

August 26, 2024

Chairman Daniel C. Goldner  
New Hampshire Public Utilities Commission  
21 South Fruit Street  
Concord, New Hampshire, 03301

**Re: DRM 24-085; 24-086 - Comments of the New England Power Generators Association (NEPGA), Clean Energy New Hampshire (CENH), Community Power Coalition of New Hampshire (CPCNH), the Conservation Law Foundation (CLF), the Consumer Energy Alliance (CEA), the Granite State Hydropower Association (GSHA), the Nature Conservancy (TNC), Southern New Hampshire Services, Inc. (SNHS)**

Dear Chair Goldner and Members of the Commission:

The New England Power Generators Association (NEPGA), Clean Energy New Hampshire (CENH), Community Power Coalition of New Hampshire (CPCNH), the Conservation Law Foundation (CLF), the Consumer Energy Alliance (CEA), the Granite State Hydropower Association (GSHA), the Nature Conservancy (TNC), Southern New Hampshire Services, Inc. (SNHS), (collectively, “the Organizations”) respectfully offer these comments on the Commission’s Initial Proposal, dated May 30, 2024, which proposes certain changes to its procedural rules in Puc chs. 100 and 200.<sup>1</sup>

The proposed rules have the potential to fundamentally alter the Commission’s role in its adjudicative proceedings in ways that could violate New Hampshire law, including RSA 541-A, the state’s Administrative Procedure Act. Both the Administrative Procedure Act and the Commission’s enabling statutes envision the Commission as an independent and impartial arbiter of the issues raised in its proceedings, not a participant with advocacy roles akin to petitioners, intervenors, or other parties.<sup>2</sup> Yet the proposed rules would interpose the Commission into its own proceedings and potentially transform traditionally adjudicative processes into inquisitorial ones.<sup>3</sup>

While many of the proposed rules raise concerns for the undersigned organizations, we are most concerned that the proposed rules would unduly exclude parties from Commission proceedings who are allowed to intervene by law. The proposed rules might bar many parties, like those in this joint letter, with clear, substantial interests, legitimate grounds for intervening, expertise on certain matters before the Commission, and a long history of constructive participation in Commission proceedings. New Hampshire law affords those parties a seat at the table. If they are excluded, the Commission’s decision-making will suffer from a lack of critical public input on matters of great economic and societal importance for New Hampshire. The Organizations propose revisions to

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<sup>1</sup> For more information about each organization, see Appendix I to this letter. The comments expressed herein represent those of the listed organizations, but not necessarily those of any particular member. Each organization reserves the right to provide additional comments during these rulemaking proceedings.

<sup>2</sup> In addition to the NH APA, RSA 363:17-a states that the Commission “shall be an arbiter between the interests of the customer and the interests of the regulated utilities.”

<sup>3</sup> Of course, the Commission would still engage in inquisitorial functions when acting in an investigative, rather than adjudicative, capacity.

two critical terms defined by the proposed rules — “participant” and “standing” — to avoid this unfortunate and improper outcome.

Because the proposed rules would drastically change the nature of Commission proceedings, we urge the Commission to engage in a more deliberative process before taking any action to finalize these rules. This would be consistent with prior rulemaking processes that provided opportunities for stakeholder input before the formal rulemaking process. Additional opportunities for public engagement would only help to ensure that the Commission develops a clear and legally sound set of rules to assist it in making the most prudent decisions based on a complete record – not only in these specific rulemakings, but in the thousands of future proceedings that these rules will govern.

**The Commission Should Revise the Proposed Definitions of “Participant” and “Standing” to Avoid Excluding Parties from Participating in Commission Proceedings Who Are Allowed to Intervene by Law.**

The Initial Proposal would add a set of definitions to the Commission’s procedural rules for certain terms, including “participant” and “standing.” See Proposed Puc 202. Those definitions could exclude certain parties with statutory rights from intervening in Commission proceedings, making them contrary to law. The Commission may not have intended to narrow its standards for granting intervention to this extent. But if left unchanged, the proposed rules could improperly limit who may participate in Commission proceedings. Because intervention is governed by New Hampshire statute, the Commission is not permitted to alter those standards in ways that conflict with New Hampshire law and impinge on parties’ rights or public access.

Under both the current rule Puc 203.17 and proposed rule Puc 302.08(2), petitions for intervention will be granted in accordance with RSA 541-A:32. Among other things, that statute requires the Commission to grant intervention petitions if (1) they are submitted in writing, with copies sent to all parties, at least three days before the hearing; (2) they state facts demonstrating the petitioner’s rights, duties, privileges, immunities or other substantial interests that may be affected by the proceeding or show that the petitioner qualifies as an intervenor under any provision of law; and (3) the Commission determines that the interests of justice and orderly and prompt conduct of the proceedings would be not be impaired by allowing intervention.

The Commission’s proposed definitions of “participant” and “standing,” however, conflate the concept of standing and intervention and could be interpreted as adopting a narrower standard for intervention than the one set by statute. The proposed rules define “participant” as, “any person with *standing* and subsequently granted the right to participate by the commission in a non-adjudicative proceeding.” The proposed rules define “standing” as “a personal and substantial interest in the case such that the party has sustained or will sustain direct injury as a result of the governmental act that is being challenged.”

The proposed definition of “standing,” which is incorporated into the proposed definition of “participant,” is far too restrictive; not every person participating in Commission proceedings is doing so to redress a “direct injury.” The law confers rights and other benefits to parties, and such parties clearly have standing to seek participation in proceedings designed to protect those benefits in circumstances other than when those parties are or may be directly injured.

Indeed, the Commission has explicitly recognized the knowledge and experience provided by organizations participating in PUC dockets, including the undersigned. The Organizations bring decades of experience to PUC proceedings on a range of topics too exhaustive to list. The following dockets are illustrative of the breadth and depth of their expertise, which ranges from wholesale electricity markets and the operational considerations of run-of-river hydroelectric facilities, to the environmental impacts of energy infrastructure and the needs of low-income families: DE 12-262 (2013-2014 CORE NH Electric and Gas Energy Efficiency Programs); DE 22-060 (Consideration of Changes to the Current Net Metering Tariff Structure, Including Compensation of Customer-Generators); DE 10-160 (Public Service of New Hampshire customer migration docket); DE 10-261 (PSNH Least Cost Integrated Resource Plan); DRM 14-234 (rulemaking on Chapter 2100 affiliate rules); IR 20-192 (Investigation into the Effects of the COVID-19 Emergency on the Renewable Energy Industry); and IR 22-053 (Investigation of Energy Commodity Procurement Renewable Portfolio Standard; Default Service Electric Power; Cost of Gas Methodology and Process).

Historically, the Organizations have contributed important information and context to aid the Commission in resolving issues raised in proceedings where they have participated. The diversity of the signatories to this letter and the range of issues in which they have been involved underscore how significantly their knowledge and experience have aided the Commission in resolving issues raised in proceedings where they have participated.

We are also concerned that, although the proposed definition of “participant” is limited to “non-adjudicative proceedings,” the word “participant” is used throughout the proposed rules applicable to adjudicative proceedings and is not separately defined. It could therefore be interpreted to apply to adjudicatory proceedings despite the caveat about “non-adjudicative” proceedings in the proposed rules. We also do not believe that limiting the definition of participant to non-adjudicative proceedings as proposed is warranted or proper either.

### **Proposed Revisions to Definitions**

The Commission could resolve these concerns by adopting revisions to its proposed definitions such as those, as suggested below. The Organizations’ substantial interest in these and other issues that will ultimately be heard by the Commission going forward warrant the Commission’s serious attention to ensuring that any rules adopted are fully consistent with the statutory provisions of RSA 541-A:32, II.

#### *Suggested Revisions to Proposed Definition of Participant*

The Organizations recommend that the Commission modify the proposed definition of “participant” to refer to “a person, other than a party, participating in a proceeding under these rules.”<sup>4</sup> This would avoid the confusion around whether the definition of “participant” is limited to certain kinds of proceedings but not others. It would also avoid the need to clarify or to adopt a separate definition for “participant” in adjudicatory proceedings and would allow the Commission

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<sup>4</sup> This proposed modification is also supported by the Office of the Consumer Advocate (“OCA”). See OCA Comments (July 12, 2024), DRM 24-085 and DRM 24-086 at 11.

to maintain the references to “participants” throughout its proposed rules for adjudicatory proceedings.

### *Suggested Revisions to Proposed Definition of Standing*

The Organizations recommend that the Commission simply remove the proposed definition of “standing.” The definition is not necessary. Indeed, the word “standing” appears only in the proposed definition of “participant” and is not used elsewhere in the proposed rules. If the Commission adopts our recommendation above, the term “standing” will no longer appear in the proposed rules at all.

Further, as mentioned above, the proposed definition of standing introduces confusion regarding whether the Commission is modifying its existing standards for intervention. The definition of “standing” appears to follow the standard for bringing an appeal of an administrative decision to the New Hampshire Supreme Court and in proceedings in the New Hampshire State courts.<sup>5</sup> That definition of standing is much more restrictive than the standard for intervention in administrative proceedings as established in RSA 541-A:32 and endorsed as common practice by the Commission. See *generally* RSA 541-A:32, I and II; Order No. 25,886, DE 16-241, at 3-4 (Apr. 22, 2016).<sup>6</sup> Yet the proposed definition of “standing” and “participant,” for the reasons stated above, could be interpreted to apply to intervenors and impermissibly narrow the circumstances when the Commission grants intervenor status. Eliminating the definition of “standing” from the proposed rules would resolve these issues.

### **Commission’s Rulemaking Process**

Finally, as discussed at the July 16, 2024 hearing on the proposed rules, we support a more fulsome process in developing these rules, including the opportunity to discuss potential changes with the Commissioners, Commission staff, and other stakeholders prior to the Commission’s adoption of a Final Proposal under RSA 365:8, I and RSA 541-A:16, I(b)-(d). The Commission’s proposed rules could significantly change the Commission’s traditional role in its adjudicative processes. Those significant changes warrant more opportunities for public involvement and engagement in the Commission’s rulemaking process, prior to consideration of these rules before the Joint Legislative Committee on Legislative Rules.<sup>7</sup>

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<sup>5</sup> See, e.g., *Appeal of Stonyfield Farm*, 159 N.H. 227, 231 (2009) (“To have standing to appeal an administrative agency decision to this court, a party must demonstrate that his rights “may be directly affected by the decision, or in other words, that he has suffered or will suffer an injury in fact.”); and in proceedings in the New Hampshire State court, see *Duncan v. State*, 166 N.H. 640, 642-43 (2014) (discussing the doctrine of standing); *Teeboom v City of Nashua*, 172 N.H. 301, 307 (2019) (standing limited to those who can present a claim for resolution where actual interests are at stake).

<sup>6</sup> See also OCA Comments (July 12, 2024), DRM 24-085 and DRM 24-086 at 12; Comments of Unitil, Transcript of July 16 Hearing at 17 (standing too restrictive a standard for participation in proceedings before the Commission).

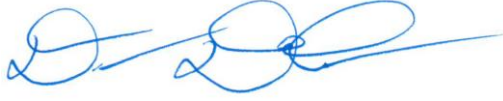






<sup>7</sup> We agree with the Department of Energy’s (DOE’s) request at the July 16, 2024 hearing that the PUC withdraw these proposals and begin a new process. We also encourage the Commission to work with DOE to ensure that the Commission’s proposed rules are coordinated with related DOE rulemakings to provide efficiency, avoid redundancy or conflict, and reduce disruption for both agencies and the entities impacted by their decisions. Because both agencies have until 2027 to finalize new procedural rules, there is significant time to engage further with the public in a more robust rulemaking process.

The Commission would only benefit from additional public input and a more complete record. Parties like the undersigned, who routinely participate in Commission proceedings, can offer helpful insights into how changes to the Commission's procedural rules could affect public participation in Commission processes. Additional issues that could benefit from further public input include:

- Whether the proposed rules improperly allocate advocacy or policymaking functions to the Commission that the General Court intended to transfer to the Department of Energy;
- Whether proposed rule Puc 204.08(c), which states that the Commission "may" consider a settlement only if not contested by any party and eliminates the possibility of resolution of issues of fact by stipulation, is contrary to RSA 541-A:31, V(a), undermines longstanding practice of full and partial settlements and factual stipulations in Commission proceedings;
- Whether the proposed provisions relating to transcripts, recordings, and destruction of recordings impact rights of appeal of Commission decisions; and,
- Whether changes to the Commission's rules continue to ensure robust public participation and engagement through intervention and other processes consistent with New Hampshire law.

We thank the Commission for its attention to these comments and respectfully asks that the Commission adopt NEPGA's recommendations.

Sincerely,

<p><i>Dan Dolan</i> President, <b>New England Power Generators Association</b></p>	
<p><i>Sam Evans-Brown</i> President, <b>Clean Energy New Hampshire</b></p>	
<p><i>Deana Dennis</i> Director, Regulatory &amp; Legislative Affairs, <b>Community Power Coalition of New Hampshire</b></p>	<p>/s/</p>
<p><i>Nick Krakoff</i> Senior Attorney, <b>Conservation Law Foundation</b></p>	
<p><i>Marc Brown</i> Northeast Executive Director, <b>The Consumer Energy Alliance</b></p>	
<p><i>Bob King</i> President, <b>Granite State Hydropower Association</b></p>	
<p><i>Meredith A. Hatfield</i> Associate Director for Policy and Government Relations, <b>The Nature Conservancy NH</b></p>	
<p><i>Ryan Clouthier</i> Chief Operating Officer, <b>Southern New Hampshire Services</b></p>	

## **APPENDIX I SIGNATORY ORGANIZATIONS**

### **New England Power Generators Association (NEPGA)**

NEPGA is the trade association representing competitive power generators in New England, and its mission is to support New England's competitive wholesale electricity markets. In New Hampshire, NEPGA members own and operate over 4,300 MW of power generation capacity and employ roughly 1,500 New Hampshire workers.

### **Clean Energy New Hampshire (CENH)**

CENH is a statewide nonprofit organization which educates and advocates for an affordable clean energy system in New Hampshire. CENH has received support from more than 500 members, including more than 130 businesses, 40 municipal members, comprising nearly 425,000 New Hampshire citizens, and more than 400 individuals in every corner of the Granite State.

### **Community Power Coalition of New Hampshire (CPCNH)**

CPCNH is a governmental instrumentality of its 60 members comprised of 58 New Hampshire municipalities and two counties and is organized pursuant to a Joint Powers Agreement under RSA 53-A and RSA 53-E:3, II(b). With current membership representing nearly 37% of the state's population, CPCNH is providing default power supply service to 43 Community Power Aggregations serving more than 130,000 customers.

### **The Conservation Law Foundation**

CLF is a nonprofit, member-supported, regional environmental organization working to protect New Hampshire's and New England's environment for the benefit of all people. CLF uses the law, science, and markets to create solutions that build healthy communities, sustain a vibrant economy, and preserve natural resources, including resources affected by the generation, transmission, and distribution of electric power. Consistent with its mission to promote thriving, resilient communities, CLF advances sound clean energy policies that strengthen New England's economic vitality.

### **Consumer Energy Alliance**

Established in 2005, Consumer Energy Alliance has become the leading consumer advocate for families and businesses seeking sensible federal, state, and local energy and environmental policies that help ensure all Americans benefit from affordable, reliable, and environmentally responsible energy solutions. CEA is a unique organization representing families, farmers, small businesses, distributors, transportation providers, manufacturers, academia, retirees, and every other energy consumer in the United States.

**The Granite State Hydropower Association (GSHA)**

GSHA is a non-profit trade association for the small-scale independent hydropower industry in New Hampshire. Members of GSHA own, operate, and manage 49 hydroelectric facilities located in 36 towns and cities throughout the state, totaling 54.9 megawatts.

**The Nature Conservancy**

The mission of The Nature Conservancy is to conserve the lands and waters on which all life depends, and has been working to advance these goals in New Hampshire since 1961. TNC NH has helped to protect nearly 300,000 acres and 680 miles of rivers and streams in the Granite State, has over 23,000 supporters and followers, and engages in regulatory and policy efforts to advance a range of goals including deploying energy efficiency and clean energy.

**Southern New Hampshire Services, Inc. (SNHS)**

SNHS is one of New Hampshire's five Community Action Agencies, has been in operation for over 55 years, and has over 350 employees dedicated to serving families of low income. SNHS administers more than 60 programs that provide workforce development, education, child care, energy, jobs, food and other assistance to over 30,000 New Hampshire households with low income and works directly with thousands of low income residential electric and residential gas customers.