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VIA ELECTRONIC DELIVERY

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

RE: Docket No. DRM 24-085 and DRM 24-086
Comments on Proposed Rules Puc 100 and Puc 200

Dear Chairman Goldner,

N.H. Brown Law, PLLC respectfully offers the following comments to the proposed Puc 100 and Puc 200 rules. NH Brown Law, PLLC represents regulated utilities and others in proceedings before the Public Utilities Commission (“Commission” or “PUC”). NH Brown Law’s principal, Attorney Marcia Brown, is a former regulator and has been involved in rulemaking since 1988 when the State, led by Scott Eaton at Office of Legislative Services, Division of Administrative Rules, began efforts to standardize rule content, ultimately creating the Rulemaking Manual which was adopted by the Joint Legislative Committee on Administrative Rules (“JLCAR”) and incorporated into law by RSA 541-A:8. Each agency is thus legally required to conform to the Rulemaking Manual. This experience has generated the below comments.

So as to minimize redundant comments, NH Brown Law includes by reference the comments of the Office of the Consumer Advocate and Attorney Justin Richardson filed in these dockets.

ISSUE 1: The Public Utilities Commission Chairman has not been Granted Rulemaking Authority.

NH Brown Law does not believe the Puc 100 and Puc 200 rulemaking (Notice Nos. 2024-111 and 2024-110, respectively) have been lawfully commenced because there is no evidence that the Commission itself has commenced this rulemaking.

Agencies are defined in RSA 541-A:1, II as “each state board, commission, department, institution, officer, or any other state official or group, other than the legislature or the courts, authorized by law to make rules or to determine contested cases.” The PUC is an “executive commission” pursuant to RSA 21-G:6-b, II. Pursuant to RSA 365:8, the legislature has authorized the PUC to adopt rules.

At the July 16, 2024 hearing on the proposed PUC 100 and 200 rules, legal counsel for the Chairman stated that the Chairman had initiated rulemaking.

As the Rulemaking Manual states at Chapter 3, Section 1.2, “rulemaking is lawmaking”. Here, the Chairman has initiated rulemaking to, among other objectives, “codify the administrative changes that occurred after the creation of the Department” of Energy and adopt “significant changes to the Commission’s discovery process”. See Rulemaking Notice 2024-110. This is a rulemaking, or lawmaking, action.

To delegate rulemaking authority of RSA 365:8 to the Chairman of the PUC, RSA 541-A:22, III(e)¹ and RSA 541-A:3-b² require specific legislative authority. See also, Rulemaking Manual at Chapter 3, Section 1.2. NH Brown Law understands that the Chairman’s legal counsel relies on reference to RSA 21-G:9 in RSA 363:1 for proposition that the Chair of the Commission can commence rulemaking:

“363:1 Commission; Term. – There shall be a public utilities commission, which shall be an independent agency administratively attached to the department of energy pursuant to RSA 21-G:10. *The chair of the commission shall have the powers and duties set forth in RSA 21-G:9.* The commission shall be composed of 3 commissioners who shall be full-time employees and who shall engage in no other gainful employment during their terms as members. Their term of office shall be for 6 years. Of the 3 commissioners, one shall be an attorney and a member of the New Hampshire Bar and one shall have either background or experience or both in one or more of the following: engineering, economics, accounting or finance.” (Emphasis added).

RSA 21-G:9 authorizes commissioners of executive departments to conduct a number of administrative duties, including rulemaking (in RSA 21-G:9, II(b)). Importantly, RSA 363:1 did not state that the chair “shall have the power and duties” set forth in RSA 365:8.

RSA 21-G:9 provides that “[t]he commissioner shall be the chief administrative officer of the *department* and shall have the following powers and duties:”...II(b) “[a]dopt all rules of the department, whether the rulemaking authority delegated by the legislature is granted to the commissioner, the department, or any administrative unit or subordinate official of the department. All rules shall be adopted pursuant to RSA 541-A, unless specifically and explicitly exempted by law. The provisions of this subparagraph shall control existing legislative enactments unless the provisions of RSA 21-H through RSA 21-P that created the department specifically and clearly confer rulemaking authority on an administrative unit or a subordinate official. The provisions of this subparagraph shall also apply to subsequent legislative enactments unless such enactments are contained in RSA 21-H through RSA 21-P or are specifically exempted from the application of the provisions of this subparagraph by language expressly referring to this subparagraph. *For the purposes of this subparagraph, “commissioner of the department of education” means the state board of education.*” (Emphasis added).

¹ III, “An agency shall not by rule:... (e) Delegate its rulemaking authority to anyone other than the agency named in the statute delegating authority.”

² RSA 541-A:3-b restricts an agency from incorporating by reference codes, rules, or documents from another state government absent specific legislative authorization. (Emphasis added).

NH Brown Law believes the italicized language is determinative. In order for the PUC Chairman to have been specifically delegated rulemaking authority, the delegation must be to the “commissioner”, “department”, or “any administrative unit or subordinate official of the department.” In RSA 365:8 the legislature granted rulemaking authority to the Commission, which is an “executive commission”, not a “commissioner”, “department”, “administrative unit”, or “subordinate official of the department” as referenced in RSA 21-G:9, II(b). For this reason, this italicized language does not move rulemaking authority to the Chairman. RSA 541-A:22 requires specific legislative authority identifying to whom delegation is given and here, there is none specifically delegating RSA 365:8 to the Chairman.

If RSA 21-G:9, II(b)’s list of delegation included “commission” or “executive commission”, then the Chairman’s legal counsel’s argument might be supportable, however, another conflict to that interpretation exists. Even in RSA 21-G:9, II(b) itself, the legislature stated that even though the Department of Education is an executive “department”, it still intended that body to act as a body: through the Board of Education. Under the Chairman’s analysis, the Chair of the Board of Education could conduct rulemaking but that is clearly not the legislature’s intent in RSA 21-G:9, II(b).

In practice, other “executive commissions” have not commenced recent rulemaking through just the chairman. For example, Fish and Game Commission (Notices 2023-290; 2024-107); State Liquor Commission (Notice 2023-275).

Given that the legislature did not remove RSA 365:8 and the Commission’s rulemaking authority, that rulemaking authority still validly exists. Given that RSA 363:1 and RSA 21-G:9, II(b) do not delegate rulemaking of an “executive commission” to its chairman, no clear specific delegation of rulemaking to the Chair exists as required under RSA 541-A:22. Ample caselaw supports that the Courts will not add language or an interpretation that the legislature did not see fit to add.

For these reasons, NH Brown Law does not believe the rulemaking for the proposed Puc 100 and Puc 200 rules are lawfully commenced by the Chairman.

NH Brown Law believes this constitutional due process error can be corrected by refileing the Initial Proposal with evidence that the Commission, not just one commissioner, wishes to commence rulemaking. NH Brown Law posits that a filing signed by all Commissioners could suffice and that a formal noticed hearing where the Commissioners vote to commence rulemaking might not be necessary.

Lastly, if the Chairman has initiated earlier rulemaking such as with the Puc 400, Puc 600, Puc 700, Puc 1600 rules instead of the Commission initiating the rulemaking, the same constitutional concerns exist. NH Brown Law thanks the Office of the Consumer Advocate for raising this issue.

ISSUE 2: Proposed Puc 205.01 Impermissibly Delegates Rulemaking Authority Absent Specific Legislative Authorization.

The Chairman proposes to revise Puc 205.01 How Adopted, to consolidate rulemaking authority in the Chair of the Commission. NH Brown Law respectfully requests the JLCAR reject this proposed change in authority because it exceeds the authority granted by the legislature in RSA 365:8 that the Commission, not the chairman, has rulemaking authority. “Rules adopted by State boards and agencies may not add to, detract from, or in any way modify statutory law.” Kimball v. N.H. Board of Accountancy, 118 N.H. 567, 568 (1978).

As noted in the Rulemaking Manual, caselaw, and in RSA 541-A:22, in order for a board-style agency chairman to have rulemaking authority, a statute must expressly identify the chairman as having rulemaking authority.

ISSUE 3: Unlawful Rule Ambiguity with use of “May” vs. “Shall” in Proposed Puc 203.01 and Proposed Puc 204.08.

The Rulemaking Manual, Chapter 4, Section 3.2 on page 106 addresses the proper use of “shall” and “may”. Here, the Chairman seeks to strike the use of “shall” and replace it in the new Puc 203.01 Waiver of Rules with “may” in addition to changing the finding to passive voice as follows:

~~Puc 201.05~~ **Puc 203.01** Waiver of Rules (a) The presiding officer ~~shall~~ **may** waive the provisions of any of the commission’s administrative rules, except when precluded by statute, in response to a motion filed by an interested party, or on the presiding officer’s own motion, ~~if the commission finds~~ **it is found** that.”

This is not permissible, as written.

Per section 3.2 of the Rulemaking Manual, this word change from “shall” to “may” would make this historically nondiscretionary agency action of waiving rules discretionary. Under the existing rules, the regulated public knows what elements have to be satisfied in order to obtain a waiver of the rules. Under the proposed Puc 203.01, the word “may” interjects unlawful uncertainty as to what proof is sufficient to trigger the Commission granting a waiver.

See, Rulemaking Manual, Chapter 4, Section 3.8: Use of the word “may” means that the agency may or may not act, which leaves “the agency action ambiguous and subject to non-uniform enforcement and oral rulemaking in violation of RSA 541-A:22, I because of unstated criteria --rules--governing the decision.”

Rulemaking Manual, Chapter 4, Section 2.9 directs agencies to not use passive voice.

For these reasons, NH Brown Law requests JLCAR not approve the change from “shall” to “may” as proposed in Puc 203.01, Waiver of Rules and the use of passive voice as to who makes the finding.

Similarly, the Chairman proposes changing the existing Puc 203.20 concerning settlements from “shall” to “may” as follows:

~~Puc 203.20~~ **Puc 204.08 Settlement and Stipulation of Facts...**

(f) (e) The commission ~~shall~~**may** accept late-filed stipulations and settlements when such acceptance:

- (1) Promotes the orderly and efficient conduct of the proceeding; and
- (2) Will not impair the rights of any party to the proceeding

As with the rule waiver, even if the criteria are met, the Commission may still withhold the relief of accepting late filed settlements, which renders this rule in “violation of RSA 541-A:22, I because of unstated criteria --rules--governing the decision”. Rulemaking Manual at Chapter 4, Section 3.8.

ISSUE 4: Proposed Puc 203.19 mandates Notice When not all Proceedings Require Notice and Hearing.

NH Brown Law recommends proposed Puc 203.19’s “shall” be changed to “may” because not all proceedings that the Commission issues orders in must be orders nisi and thus not all *nisi* orders require renotification of the proceeding. See e.g. RSA 374:26 (“Such permission may be granted without hearing when all interested parties are in agreement.”)

NH Brown Law proposed revision:

Puc 203.19 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~~**may** include a notice and publication requirement to allow interested parties an opportunity to object or request a further hearing.

ISSUE 5: Proposed Puc 204.01(b) Automatic Disclosures Conflicts with RSA 541-A:29 and Part I, Article 28-a of the N.H. Constitution.

Proposed Puc 204.01(b) requires utilities to file what appears to be additional materials to make their petition complete. The content of this new requirement goes to the sufficiency of the initial pleading, which is already addressed in the current Puc 203.05 Pleadings (Proposed Puc 203.07 Pleading Requirements) ; Puc 203.06 Petitions (Proposed Puc 203.08 Specific Pleadings).

Proposed Puc 204.01(b) also conflicts with RSA 541-A:29 which requires that “an agency shall” “[w]ithin 30 days of receipt” of a “petition”, “notify the applicant of any apparent errors or omissions, request any additional information that the agency is permitted by law to require.” Puc 204.01(b)’s 30-day delay in filing complete petitions conflicts with RSA 541-A:29 and is even more reason for this requirement to instead be included in proposed Puc 203.07 or proposed Puc 203.08.

The Commission regulates municipal water utilities pursuant to RSA 362:4, III-a(a)(1) if the municipality charges rates for inside and outside customers that differ by more than 15 percent. Because Proposed Puc 204.01(b) applies to petitioners who could be

municipalities seeking higher rate differentials than 15 percent, the proposed rule implicates Part I, Article 28-a of the N.H. Constitution.

The fiscal impact statement to the proposed rules stated that there was “no difference in cost” and that there was no cost to State citizens, independently owned businesses or political subdivisions. NH Brown Law submits that this additional requirement by rule (and not by statute) will increase costs to the regulated utilities (including municipally-owned utilities under RSA 364:4), which will increase a utility’s revenue requirement, and in turn, will increase the customer rates citizens pay to support the authorized revenue requirement. For this reason, the current fiscal impact statement is not complete, especially as to municipalities filing petitions with the Commission.

Without an accurate fiscal impact statement, the Legislative Budget Assistant cannot determine whether the extent of financial impact per RSA 541-A:5, IV(d) and the JLCAR cannot determine whether the impact is substantial per RSA 541-A:13, IV. NH Brown Law recommends that the JLCAR reject proposed Puc 204.01(b) until a revised fiscal impact statement is completed and the rulemaking is properly commenced by the full Commission. In the alternative, proposed Puc 204.01(b) should exclude municipalities.

ISSUE 6: Puc 204.01(f) Non-Party Access to Discovery Conflicts with RSA 541-A:32.

Proposed Puc 204.01(f) requires that a “copy of each data request, each objection to data requests and each response to data requests shall be served upon every person designated for discovery filings on the Commission’s official service list pursuant to Puc 203.16.” However, proposed Puc 203.16(a)(5) states that the Commission’s service list contains “parties *or participants* to the proceeding.”

This is contrary to RSA 541-A:32 which only authorizes persons to intervene and become parties to an adjudicatory proceeding when they, per RSA 541-A:32, I(b), set forth “facts demonstrating that the petitioner's rights, duties, privileges, immunities or other substantial interests may be affected by the proceeding or that the petitioner qualifies as an intervenor under any provision of law”; or per RSA 541-A:32, II, when the “presiding officer may grant one or more petitions for intervention at any time, upon determining that such intervention would be in the interests of justice and would not impair the orderly and prompt conduct of the proceedings”. Under either RSA 541-A:32, I(b) or RSA 541-A:32, II, the intervenor is granted party status, yet the proposed rule requires the utility to provide discovery to non-parties, contrary to RSA 541-A:32.

A solution to this conflict between the proposed Puc 204.01(f) and RSA 541-A:32 is to limit service of discovery to only parties:

“(f) A copy of each data request, each objection to data requests and each response to data requests shall be served upon every **party listed** ~~person designated for discovery filings~~ on the commission’s official service list pursuant to Puc 203.16.”

ISSUE 7: Proposed Puc 203.20 Impermissibly Allows Commission Discovery Obtained Outside of an Approved Procedural Schedule and Noticed Hearing to be Added to the Record.

Although the rules of evidence do not apply to administrative tribunals, RSA 541-A:31, IV guarantees all parties the right to respond and “present evidence and argument on all issues involved.” The proposed Puc 203.20, as written, does not limit the Commission’s placing into the record discovery that hasn’t been subjected to the party’s right to “present evidence and argument on all issues involved”. NH Brown Law, strongly recommends that the proposed rule be revised to comply with RSA 541-A:31, IV as follows:

Puc 203.20 Commission record requests. At any time during a proceeding **but prior to any close of the record**, the commission may ask questions of ~~participants, parties, or regulated utilities~~, to be answered in writing ~~or orally~~ within a time period determined by the commission. Responses to commission record requests shall be part of the record, **shall be subject to examination by parties pursuant to RSA 541-A:31, IV**, and may be considered by the commission in its decision on the matter.

NH Brown Law believes the proposed rule is counter to the Commission’s obligation to conduct orderly and efficient proceedings because parties will have budgeted their time per the approved procedural schedule yet the Commission can unilaterally disrupt that schedule by issuing its own discovery requests. This disruption is problematic.

NH Brown Law notes its earlier objection to including non-parties in the proceeding and thus recommends striking “participants”. RSA 541-A:32 allows “parties”, not just any interested person, to participate in adjudicative proceedings only if they meet the requirements of RSA 541-A:32.

Regulated utilities are already “parties” and thus do not need to be separately listed.

In conclusion, NH Brown Law respectfully requests the JLCAR and the Commission consider these comments in addition to the other comments received in these dockets for the benefit of the proposed Puc 100 and Puc 200 rules and the entities those rules regulate.

Thank you.

Very Truly Yours,



Marcia A. Brown

cc: Electronic Service List for DRM 24-085 and 24-086
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