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October 29, 2024

Chairman Daniel C. Goldner
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, New Hampshire 03301 via email 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:

Filed on behalf of the state's residential utility customers by their statutorily designated representative, this letter responds to the Commission's invitation for comments by October 29, 2024 on the revised proposals in the above-captioned rulemaking dockets. To the extent they remain relevant, our previously filed comments and our previous statements at public comment hearings are incorporated herein by reference. It is the understanding of the Office of the Consumer Advocate ("OCA") that the Commission intends to present final proposals for both the Puc 100 and the Puc 200 rules before the Joint Legislative Committee on Administrative Rules ("JLCAR") at the Committee's regular December meeting, presently scheduled for December 19, 2024. The OCA continues to believe strongly that the Commission's proposed rules are not yet ready for JLCAR deliberation and require further workshopping among the agency and its stakeholders. Accordingly, we reiterate our recommendation that the Commission not proceed directly to the JLCAR.

Below are specific comments on the draft Puc 100 rules issued on September 26, 2024 (tab 24) in DRM 24-085 and the draft Puc 200 rules issued on October 7, 2024 (tab 27) in DRM 24-086.

Puc 102.01, General Description

The New Hampshire Drafting and Procedure Manual for Administrative Rules as amended effective August 1, 2019 ("Rulemaking Manual") requires an agency to use its Chapter 100 rules to '[s]tate fully the areas over which [the] agency has control." Proposed Rule 102.01 does not meet this standard. Among the Commission responsibilities that are neither listed nor fairly implied by the proposed language are municipalizations, eminent domain proceedings involving public utilities, utility ownership transfers, community power aggregation plan approvals,

registration and oversight of competitive energy suppliers and aggregators, review of utility financings, and consideration of waterway line crossings.

Puc 103.01 – General Inquiries and Requests for Access to Records

The Commission's telephone number should appear in the organizational rules. It is not reasonable for a state agency to insulate itself from contact with the public initiated by telephone. Along similar and potentially more significant lines, it is not appropriate for an agency to require requests for access to public records under RSA 91-A to be tendered in writing. The right secured to the public via RSA 91-A:4 is not the right to request access to public records; it is the right to *inspect* such records. Accordingly, neither the statute nor the latest edition of the Attorney General's Memorandum on the Right-to-Know Law (considered the gold standard for agencies seeking to comply with RSA 91-A) requires the public to tender requests in writing. While it is certainly advisable for requests to be in writing, the better to address any disagreements between a requestor and an agency, no agency should be allowed to deny a request based on it having been made orally. At the OCA, we treat even the most casual requests for access to our records as involving RSA 91-A, the better to advance the statute's explicit policy goal of maximizing public accountability.

The existing version of this rule advises the public that it may contact the Commission via its Consumer Affairs Division, its Safety Division, or its Executive Director. Obviously, this is no longer appropriate because the first two divisions are now lodged in the Department of Energy and the Commission no longer has a statutorily mandated Executive Director. However, the spirit of this old rule should endure – the idea that an actual human being is responsible for fielding public contacts. We continue to believe strongly that the Commission should designate one of its employees as its Clerk, precisely as a court does, to field not just general questions from the public but ministerial inquiries by knowledgeable persons with business at the agency. As we have previously pointed out, it would promote respect for the Commission as a quasi-judicial decisionmaker if the Clerk were designated as the official addressee of pleadings directed to the Commission; addressing pleadings to the Chairman carries with it a faint but still unwelcome flavor of *ex parte* communication that the Commission should wish to avoid. For the same reason, the explicit requirement in Puc 203.04(a) to address all correspondence for the Commission to the Chairman should be deleted or replaced with a requirement to address all correspondence to the Clerk.

Puc 203.01 – Waiver of Rules

The Commission is proposing, in essence, to maintain its existing rule with respect to rules waivers. This has the virtue of being well-established as the basis for rules waivers. But the rule is noteworthy for its lack of any explicit reference to avoiding an outcome that is unfair from the perspective of parties not seeking a rules-waiver. The Commission should consider adding a third waiver criterion to Puc 203.01(a): "The waiver will not unfairly prejudice other participants or parties."

Puc 203.03 -- Acceptance of Filings

This rule should be deleted from the final proposal as unnecessary. The first sentence duplicates the principle laid out in the first sentence of Puc 203.09 ("Filings shall be deemed filed on the date that the Commission receives it [sic]"). The remainder of this proposed rule enumerated a procedure by which the Commission may reject a filing. A rule of this type is appropriate for an agency processing applications, to prevent the submission of facially deficient documents for reasons of meeting deadlines, etc. But for the Commission, it more than suffices to consider deficient filings on their merits. The rule as drafted opens up mischief potential in the event a future iteration of the Commission were inclined to reject filings for hypertechnical reasons (e.g., missing signature, erroneous date, submission of a letter where a formal motion is technically required, failure to address a letter to the chairman of the Commission as required by Puc 203.04, etc.). The rule as drafted sets up a situation in which a party seeking rehearing pursuant to RSA 541:3, near the close of the 30-day period for making such a request, could find its submission rejected under this rule on (or example) day 33 (within the five-day rejection window established by the rule). The Commission may not, by rule, create a process that deprives a party of its right to seek rehearing – a precondition to appellate remedies – in this fashion.

Puc 203.04 – Address and Filing Format

The Commission should modify the language of paragraph (c) of the rule to soften the absolute prohibition on the submission of large files via flash drives and similar devices. It is reasonable for the Commission to encourage the routine submission of large files via the state's file transfer protocol but the rule as drafted will hamstring parties unfamiliar with the protocol and/or create problems when emergencies and other exigent technology-driven circumstances arise.

Puc 203.11 *et seq*., regarding public access to documents

The OCA reiterates its previously tendered comments to the effect that both the existing Puc 200 rules and the proposed revisions to these rules are not compliant with the Right-to-Know Law, RSA 91-A. As previously explained, RSA 91-A is a disclosure statute and not a privacy statute; therefore, it is impermissible to allow public utilities or anyone else submitting information to the Commission to cause the Commission to treat certain documents as confidential, even on a preliminary, putative, or temporary basis.

At the Commission's public hearing on October 22, Hearing Officer Fuller noted with apparently consternation that no comments had surfaced in opposition to the OCA's recommendations about RSA 91-A compliance. The OCA continues to recommend, in essence, that the Commission (1) comply with RSA 91-A as other agencies do, by handling public requests for access to documents on a case-by-case basis, and (2) exercise its inherent authority as an agency authorized to conduct adjudicative proceedings to enter protective orders on a case-by-case basis in those rare instances when legitimate confidentiality issues arise.

Puc 203.13 – Motions for Confidential Treatment

In addition to its position that, in general, the Commission's approach to document confidentiality is inconsistent with RSA 91-A, the OCA notes that the language of paragraph (e) of this proposed rule facially exceeds the Commission's authority by purporting to authorize the agency to designate as confidential documents submitted not just to the PUC but also to the Department of Energy, the OCA, or "any other governmental agency." Absent an applicable privacy statute, RSA 91-A vests all instrumentalities of government in New Hampshire with unfettered discretion to determine that documents in their files are subject to public disclosure.

Puc 203-16 – Appearances before the Commission

The Department of Energy and the OCA should be exempted from the requirement to file the Notice of Appearance form the Commission plans to implement. Instead, consistent with the longstanding Memorandum of Understanding between the Commission and the OCA, both agencies should be permitted simply to file a letter in any proceeding indicating an intent to participate as a party. The contact information, key decisionmakers, and litigation e-mail addresses for both agencies are well-known to the Commission.

Puc 203.19 -- Commission Record -Requests

The OCA continues to believe that the Commission may not conduct inquisitorial proceedings – i.e., cases in which the agency is serving as both the adjudicator and the investigator/prosecutor – pursuant to the Administrative Procedure Act and the PUC's enabling statutes. As we have previously suggested, the Commission can and should explore other methods for actively managing its proceedings and assuring that Commissioners have the information and insight they need to render the best possible decisions. Even assuming that it is permissible under existing law for the Commission to conduct its own discovery in contested administrative proceedings, the term "record request" is misleading and should be abandoned. In a contested case, nothing is (or, more precisely, nothing should be) part of the "record" until the Commission has admitted it into evidence. The term "record request" historically came into frequent, though unofficial, usage at the PUC to denote late-filed exhibits – i.e., evidence to be admitted into the record after the close of a hearing, generally without objection. This term should either be retired or confined to its historical usage.

Puc 203.21 – Transcripts

The Commission should continue its longstanding practice of causing a transcript to be made of all proceedings. The march of technological progress should make it easier and less expensive than has been the case over the decades to make transcripts available. Sound recordings are inadequate because they are un-searchable. In no circumstances should the Commission assert the authority to tax any costs associated its PUC proceedings, transcription included, to parties other than utilities, particularly because utilities have a recovery mechanism to assure that ultimately it is customers who cover the cost of utility regulation.

Puc 204.01 – Applicability [of rules governing adjudicative proceedings]

The OCA thanks the Commission for adopting the OCA's suggestion that Puc 200 rules state with particularity when the Commission will treat a proceeding as a contested case (to which the rules governing formal adjudication apply) and when less formal procedures will apply. To the list the Commission should add RSA 362-A (in light of RSA 362-A;5, stating that "[a]ny dispute arising under the provisions of this chapter may be referred by any party to the commission for adjudication"), RSA 362-I:2 (requests for recovery of costs related to procurement of renewable natural gas), and RSA 366:5 (proceedings initiated by Department related to affiliate contracts).

Puc 204.03 – Discovery

There is no plausible reason for requiring parties to file the discovery questions they pose to another party with the Commission. The requirement is likely to have a chilling effect on a process – discovery – that should be robust. To put it another way, a party should not have to tip its hand to the Commission about what aspects of a proceeding the party deems significant in order to participate in discovery.

Puc 204.07 – Prehearing Conference

The requirement that party – presumably the petitioner, though this is not specified – submit a "structuring statement" (see proposed form, erroneously identifying this document as a "Case Structuring Order) is unworkable as proposed. The proposed rule requires the petitioner to circulate this document to "the parties" ten days prior to the prehearing conference, at a point when the roster of parties has not been determined. RSA 541-A:31 contemplates that intervention requests will be submitted "at least 3 days before the hearing," which the Commission has traditionally interpreted (and presumably will continue to interpret) as "at least three days before the prehearing conference." The contents of the proposed form do not align with the requirements of the rule.

Another unworkable requirement is contained in paragraph (g) of the proposed rule, to the effect that "the parties shall file a proposed procedural schedule." At the very least, this language should specify which party is responsible for making such a filing. Better yet would be addressing the question of the procedural schedule at the prehearing conference itself. This would have the virtue of eliminating the need for the parties to guess when the Commission will be available for hearings – a nagging problem. Historically, the Commission would convene prehearing conference, adjourn the prehearing conference to give the parties to discuss scheduling issues off-the-record, and then reconvene to give the parties an opportunity to propose a procedural schedule on the record. Over time, this devolved into the Commission preferring that the parties simply advise the Commission in writing about a proposed schedule, after which the Commission would issue a scheduling order. But this practice arose at a time when there was a representative of the Commission Staff taking part; that person could view Commissioner schedules and otherwise pinpoint suitable hearing days. Now the Commission essentially proposes to enshrine the current unbounded practice in its rules, which is problematic given the substantial amount of time our office must typically spend dealing with squabbling among parties to PUC proceedings about scheduling issues.

Puc 204.08 – Intervention

This proposed rule establishes, as is appropriate, that the Commission will rule on intervention requests by applying the standard enumerated in RSA 541-A:32. But, inexplicably, paragraph (c) of the proposed rule singles out one of the RSA 541-A:32 requirements – that granting an intervention request not impair "the orderly and prompt conduct of the proceedings – for special mention. This is confusing and the partial reference to the substantive requirements of the statute should be eliminated.

Puc 204.10 – Settlement

In a proceeding that produces a comprehensive settlement agreement among the subject utility or utilities, intervenors, the OCA, and the Department of Energy – essentially, all parties that could reasonably be expected to have a cognizable interest in the outcome – the Commission should not claim unfettered discretion to reject the collective wisdom of those parties. At the public comment hearing on October 11, 2024, Senior Advisor Fuller suggested that the Commission should be free to reject proposed settlements for the same reason that criminal courts exercise independent judgment over plea deals in criminal proceedings and the same reason a family court does not necessarily accept agreements between divorcing or non-married parents concerning their minor children.

These analogies are inapposite. The constitutional protections enjoyed by accused persons, as against the formidable power of government prosecutors to cause the incarceration or even the execution of criminal defendants, have no applicability to the quasi-judicial process used by the Commission to arbitrate between the interests of utility shareholders and utility customers. In cases were a family court must make decisions that are in the best interests of a minor child, there are typically two other parties – the Division for Children, Youth and Families, and an independent guardian *ad litem*, and when all of those parties are in agreement the court has no reason to question their judgment. In the case of PUC proceedings, the Commission can and should expect the Department in particular to pursue the public interest with vigilance. Therefore, the Commission should not override the Department's judgment in cases that are not a subject, or are no longer a subject, of disagreement among the parties.

Puc 204.19 – Briefs

As the OCA has previously pointed out, it is not appropriate to *require* litigants to submit briefs at any point in a proceeding, much less any point the Commission might deem to be convenient. The contested case procedures in the Administrative Procedure Act contemplate an advocacy-driven process – i.e., a system in which attorneys, parties' other representatives, and parties themselves (if pro se) determine whether and how they will avail themselves of *opportunities* to make legal arguments and offer evidence into the record. There are well-established legal principles governing the preservation of arguments, *see, e.g.*, RSA 541:4 (requiring appellate arguments to be preserved at agency level via motions for rehearing), and the Commission can and should expect parties to act on their rights.

Puc 205.01 – Rules Adoption

Under our system of government, a regulatory agency makes decisions two ways: (1) via case-by-case adjudication, applicable to specific litigants, and (2) via the adoption of rules applicable across the board to persons and entities subject to the agency's jurisdiction. It is, essentially, unthinkable that when the General Court created the Department of Energy in 2021 and reconfigured the PUC accordingly it also transformed the Commission into a tribunal solely for purposes of case-by-case adjudication while transferring authority to promulgate rules exclusively to the chairman. "A provision may be either disregarded or . . . corrected as an error . . . if failing to do so would result in a disposition that no reasonable person could approve." A. Scalia and B. Garner, *Reading Law" The Interpretation of Legal Texts* (2012) at 234.

Conclusion

The foregoing supplements the comments previously tendered by the Office of the Consumer Advocate. We look forward to reviewing the Commission's Final Proposal and sharing our views with the JLCAR in due course.

Sincerely,

Donald M. Kreis
Consumer Advocate

cc: Service List (both dockets)