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Via Electronic Service Only
Daniel C. Goldner, Chairman
c/o ClerksOffice@puc.nh.gov
NH Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, N.H. 03301-2429

Re: Docket No. DRM 24 – 85 & 86: Lakes Region Water Co., Inc., Comments in Response to Commission Order of Notice re: Proposed Amendments to the Commission’s Procedural Rules, Puc 100 and Puc 200.

Chairman Goldner and Commissioners:

I write to provide comments on behalf of Lakes Region Water Co., Inc., (“Lakes Region”) in response to the June 21, 2024 *Order of Notice* issued in Docket Nos. DRM 24 – 85 & 86 concerning amendments to the Commission’s Puc 100 and Puc 200 procedural rules. Because Lakes Region did not conduct a detailed review and a “track changes” version showing all of the proposed changes was not available, these comments are summary in nature. Lakes Region believes that the proposed amendments represent an excellent starting point for discussion but a less-than-ideal ending point. Lakes Region therefore recommends and requests that the Commission revised its proposed rules based on comments and then schedule a collaborative or investigatory hearing to hear final comments based on the collective experience of all interested parties. In support of this request, Lakes Region offers the following comments:

I. Authority to Adopt Procedural Rules Resides Entirely with the Commission.

RSA 365:8 clearly states that the Commission’s procedural rules are exclusively controlled by the Commission. The statute states:

365:8 Rulemaking Authority. –

I. The commission shall adopt rules, pursuant to RSA 541-A, relative to:

(a) The conduct of its hearings, including alternative processes in hearings and other forms of alternative dispute resolution. [...]

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However, during the Public Hearing held on July 16, 2024, the Commission's Hearings Officer expressed the view that the Commission was not required to hold a public meeting to discuss the proposed amendments and that the Chairman had the exclusive authority to promulgate rules on behalf of the Commission. Beginning on Pages 4 and 57 of the Transcript, the Hearings Officer stated as follows:

On Page 4: “[PRESIDING OFCR. FULLER:] The Chairman of the PUC has exclusive rulemaking authority under RSA 363:1 and RSA 21-G:9. Chairman Goldner submitted the Commission's Initial Proposal for Rulemaking for both the 100s and 200s on June 7th of 2024. The Initial Proposal appeared in the June 20th, 2024, Rulemaking Register.”

On Page 57: “PRESIDING OFCR. FULLER: Thank you. I'm just going to be up front and clear, that was no Commission meeting. Under 363:1, if you read 363:1, there the second sentence is "The chair of the commission shall have the powers and the duties set forth in RSA 21-G:9." 21-G:9 gives exclusive rulemaking authority to the Commissioners, and, in the case, the Chair, under this section. So, the Chair is well within his right to put forth rules as statutorily allowed.

I understand 365:8 says "The commission shall adopt rules." That is comparable to any other legislation that allows a state agency to adopt rules. The Department of Labor statute says "The department of labor shall", you know, "adopt rules."

Our title of our agency is the "Public Utilities Commission". But, by statute, the Chair has exclusive rulemaking authority.”

The views expressed by the Hearings Officer are mistaken for several simple reasons, including the following:

- RSA 365:8 is a specific statute that governs “Rulemaking Authority” by the Commission. RSA 21-G:9 is a general statute concerning the organization of executive branches in state government. Even assuming for the sake of argument that the statutes conflict, it is a fundamental principle of law and statutory interpretation that: “To the extent two statutes conflict, the more specific statute controls over the general statute.” *Casey v. N.H. Secy. of State*, 173 N.H. 266, 280 (2020) *quoting EnergyNorth Natural Gas v. City of Concord*, 164 N.H. 14, 16 (2012). RSA 365:8 is a specific statute governing the Commission. RSA 21-G:9 is a general one providing for organization of all executive departments. The specific, RSA 365:8, controls over the general, RSA 21-G:9.
- The bifurcation of the Commission in 2021 did not change the manner in which the Commission adopts rules. In fact, the Legislature made only minor changes to RSA 365:8 in 2021 when it created the NH Department of Energy, but left rulemaking authority in the hands of the commission as a whole. *See Laws of*

2021, Chapter 91, Sections 249 and 250.¹ The Legislature could have moved rulemaking authority to the Chairman alone but it did not do so. To read RSA 21-G:9 to circumvent the mandate in RSA 365:8 that rules be adopted by the full Commission violates that basic legal principle that courts and administrative agencies cannot “add words that [the Legislature] did not see fit to include”. *Correia v. Town of Alton*, 157 N.H. 716, 719-720 (2008) quoting *Dalton Hydro v. Town of Dalton*, 153 N.H. 75, 78 (2005). The commission should follow the plain mandate in RSA 365:8 which requires rules to be adopted by the commission as a whole and not by a single commissioner.

- A careful reading of RSA 21-G confirms that it does not control over RSA 365:8. RSA 21-G gives a commissioner of an executive department the general power to “manage all operations of the department” RSA 21-G:9, I. It also gives a commissioner of an executive department the power to adopt “all rules of the department, ... or subordinate official of the department.” RSA 21-G:9, II (b) (emphasis added). However, the commission is not an “executive department” as defined by RSA 21-G:6-b, II. It is an “executive commission” as defined by RSA 21-G:6-b, IV. The commission’s rules are not “subordinate” to an executive commissioner or a department. In all proceedings, both the chairman and the commissioners are subordinate to the rules duly adopted by the commission.²
- What this means is that RSA 365:8 governs the commission’s rulemaking and requires the commission as a whole to consider the adoption of rules in a public process. Such a process should not be viewed as a hinderance. To the contrary, it is an opportunity to improve the practices and procedures before the commission and thereby benefit both regulated industries and the public. Lakes Region is aware that representatives of regulated utilities, public interest groups and other interested parties would welcome the opportunity to provide comments to the Commission and hear the Commission’s concerns underlying the proposed changes. The proposed rules are a step forward, but additional steps are needed.

¹ Laws of 2021, Chapter 91:249 & 250 amended RSA 365:8 as follows:

“91:249 Proceedings Before the Public Utilities Commission. Amend RSA 365:8, I(j) to read as follows: (j) Standards and procedures for determination and recovery of rate [case] **proceedings** expenses.

91:250 Proceedings Before the Public Utilities Commission. Amend RSA 365:8, II to read as follows: II. Where the commission has adopted rules in conformity with this section, [complaints to and] proceedings before the commission shall not be subject to RSA 541-A:29 or RSA 541-A:29-a.”

² See e.g. *Appeal of Union Tel. Co.*, 160 N.H. 309, 317 (2010) quoting *Attitash Mt. Service Co. v. Schuck*, 135 N.H. 427, 429 (1992) (“The law of this State is well settled that an administrative agency must follow its own rules and regulations, and that an agency's interpretation of its own regulations is erroneous as a matter of law when it fails to embrace the plain meaning of its regulations.”); *Appeal of Nottingham*, 153 N.H. 539, 554-555 (2006).

II. COMMENTS ON PROPOSED PUC 200 RULES

Comment 1: Automatic Disclosure in Proposed Rule 204.01 is Unnecessary and will result in Litigation and Delays.

- **Proposed Rule 204.01 imposes a new requirement for all utilities to file an “automatic disclosure”.** The scope of the automatic disclosure is broad and includes “all statutes and rules that govern the Petition”; the “estimated rate impact of requested Commission action”; and other matters. Because an automatic disclosure falls under the Commission’s discovery rules, it will require utilities to “reasonably and promptly amend or supplement” disclosures on an on-going basis during the course of a proceeding. See proposed rule Puc 204.01 (k).
- **The Burden Imposed on Small Water Companies.** The burdens imposed on small water companies such as Lakes Region are particularly acute. Lakes Region typically prepares its own financial analysis when needed to support a petition. However, that analysis can change as a result of the discovery process in collaboration with the Department of Energy and other interested parties. This rule would appear to require Lakes Region to supplement or update its initial financial disclosures each time it provided responses to discovery requests to parties. The proposed rule will double an already significant burden for small water companies.
- **Automatic Disclosure for Petitions is Not Needed.** The current rule governing petitions requires all utilities to submit the provisions that support the requested relief. *See e.g.* current Rules Puc 203.05 & 203.06. The existing rules put the burden on the utility to specify the legal authority to proceed and give the Commission the power to dismiss a petition deemed inadequate per Puc 203.05 (b). It is recommended the Commission continue to use this approach.
- **Automatic Disclosure May Result in Litigation and Delays.** During the review process it is common for parties to agree to settlements containing innovative solutions not contemplated at the outset of a proceeding. By imposing an automatic disclosure as a discovery requirement, the proposed rule would require supplemental automatic disclosures and create a barrier to innovative solutions. Parties opposed to a settlement could use the proposed rule to argue that: (a) the initial disclosures were legally inadequate; (b) the hearings based on prior disclosures need to be continued; and/or (c) new discovery should be allowed or a new proceeding commenced to consider new information not in the initial or prior disclosures.
- **Recommended Approach:** It is recommended that the Commission not impose an automatic disclosure rule and instead use its authority under its existing Rules Puc 203.05 and 203.06 which require that petitions include, *inter alia*: “(2) A clear and concise statement of the authorization or other relief sought; (3) The statutory provision or legal precedent under which the authority or other relief is sought; [...] (6) A concise and

explicit statement of the facts upon which the commission should rely in granting authorization or relief; and (7) Such other data as the petitioner considers relevant to the request for authority or relief.” The current Rule 203.05 (b) also gives the Commission the authority to: “notify in writing a petitioner filing a petition when such petition is deficient in any respect and any such deficient petition shall not be deemed to have been filed until the deficiency is corrected.” These existing rules are more than adequate to protect the interests of the Commission, interested parties, and the public.

Comment 2: The Proposed Definition of “Applicable Law” is Overbroad and Unnecessary.

- **The Proposed Rule 202.02 Defines Applicable Law as:** “any duly promulgated federal, state, or local law, regulation, rule, ordinance, code, directive, decree, judgment, order, permit, or other duly authorized and valid action of any Governmental Authority, including any binding interpretation of any of the foregoing by any Governmental Authority, which is applicable to a Person, including, without limitation, its property, business, a transaction, or any other matter of any kind concerning or related to the Person.”
- **Rule is Overbroad.** As written, the proposed Rule so broadly written as to include an incredible range of subjects from Select Board decisions on uses of public highways under RSA 236:9 et seq; to DES and DOT laws, rules and regulations; to Superior Court decisions governing private property and/or easement rights; and a vast universe of legal matters than may have little or no bearing on a proceeding.
- **Intent is Unclear.** The phrase “applicable law” is used in 4 very different proposed 200 Rules: (1) Proposed Rule 203.11 governing requests for confidential information; (2) Proposed Rule 203.14 (a) governing confidential treatment; (3) Proposed Rule Puc 203.26 (a) governing withdrawal of the Presiding Officer; and (4) Proposed Rule 204.08 (b) governing commission approval of Settlement Agreements. However, the phrase is not capitalized and it is unclear when the rule is meant to apply. Its application to approval of settlement agreements under Rule Puc 204.08 could be problematic as it would require the Commission to determine “that the result is consistent with applicable law” before approving a settlement.
- **The Proposed Definition Does Not Appear to be Particularly Helpful.** None of the rules using the phrase “applicable law” appear to benefit from the proposed definition. Its use in the rule governing approval of settlements could prohibit the Commission from approving a settlement agreement due to perceived conflicts with other rules or decisions. It is recommended to leave the term undefined and allow the Commission to determine whether a claimed law or decision is not applicable to a particular proceeding on a case-by-case basis.

Comment 3: The Commission Rule Requiring Searchable PDFs Needs Flexibility.

- **Proposed Rule 203.04 (b) on Page 23 provides:** “(b) Electronic filings must be made in searchable portable document format (PDF) and Excel files and reflect the same text and pagination as any submitted hardcopies.” It is recommended that the words: “whenever reasonably possible” be added. This is because some source documents included in an electronic filing may be illegible, locked, copyrighted or otherwise saved into a format which makes it difficult to make the documents searchable.

Comment 4: The Proposed Rule on Orders Nisi Should be Reconsidered.

- **Proposed Rule Puc 203.19 states:** “**Orders nisi.** In a docketed matter, the commission may elect to issue a final order with a delayed effective date referred to as an order nisi, if permitted under New Hampshire law and the commission determines that the record is sufficient to support a commission decision without further process. Any order nisi shall include a notice and publication requirement to allow interested parties an opportunity to object or request a further hearing.”
- **Purpose and Value of Orders Nisi:** It is believed that Orders Nisi are intended to allow orders to be issued in uncontested cases without a formal hearing where a hearing was required by statute. *See e.g. Blacks Law Dictionary, Centennial Edition (1991);³ Merriam Webster Online.⁴* Orders Nisi allow the commission to decide uncontested cases informally when a hearing is required by statute, consistent with RSA 541-A:30, V.⁵ This helps parties and the commission avoid the time and expense of a hearing when the issues are uncontested. However, not all proceedings before the Commission require hearings. For example, in financing proceedings under RSA 369:4, the Commission is authorized to issue orders “after such hearing **or** investigation as it may deem proper” (emphasis added). In some of those cases, an Order Nisi may delay the effective date of a financing approval without a corresponding benefit.
- **The Proposed Publication Requirement Improperly Opens the Door to Untimely Hearing Requests.** Proposed Rule 203.19 includes language which requires the Commission to “include a notice and publication requirement to allow interested parties an opportunity to object or request a further hearing.” However, a notice and publication requirement at the end of a proceeding is inconsistent with RSA 378:4 which requires the

³ Defining Nisi “... to indicate that the adjudication spoken of is one which is to stand as valid and operative unless the party affected by it shall appear and show cause against it, or take some other appropriate step to avoid it or procure its revocation.”

⁴ “taking effect at a specified time unless previously modified or avoided by cause shown, further proceedings, or a condition fulfilled”. <https://www.merriam-webster.com/dictionary/nisi>

⁵ RSA 541-A:30, V, provides that: “(a) *Unless precluded by law*, informal disposition may be made of any *contested case*, at any time prior to the entry of a final decision or order, by stipulation, agreed settlement, consent order or default.” (emphasis added).

Commission to issue an order of notice and allow intervention at the beginning of a rate proceeding, not at the end of it. After the date for intervention has expired in a duly noticed proceeding, intervention by the public is allowed only as a discretionary matter. *Compare* RSA 541-A:32, I (commission “shall” grant intervention up to 3-days prior to a scheduled hearing) *with* RSA 541-A:32, II (commission “may” grant intervention thereafter). The Commission’s *Order Nisi* rule should not require notice and publication at the end of a proceeding and thereby open the door to persons who failed to intervene and participate in a timely manner to request a hearing and thereby delay hearings and approvals.

- **Recommended Change.** It is recommended that the Commission’s proposed Rule 203.19 be changed to allow any “party” to a proceeding to request a hearing but not require publication at the end of a proceeding. The following revision is recommended:

“**Orders nisi.** In a docketed matter, the commission may elect to issue a final order with a delayed effective date referred to as an order nisi, if permitted under New Hampshire law and the commission determines that the record is sufficient to support a commission decision without further process. Any order nisi shall ~~include a notice and publication requirement to~~ allow interested parties an opportunity to object or request a further hearing for good cause shown.”

Comment 5: Other Rules and Going Forward.

Lakes Region anticipates that other utilities and interested parties have engaged in a broader and more comprehensive review and will offer other comments and suggestions that merit consideration. Lakes Region therefore recommends that the Commission revise its proposed procedural rules following the August 26, 2024 comment deadline, and, thereafter, hold an informal collaborative or investigatory hearing to allow further comment prior to submission of its final proposed rules.

Thank you for this opportunity to provide these comments. Lakes Region looks forward to working with the Commission, its Staff and other interested parties going forward.

Respectfully submitted,



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Cc: Service List