sound reason to provide the Department with a special opportunity to make filings in Commission dockets. See our comment on Puc 203.17 regarding the party status of both the Department and the OCA.

Puc 203.10 – Date of Filing

See comment, *supra*, about proposed rule Puc 203.03. Also, the reference to "business hours" and their effect on the effective date of a filing is imprecise. A better version of this rule might be: *A pleading shall be deemed filed on the date that the commission receives the document, if submitted by 4:30 p.m. A pleading submitted after 4:30 p.m. shall be deemed to have been filed on the next ensuing business day. In the event the Commission determines that a pleading is not compliant with the requirements of PART Puc 203, the Commission shall so inform the filing party within one day and the person submitting the pleading shall have five days thereafter to submit a corrected pleading. A pleading, so corrected, shall be effective as of the date of its original filing.*

Puc 203.11 – Public Records

Consistent with the general discussion above about RSA 91-A, this rule should read as follows–:

(a) All documents submitted to the commission shall be available for public inspection and copying pursuant to RSA 91-A:4 as of the date and time of their submission, with the following exceptions:

(1) Accident reports, which are confidential pursuant to RSA 374:40;

(2) The names, addresses, and other information specific to individual residential customers;

(3) Documents subject to a protective order issued pursuant to Puc 203.12;

(4) Documents entitled to confidential treatment pursuant to Puc 203.13; and

(4) Documents exempt from disclosure under RSA 91-A:5.

As noted, *supra*, RSA 91-A does not entitle any documents to confidential treatment. The Commission's procedural rules should not suggest otherwise. Generally, the Commission should enjoy full discretion to make publicly available any documents in its files, regardless of how a disclosure request would be evaluated under the balancing test applied by Courts when reviewing RSA 91-A non-disclosure determinations of agencies. See also our comments on proposed Rules 203.12 and 203.13. For the reasons explained there, paragraph (b) of proposed Rule 203.11 is inappropriate and should not be included.

Puc 203.12 – Requests for Confidential Treatment of Documents Submitted by Utilities in Routine Filings and **Puc 203.13 – Requests for Release to the Public of Confidential Documents Submitted in Routine Filings**

The current version of the rules providing for confidentiality of, and potentially disclosure of, sensitive information in routine filings (presently codified as Puc 201.06 and Puc 201.07) are largely adequate for their intended purposes. We recommend adoption of the following language:

Puc 203.12 – Confidential Treatment of Certain Routine Filings

(a) The following shall be the routine filings to which the procedure established by this rule applies:

(1) The preliminary and final versions of a wholesale performance plan submitted by a telephone utility containing carrier-specific performance and bill credit calculations;

(2) NHPUC Form T-8 Exchange Eligibility Reports;

(3) In cost-of-gas proceedings,

a. Supplier commodity pricing information related to the unit volumetric and demand cost;

b. Pricing and delivery special terms of supply agreements;

c. Pricing and special terms for storage lease agreements;

d. Natural gas or propane costs and availability relating to hedging;

e. Special terms for hedged natural gas or propane contracts;

f. Supply commodity cost information specific to individual suppliers in supply and demand forecasts; and

g. Responses to data requests related to a. through f. above;

(4) NHPUC Form E-5, Accident Reports;

(5) In proceedings related to default energy service rates pursuant to RSA 374-F:3, V(c):

a. Solicitations for wholesale power contracts;

b. Bidder information;

c. Descriptions of the financial security offered by each bidder;

d. Bid evaluations;

e. Rankings of bidders' financial security;

f. Descriptions of financial security required by bidders;

g. Fuel supplier contracts;

h. Commodity and fuel pricing;

i. Contact lists used during the requests for proposals process;
j. Financial security, pricing and quantity terms of master power agreements and amendments;

k. Transaction confirmations;

l. Retail meter commodity cost calculations;

m. Wholesale power purchase prices until made public by other governmental agencies; and

n. Responses to data requests related to a. through m. above.

(6) Utilities' cybersecurity plans; and

(7) Utilities' physical security plans

(b) A party may request confidential treatment of a document covered by this rule by so indicating when filing the document. Thereafter, the Commission and any parties receiving a copy of such a document shall treat it as confidential until

(1) three years from the date of filing with the commission, or

(2) the commission determines pursuant to subsection (c) below that the document is not entitled to confidential treatment,

whichever is sooner.

(c) The commission may, on its own motion or pursuant to a request made pursuant to Puc 103.01, determine that all or part of a document to which this rule applies shall be made available to the public.

(d) A person filing a document under this rule shall also prepare and file a redacted version of the document, which shall be available for public inspection and copying.

(Note that, as to (d) above, it is our recommendation to eschew the highly prescriptive and detailed provisions governing the formatting of redacted versions of documents covered by the rule. The detailed instructions seem unnecessary, though we are not averse to the Commission concluding otherwise if recommended by others.)

Proposed Rule Puc 203.13, laying out special processes for public requests to inspect and/or copy confidential documents submitted to the Commission in routine filings, is neither necessary nor appropriate. The standard process applicable under RSA 91-A should apply. In particular, it for the reasons stated *supra* (pointing out that the Right-to-Know Law is not a privacy statute) it is inconsistent with the letter and spirit of RSA 91-A to provide the sources of confidential (or potentially confidential) documents a rule-enshrined opportunity to prevent public disclosure of information. Disclosure decisions are exclusively the responsibility of the Commission.

Puc 203.14 – Motions for Confidential Treatment

This proposed rule readopts the convoluted process in the current rules by which parties can exchange information in discovery that is treated as putatively confidential, subject to final confidentiality determinations. The process is a relic of the era in which the Commission Staff participated in proceedings as if it were a party (thus participating in discovery) and leaves unaddressed the fate of documents for which confidential treatment was asserted but were never introduced into the record (and were thus never the subject of a motion for confidential treatment). This is especially problematic for the OCA and, more recently, for the Department

inasmuch as both agencies are themselves independently subject to RSA 91-A and must respond to document access requests submitted to them directly.

A better approach would be to promulgate a rule that allows for the entry of a protective order in any Commission proceeding, modeled on Superior Court Rule 29. We propose

Puc 203.14 -- Protective Orders

(a) On motion of a party to an adjudicative proceeding, on motion of any participants submitting information in a non-adjudicative proceeding, on its own motion, the Commission may enter a protective order relating to trade secrets, confidential research, development or commercial information, information covered by Puc 203.12, or other confidential information exchanged in the proceeding.

(b) When required by the public interest, and when it will not impede the rights of any party or participant, such a protective order may provide that

> *(1) the requested information shall not be provided by the participant or party from whom it was requested,*
>
> *(2) that the requested information may be obtained only on specified terms and conditions, including a designation of the time or place,*
>
> *(3) that the requested information not be disclosed or be disclosed only in a designated way.*

(c) Nothing in this rule shall limit the right of any citizen to inspect records in the possession, custody, or control of a public body pursuant to RSA 91-A:4.

Puc 203.17 – Requirements to Appear Before the Commission

A better title for this rule would be, simply, "Appearances Before the Commission."

In subsection (a), the word "by" should be replaced with "through," since one does not appear "by" an agent (including an attorney) but through such a person.

Subsection (b) is unnecessary and should be deleted. The Commission's procedural rules (and orders) are applicable to all persons appearing before the agency; a separate rule explicitly requiring adherence to the rules is surplusage. The requirement of a signed affidavit from persons appearing *pro se* is onerous and calculated to discourage public participation in Commission proceedings.

Subsection (c) is inappropriate and should be deleted. "Demonstrated a disregard for commission practices and procedures" is too vague a standard to justify disqualification of a person from participating in a commission proceeding. This is a solution in search of a problem.

Puc 203.19 – Orders nisi

Enshrining orders *nisi* in the Commission's procedural rules is a worthy idea, but the proposed rule does not capture the concept adequately. We suggest:

When the commission reasonably believes that no person objects to the granting of a petition or to other proposed commission action, the commission may approve such outcome via the issuance of an order nisi. *An order* nisi *shall*

> *(a) have an effective date that is at least 14 days after the date of the order's issuance, and*
>
> *(b) specify that the order* nisi *shall have no force and effect if a person entitled to request a hearing on the matter submits such a request.*

Puc 203.20 – Commission Record Requests

This proposed rule is inconsistent with the Administrative Procedure Act, as to contested cases, and is not otherwise authorized (at least in such broad terms) in the Commission's enabling statutes. By deeming responses to the PUC's questions to be part of the record automatically, the Commission would be (1) stripping authority from the parties to make or present the case in the manner they believe most beneficial, (2) arrogating onto itself an investigatory function in adjudicated proceedings that is beyond its power and inconsistent with RSA 541-A:31, and (3) including materials in the record that parties cannot adequately question, challenge, or oppose because parties cannot cross-examine the commission about its understanding or interpretation of the material. Further, in conjunction with the proposed rule in Puc 204.03 regarding failures to respond, should an entity (including an agency or entity over which the PUC does not have supervisory or other authority) not reply to a Commission inquiry, that entity risks having all of its materials stricken from the record. This is manifestly inappropriate.

In addition, the title of the proposed rule is a misnomer inasmuch as the term "record request" is historically understood to involve the submission of late-filed exhibits pursuant to the rule presently codified as Puc 203.30.

It is the understanding of the OCA that the purpose of a rule such as proposed rule Puc 203.20 is to effectuate the Commission's authority under RSA 365:19 to conduct an "independent investigation" in "any case in which the commission may hold a hearing." Considered in the context of RSA 365 generally, it is clear that this provision authorizes the Commission to investigate *public utilities* and, perhaps, other entities (e.g., competitive energy suppliers, community power aggregation programs) but it does not give the agency license to subject others to interrogation either within or without the hearing room.

The OCA agrees it would be useful for the Commission to notify parties and participants that it may invoke RSA 365:19 in appropriate circumstances. A rule that accomplishes that objective would read:

Puc 203.20 – Independent Investigations During Proceedings

Pursuant to RSA 365 and at any point during a proceeding prior to the final evidentiary hearing, the commission shall conduct an independent investigation of a utility or other person subject to regulation by the commission when the public good requires such an investigation. If the investigation discloses any facts the commission may consider in determining the outcome of the proceeding, at least ten days prior to hearing the commission shall reduce such facts to writing and file them in the docket for inclusion in the evidentiary record. At hearing, the commission shall afford any person whose right may be affected by the results of the investigation to be heard in connection with such results.

Puc 203.21 – Status conference

The OCA agrees that status conferences are appropriate and helpful in dockets that are not considered contested cases within the meaning of the Administrative Procedure Act. (We believe status conferences are also appropriate and helpful in contested cases as well, but are properly treated as prehearing conferences within the meaning of RSA 541-A:31, V.) However, the proposed rule as drafted is overbroad inasmuch as the Commission lacks authority to *require* parties or participants (other than public utilities and other entities subject to regulation by the commission to do anything. We propose this version of a rule providing for status conferences:

Puc 203.21 – Status conferences

In any docket that is not considered a contested case pursuant to RSA 541-A:31 and PART Puc 204, the Commission may on its own motion or at the request of any person schedule one or more status conferences when the Commission determines that it will assist in the efficient and fair resolution of the issues presented by the docket. The Commission shall give at least ten days' notice of the issues to be addressed at the status conference and shall provide participants a reasonable opportunity to be heard at the status conference on such issues.

Puc 203.22 – Briefs

Contrary to the language in the proposed rule, the Commission does not have the authority to *require* any party to submit a brief. Therefore, the first sentence of the rule should be revised to read: *The commission shall allow parties or participants to submit briefs at any point in a proceeding when the commission determines that such briefing would assist the commission in its determination of the issues presented*. Further, we are concerned about the reference to "parties or participants" submitting briefs inasmuch as, in non-adjudicative proceedings, there should not be any issues to "determine" that require briefing. (In that sense, it is probably appropriate to transfer this rule into PART Puc 204.) Finally, the last sentence of the proposed rule is unnecessary and may have been included in error.

Puc 203.23 – Testimony based on proprietary models

The term "proprietary model" is commonly used jargon but is inappropriate given the requirement for precision in rules language. We suggest use of the phrase "proprietary software

model." We agree it would be useful to clarify by rule how the Commission and those participating in Commission proceedings should treat such proprietary software. Although we, obviously, do not speak for utilities we assume this rule will be problematic for them by making it more difficult for them to contract for certain expert services.

Puc 203.24 – Obstructing Justice

The OCA agrees with the Commission that it is appropriate to put persons with business at the Commission on notice via the procedural rules that the agency takes seriously the sort of misconduct made criminally sanctionable under RSA 641 (titled "Falsification in Criminal Matters). To the best of our knowledge, "obstructing justice" or "obstruction of justice" are not defined criminal acts in New Hampshire. Therefore, we recommend the Commission eschew the use of this phrase in its rules. We agree that the Commission should refer for prosecution any person who violates RSA 641:1 (perjury) or RSA 641:2 (false swearing) in connection with Commission proceedings. The Commission should consider making clear it will likewise refer conduct that comprises unsworn falsification pursuant to RSA 641:3, witness tampering pursuant to RSA 641:5, falsifying physical evidence pursuant to RSA 641:6, and tampering with public records or information pursuant to RSA 641:7. We are not aware of any such conduct having been committed in connection with Commission proceedings but, regrettably, it could happen.

Puc 203.26 – Control of Hearing

The Commission should consider the First Amendment implications of adopting a rule that appears to be a solution in search of a problem. Among other things, prohibiting "bitter exchanges" and "insulting comments" would create a standard too vague too enforce in light of the constitutional guarantee of free speech and the constitutionally protected right to petition the government for redress of grievances.

PART Puc 204 – ADJUDICATIVE PROCEEDINGS AND HEARINGS

The proposed title of this part is redundant and should read, simply, "ADJUDICATIVE PROCEEDINGS." The part should begin with a general provision specifying when it is applicable, *viz*:

Puc 204.01 Applicability

This part applies to

(a) proceedings conducted pursuant to RSA 365 other than rulemakings,

(b) proceedings to acquire property or rights pursuant to RSA 371,

(c) proceedings conducted pursuant to RSA 374:22 through :36,

(d) proceedings related to the implementation or enforcement of RSA 374-F;

(d) rate proceedings conducted pursuant to RSA 378 when the commission exercises its rights to suspend a proposed rate schedule pursuant to RSA 378:6;

(e) commission reviews of integrated distribution plans pursuant to RSA 378:40;

(f) any other proceeding in which a person is entitled to notice and hearing; and

(f) any other docket when the commission determines it would be in the public interest to conduct the case as an adjudicative proceeding.

In addition, it appears that a provision similar to current rule Puc 203.17, governing interventions, is necessary but missing. We believe such a rule should also specify the party status of the Department and the OCA in adjudicative proceedings. Accordingly, we propose

204.02 – Parties

The parties to a proceeding conducted under this Part shall consist of

(a) The department, upon notifying the commission in writing of its intention to participate as a party,

(b) the OCA, upon notifying the commission in writing of its intention to participate as a party,

(c) any other person granted intervenor status pursuant to RSA 541-A:32.

It would further appear that the rules in proposed Part Puc 204 appear in an illogical order. We recommend ordering the rules in roughly the sequence of their temporal applicability in an adjudicative proceeding. Thus, the rule governing discovery (Puc 204.01) should come between the rule governing prehearing conferences (Puc 204.05) and the rule governing consolidation of hearings (Puc 204.07). For the reasons described below, the rule governing status conferences (Puc 204.06) should be omitted.

Puc 204.01 – Discovery

Consistent with the proposal to add a rule specifying the identity of parties to adjudicative proceedings, the initial paragraph of this rule should be revised to read as follows: *(a) Parties to proceedings conducted pursuant to Puc 204 shall be permitted to conduct discovery pursuant to this rule.*

The following sentence, which states that discovery requests and discovery responses must be filed with the commission, should be deleted. This proposed requirement is not consistent with the relevant provisions of the APA (RSA 541-A:31 et seq.), which contemplates that adjudicative proceedings will be adversarial rather than inquisitorial in nature (i.e., will not involve the tribunal also serving a prosecutorial role in developing evidence for admission into the record) similar to civil proceedings conducted by the Superior Court.

Subsection (b) of this proposed rule, which requires a petitioner to make certain "automatic disclosures" by relying on a newly adopted form, should be deleted. In particular, nothing in New Hampshire law requires or authorizes the Commission to insist that petitioners estimate the rate impacts of any relief requested by petition. Generally, the Commission should rely on, and expect petitioners to, meet their burdens of proof and persuasion by deploying appropriate arguments and evidence. Although we do not consider it necessary, the Commission could reasonably include in its rule governing the submission of petitions (proposed Puc 203.08) a requirement that a petitioner state the legal authority on which the petition relies.

Subparagraph (d) of the rule should be redrafted to read as follows: *At any time not inconsistent with a procedural order issued by the Commission, a party to a proceeding conducted under Puc 204 shall have the right to serve data requests on any other party, consisting of written interrogatories or requests for the production of documents.*

Subparagraph (f) should be redrafted to read as follows: A party issuing a data request, objection to a data request, or a response to a data request shall serve the document on every person designated on the commission's official service list to receive a copy of discovery papers.

The Commission should explain what a "technical session" is. A second sentence should be added to paragraph (J) of the rule: *For purposes of this rule, a "technical session" is an informal and non-public meeting of the parties, convened by the petitioner, for the purpose of informal discussion and information exchange.*

Puc 204.02 – Notice of Proceedings

Paragraph (a) should be revised slightly so that it reads:

(a) The commission shall provide notice of a prehearing conference or hearing, which shall include the information required by RSA 541-A:31, III:

> *(1) a statement of the time, place, and nature of the prehearing conference or hearing;*
> *(2) a statement of the legal authority under which the hearing or preferring conference is to be held,*
>
> *(3) a reference to the particular sections of the statutes and rules involved,*
>
> *(4) a short and plain statement of the issues presented, and*
>
> *(5) a statement that each party as the right to have an attorney represent them at the party's own expense.*

Paragraph (b) of this proposed rule, which governs the publication of notice, should be revised. Publication in a newspaper of general circulation in the relevant geographic area is no longer an effective means of assuring public notice; the readership of such publications has been plummeting and most people no longer rely on them to keep abreast of developments in their

communities or state. Notice requirements in the internet age should focus on the web sites of relevant entities. Thus this paragraph should read: *The commission shall publish all orders of notice issued under this rule on its web site and shall direct all utilities appearing in the proceeding to publish such orders of notice on their web sites. When necessary to assure reasonable notification of all persons whose interests may be affected by the proceeding, the commission may require the use of other notification methods including communications from utilities to individual customers.*

Puc 204.03 – Failure to Appear or Respond

This proposed rule should be deleted as inappropriate. Parties to Commission proceedings (including the OCA) sometimes opt not to participate or respond to a commission order for a variety of legitimate reasons often related to scarcity of resources and time. Obviously, in some circumstances a party may waive rights to pursue arguments or remedies by not appearing or otherwise acting to preserve issues. Those waiver principles are not conducive to enumeration in the Commission's procedural rules.

Puc 204.05 – Prehearing Conference

This rule should be recaptioned "Prehearing Conferences" (plural) in light of the fact that the Commission (appropriately) reserves the right to schedule more than one prehearing conference in each proceeding. Indeed, we believe that it is consistent with the letter and spirit of RSA 541-A for the Commission to meet its (reasonable) need for what it characterizes as "status conferences" as prehearing conferences – since status conferences are not a concept that appears anywhere in the Administrative Procedure Act.

We are supportive of the concept of requiring the submission of structuring statements (as presently specified in paragraph (c) of this proposed rule as a reasonable means of developing procedural schedules that meet the needs of both parties and the commission. Indeed, the Commission should consider whether to require the submission of a structuring statement even in those rare adjudicative proceedings where there will be no prehearing conference. (If so, then structuring statements likely deserve their own freestanding section of Puc 204.) At present paragraph (c) contains a fatal flaw – it does not assign any individual party the responsibility for convening the necessary discussions among the parties and actually filing the document. In our view, that obligation should belong to the petitioner. With respect to the requirement that structuring statements be filed ten days prior to prehearing conferences, (1) this requirement should apply only to the initial prehearing conference in a docket, and (2) the Commission should carefully consider the extent to which this timing comports with the timeline for intervention petitions, lest parties or putative parties be improperly excluded from participating in the development of a structuring statement.

There are various problems with the details of the proposed rule. It is unreasonable to expect parties to enumerate, before a proceeding is under way, "all procedural issues and motions." The phrase "settlement track" is unclear (and should likely be replaced by "offers of settlement" pursuant to RSA 541-:31, V(c)).

Puc 204.06 – Status Conference

This proposed rule should be deleted since there is no such thing as a "status conference" in the Administrative Procedure Act.

Puc 204.08 – Settlement

The current version of this rule, Puc 203.20, provides for both settlements and factual stipulations, the latter binding the commission "as to the facts in question" when the stipulation is not contested by any party. There is no reason to omit this rule, which in appropriate cases has the effect of streamlining hearings and focusing them on matters that are truly a matter of factual dispute. Moreover, the provision that a non-contested settlement *may* be considered as evidence in the proceeding unreasonably implies that a contested settlement cannot be so considered.

The proposed rule prohibits disclosure of settlement discussions to "third parties." It is not clear what this means.

The requirement in proposed paragraph (f) of the rule, that in any case to which the Department is a party it certify that the settlement is "just and reasonable and serves the public interest," is not within the authority of the Commission to impose on the Department. The cited statutory provision, RSA 12-P:2, III, obligates the Department to provide certain "administrative, technical and staff support" to the Commission "to assist the commission in carrying out its regulatory and adjudicative functions. This requirement does not implicate substantive determinations made by either the Commission or the Department within the scope of any authority vested in the Department.

Puc 204.10 – Exhibits

The OCA does not know what presenting evidence "in exhibit form" means; if this requirement is necessary, "exhibit form" should be explained or defined. The requirement that an exhibit other than a document or photograph must either be produced tangibly at hearing or offered as a "photographic representation" is problematic in circumstances where such an exhibit is an audio or video recording. The timing specified in Puc 204.11(b) does not align with the timing specified in Puc 204.10 concerning the same materials.

Puc 204.11 – Pre-Marked Exhibits and Witness Lists

This rule, while reasonable, fails to identify which party is responsible for making the necessary filings. The responsibility should be vested in the petitioner.

Puc 204.12 – Evidence

Paragraph (a) is improvidently drafted; among other things, it deprives the OCA (inadvertently, we hope) of its right to offer evidence at hearing. This paragraph should read: *The persons entitled to offer evidence at hearing in an adjudicative proceeding shall be the petitioner or*

petitioners, the Department when it has entered an appearance, the OCA when it has entered an appearance, and any party granted intervenor status.

The Commission should eliminate the surplusage from paragraph (d) so that it reads, simply: *The commission shall exclude evidence that is irrelevant, immaterial, or unduly repetitious.*

Puc 204.13 – Cross-Examination

Paragraph (a) improperly omits the OCA from the list of parties authorized to conduct cross-examination at hearings.

Puc 204.20 – Reopening the Record

Paragraph (a) refers to submission of evidence after "the close of a hearing" but paragraph (b) refers to such submissions "after the close of the record." This needs to be clarified.

Puc 204.21 – Recording

Limiting to 60 days the period of time for retention of recordings is not appropriate. It raises the possibility that recordings of early stages of proceedings will be deleted well before the completion of such proceedings. Moreover it is not permissible under RSA 91-A for the Commission to impose an undefined and unbounded fee for obtaining copies of recordings.

Puc 204.22 – Transcripts

The rules governing adjudicative proceedings should memorialize the current practice of transcribing all hearings in such proceedings, including prehearing conferences. Consigning the question of whether to produce a transcript to unbounded Commission discretion is unfair. The implication that transcripts are only justifiable when they assist in the Commission's deliberations, is not reasonable

Puc 204.23 – Rehearing

RSA 541:3 specifies that motions for rehearings may be filed by any party to the proceeding or "any person directly affected" by the applicable order. The proposed rule improperly limits rehearing motions to parties.

PART Puc 205 -- Rulemaking

Puc 205.01 – How Adopted

This proposed rule improperly shifts the authority to promulgate the agency's rules from "the commission" (i.e., the three commissioners appointed pursuant to RSA 363:1) to the chairman of the Commission. This is inconsistent with both the relevant provision of the Administrative Procedure Act (RSA 541-A:3, authorizing "an agency" to adopt rules in appropriate circumstances) and the Commission's enabling statute (RSA 365:8, authorizing "the

commission" and not "the chairman" to adopt rules pursuant to RSA 541-A). Proposed Rule 205.02 contains a similar flaw. This mirrors the concern described at the beginning of this letter concerning potential flaws in which the Commission adopted its initial proposals in these two rulemaking dockets.

IV. Conclusion

The Office of the Consumer Advocate again thanks the Commission for this opportunity to comment on its long-awaited update to the agency's procedural rules.[8] In closing, we note that these rules are complex, the issues implicated by the rules are extensive, and the implications are vast given the implications of Commission regulation for everyone in New Hampshire. Participants in this proceeding, most certainly the OCA employees who contributed to these comments, are fallible human beings who acted under time pressure. These rules clearly require more work before they are ready to be deliberated upon by the JLCAR and we respectfully urge the Commission to build more time into the pre-JLCAR phase of theses rulemakings. The Commission and all other persons interested in these rules can count on the OCA to be an active, engaged, and constructive participant in these rulemakings at every step.

Sincerely,

Donald M. Kreis
Consumer Advocate

cc: Service Lists for both dockets (via e-mail)

[8] The Consumer Advocate would also like to take this opportunity to thank Assistant Consumer Advocate Matthew J. Fossum and Staff Attorney Michael J. Crouse for their assistance in developing these comments. Their input was invaluable.