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Daniel Goldner, Chairman
Public Utilities Commission
21 South Fruit St., Ste. 10
Concord, NH 03301

RE: DRM 24-086/NH Code of Administrative Rules Puc Ch. 200 Procedural Rules
New Hampshire Department of Energy Comments on Initial Proposal

Dear Mr. Goldner:

Pursuant to the Rulemaking Notice filed by the Public Utilities Commission (PUC and/or Commission), the Department of Energy (DOE and/or Department) provides these comments regarding the PUC's Initial Proposal for adoption of Puc 200 Procedural Rules. The Department provided high-level comments relative to the Puc 200 rules during the public comment hearing held on July 16, 2024. The Department now provides a comprehensive set of comments including recommended edits and language changes to the Puc 200 rules.

The Department wants to ensure that the PUC will not repeal or amend Puc 201.04 (Public Records and Marking of Confidential Information), Puc 201.05 (Waiver of Rules), Puc 201.06 (Confidentiality of Routine Filings), and Puc 201.07 (Release of Confidential Routine Filings). As the PUC is aware, the Legislature intended for the Department to be able to rely upon and enforce these rules until August 2027. The Department depends upon these rules to conduct its business and would not be able to enforce them if the Commission repeals or amends them. *See* RSA 12-P:14.

The Department is concerned with the PUC's edits to their Puc 200 rules because many items create a fiscal impact to the Department due to the advancement of deadlines and increased responsibilities imposed on the Department by the PUC.

1) **Part Puc 202 – Definitions**

a. The Department recommends that the PUC include the following definitions.

- **Complaint:** The PUC rules provide for a complaint process described in Puc 204.27. Given this, and that the Department has its own complaint process, the Department believes it would be helpful if the proposed Puc 200 rules defined the term "complaint."

- **Correspondence:** Proposed rule Puc 203.04(a) requires that "[a]ll correspondence intended for the commission shall be addressed to the commission chairman" and directed to the Clerk's office at ClerksOffice@puc.nh.gov or the PUC mailing address. Proposed rule Puc 202.15 states that a "pleading does not include communication in the form of correspondence such as a letter or email," but it may be helpful to explain when a party may submit correspondence informing the PUC of a matter versus utilizing a motion or pleading. For example, can a request to approve a procedural schedule be in the form of a letter or should it be submitted as a motion? If a party is submitting required information, but not requesting certain relief in a pending docket, can such filing be in the form of a letter?
- **File Electronically:** This definition at proposed Puc 202.06 appears to govern adjudicative pleadings, in that it pertains to filings of "a document, excluding reports and related documents." Later, in Puc 203.04 there is a provision for filing all "written communications," and the method and manner for filing electronically by means of email.

There is no definition of "report" and there are numerous types of reports required by the rule, and then there are reports that the PUC may require either within or following on a proceeding such as reports in investigations, etc. Where "reports and related documents" are excluded from "electronic filing," these terms must be properly defined.

Puc 203.04 should state clearly that electronic filings must be made during the business hours of the commission.

- **Position Statement and Technical Statement:** In proposed Puc 203.09, the PUC requires the Department to "file a statement of its position and an explanation of the basis of its position regarding the petition at least fourteen days prior to the scheduled hearing." Often, under current practice, the Department files technical statements and not position statements prior to a hearing.

The Department suggests that the PUC define the terms "position statement" and "technical statement," to distinguish whether they are the same or different. The Department is curious as to whether a position statement should be a legal document, submitted by an attorney or whether it should be a technical document written by an analyst who may or may not be testifying at the hearing, or a combination of both.

This rule places obligations upon the Department that are not placed on other parties, and the commission's authority to do so is questionable – see further discussion below. Requiring the Department to file a statement places the Department at a litigation disadvantage which makes the adjudication unfair.

This rule is unclear, given the definition of hearing, whether it applies only to a hearing on the merits or pre-hearing conferences and status conferences. It is also unclear how the rule would be applied when multiple hearing dates are set in the same docket.

Last, the additional requirements create additional work for the Department and will have a fiscal impact that the Commission did not attempt to quantify prior to requesting a fiscal impact statement.

- **Usage of "Participants" and "Parties":** Pursuant to the proposed rule Puc 202.11, "participant" means any person with standing who is granted the right to participate in a non-adjudicative proceeding. On the other hand, the word "party" denotes a person or agency who is admitted as a party in an adjudicative proceeding (Puc 202.12). Although a participant only applies in a non-adjudicative proceeding, there are numerous references to participants in sections where the rules apply to adjudicative proceedings. Given this, the Department recommends that the proposed rules be careful to use these terms in the appropriate context. Additionally, the use of the word "standing," in the definition of a "participant" is misplaced because "standing" is defined as an individual's connection or showing of harm in a case or controversy. (See definition of "standing" at proposed Puc 202.22), which should not be required of a participant in a non-adjudicative proceeding.

Non-adjudicative proceedings would include rulemakings and investigations. There is no standing requirement to participate in a formal rulemaking and the PUC may not impose one. The PUC might consider imposing a standing requirement on participants in certain investigations, for example when the PUC proposes to permit participants to conduct mutual discovery.

b. The Department recommends that the PUC amend or remove the following definitions from its proposed 200 rules, as described below.

- **Puc 202.02 – "Applicable Law":** The Department recommends that this definition be removed entirely, because applicable law varies case by case, may be viewed differently by different parties, and thus is not readily defined. The PUC uses the term "applicable law" in reviewing settlements, (Puc 204.08(b)) and in determining whether a document is part of the public record (Puc 203.11). The Department is concerned that the definition is too broad and does not give the Department or other parties notice of what the PUC would be relying on.
- **Puc 202.04 "Data Request":** The Department recommends replacing "another person" with "another party," to ensure consistency with proposed rule Puc 204.01.
- **Puc 202.07 – "Governmental Authority":** Proposed rule Puc 202.07 includes a very broad definition of governmental authority. It includes any "state, municipality . . . quasi-governmental . . . agency, commission, department, board, bureau, or entity exercising judicial, executive, legislative, administrative, or regulatory functions, any court or arbitrator . . . or any self-regulated organization or other quasi- or nongovernmental regulatory authority to the extent that its rules, regulations, or orders have the force or

effect of law." The Department of Energy questions whether this definition is needed in the rules.

- **Puc 202.13 – "Person":** The definition of "person," at proposed Puc 202.13, does not conform with RSA 541-A:1, XIII because the definition of person at Puc 202.13 includes "governmental authority", which as defined at proposed Puc 202.07 includes an agency. RSA 541-A:1, XIII specifically excludes agency from the definition of person. Further, the Department recommends ensuring that the definitions of "person" in proposed Puc 101.10 and proposed Puc 202.13 are consistent, as the current proposed language varies between the two definitions. The Commission should also keep the phrase "which appears before the commission for any purpose" from current rule Puc 102.11 so as not to produce a result where the Commission's proposed rules attempt to assert jurisdiction over entities over whom they do not have jurisdiction.
- **Puc 202.17 – "Proceeding":** The proposed rule revises existing Puc 102.16 to say, "docket on the Commission's website." Existing Puc 102.16 defines "proceeding" as, "a docketed case commenced by the Commission." The Department recommends keeping the existing Puc 102.16 definition, as there appears to be nothing necessitating the change and the current definition also allows for inclusion of dockets that no longer appear on the Commission's website.
- **Puc 202.18 – "Public statement hearing":** This proposed definition revises the existing Puc 102.17 to say "proceeding" instead of "adjudicative proceeding." The existing definition also says a public statement hearing is for "receiving public comment that will not be entered into evidence," whereas the proposed rule says, "receiving public comment that will not be entered into evidence but may be considered by the commission in its decision in the proceeding." The reference "not entered into evidence" in both the existing and proposed rule would apply only to an adjudicative proceeding, so the existing language referencing adjudicative proceeding should be retained.

2) Part Puc 203 – General Requirements

- **Puc 203.07 – Pleading Requirements:** It is unclear whether Puc 203.07 applies to procedures for adjudicative or non-adjudicative matters. The term "parties," "participants," and "person," are all used in this section which would mean that this section governs procedures for adjudicative and non-adjudicative matters. However, the procedures in this section appear to more closely align with adjudicative filings.
- **Puc 203.08 – Specific Pleadings:** The Department recommends that the PUC clarify whether this section applies to adjudicative and non-adjudicative proceedings. Reviewing the definitions of "petition" (Puc 202.14) and "proceeding" (Puc 202.17), it appears that Puc 203.08 could apply to non-adjudicative matters. This is especially so, given the use of the word "proceeding," throughout Puc 203.08(a), a term which is defined as "a docket on the commission's website," and therefore would include a non-adjudicative matter yet the requirements at Puc 203.08(a) and other sections within Puc 203.08 appear to govern

adjudicative procedures. Additionally, this section also addresses "intervention" (Puc 203.08(a)(2)) which only applies to adjudicative procedures.

Subsection (e): The proposed rule requires that "[a]ll petitions shall include a statement of financial impact the petition will have if granted." The Department recommends that this provision be removed or amended because a petitioner will not always know the exact financial impact, which will be examined during the course of the proceeding and some petitions may have no financial impact.

This provision will have a fiscal impact on the Department that was not quantified by the Commission when it filed for a fiscal impact statement, as the Department will have to calculate the financial impact of any petition it brings before the Commission, including petitions to enforce the Department's or the Commission's rules.

This provision will discourage the filing of consumer complaints, the procedure for which is already quite complicated for consumers to negotiate easily.

If the PUC believes this provision should remain, it should be amended to qualify that the petition includes a statement of the "estimated" financial impact., and that the requirement does not apply to petitions filed by the Department or to consumer complaints.

- **Puc 203.09 – Department Position Statements:** This rule places obligations upon the Department that are not placed on other parties, and the Commission's authority to do so is questionable. Requiring the Department to file a statement places the Department at a litigation disadvantage which makes the adjudication unfair.

Last, the additional requirements create additional work for the Department and will have a fiscal impact that the Commission did not attempt to quantify prior to requesting a fiscal impact statement

- **Puc 203.15 – Place of Hearings:** The proposed rule allows the Commission to require a view, "in any proceeding when it deems that a view would assist the Commission in reaching a decision in a matter." Proposed Puc 204.17 also allows for views and inspections in adjudicative proceedings. To the extent the Commission desires, through this provision, to conduct views in non-adjudicative proceedings, these rules should make that clear, and should identify the statutory provision authorizing the Commission to undertake views in non-adjudicative proceedings.
- **Puc 203.17 – Requirements to Appear Before the Commission:** The term "Pro Se" as used in proposed Puc 203.17(4) should be defined.
- **Puc 203.18 – Public Comment:** Submission of written public comments outside of hearing should also be allowed, consistent with current practice. The rule should also refer to "a person who is not a party or a participant" rather than "who do not have intervenor status," unless this is only meant to apply in adjudicative proceedings.

- **Puc 203.20 – Commission Record Requests:** The Department recommends the language be specified such that record requests be limited to matters officially noticed in the proceeding. The Department also recommends that:
 - a) Other parties should have the opportunity to respond to other parties' or participants' record request responses; and should be given the opportunity for cross-examination if requested, even for record requests and responses filed after the close of hearing.
 - b) The Department is concerned that requiring record request responses from parties may effectively force parties to testify, particularly non-utility parties.
 - c) The Commission, when issuing record requests and reviewing record request responses should be mindful of the likelihood of disparate resources between some utilities and some other parties.
- **Puc 203.21 – Status Conference:** The Department recommends clarifying that there will be recordings of status conferences which is provided for hearings at proposed Puc 204.21 and in accordance with RSA 541-A:30-a, VII. The Department also recommends providing parties or participants the option of submitting a joint written status report in lieu of a live status conference for purposes of efficiency and saving parties or participants the resources required to attend a hearing.
- **Puc 203.22 – Briefs:** It is unclear as to whether this rule applies to non-adjudicative proceedings as well as adjudicative proceedings because there is reference solely to "party/parties," in paragraphs (b), (c), (d) and (e). However, in paragraph (a) there is reference to "parties or participants," signifying a broader application to both adjudicative and non-adjudicative proceedings. If the rule applies to both non-adjudicative proceedings as well as adjudicative proceedings, any reference to "party" or "parties" should also include a reference to "participants," consistent with proposed Puc 203.22(a).

As compared to the existing rule (Puc 203.32) which allows for the submission of briefs, the new rule establishes the Commission authority to require briefs. This will place a fiscal burden on the Department, which will now be required to staff itself to meet the requirement.

- **Puc 203.23 – Testimony based on proprietary models:** The Department is concerned that this proposed rule will make it more difficult for the Department, and likely other parties, to retain consultants in proceedings. Even if proprietary models are treated as confidential, such a rule would require a consultant to share their proprietary model(s) with multiple people, despite any harm to the consultant that may result. This rule may require consultants to share proprietary models with their competitors and make them available to their competitors, at a minimum, throughout the course of a proceeding. There is also the potential that such a rule would lead to consultants having to develop models specific to certain proceedings, to avoid sharing proprietary models to the greatest extent possible, resulting in more time and costs required associated with hiring

consultants.

This rule has a fiscal impact on the Department that the Commission did not attempt to quantify before obtaining a fiscal impact statement. The Department will likely have to a) pay more to obtain necessary testimony, the cost passed on to ratepayers through utility rates, or b) hire staff with the ability to create complex models of all types to be funded through the state budget.

Finally, the Department is concerned that handling information or questions related to proprietary models will make hearings more complicated. Since the proposed rule does allow for parties to request confidential treatment, it appears the proposed rule anticipates that proprietary model information may be treated the same as other confidential material in proceedings, including making relevant portions of the hearing confidential and redacting such portions from any recordings and transcripts.

Similar to other provisions in this rule set, the Department seeks clarification regarding which type of proceedings are contemplated here and potential removal of the word "participant," which applies to non-adjudicative proceedings as defined in Puc 202.11 – if the process involved is, as it seems to be, a solely adjudicative one.

- **Puc 203.24 – Obstructing Justice:** The Department recommends amending "he" and "his" to gender-neutral language.
- **Puc 203.25 – Withdrawal of Presiding Officer or Commissioner:** Should this proposed rule be intended to apply to non-adjudicative proceedings as well as adjudicative proceedings? The Department recommends adding "participant" to any reference to a "party," consistent with language elsewhere in the proposed rules if the rule applies to both types of proceedings. The Department also recommends replacing "case" in 203.25(b)(3) with "proceeding."
- **Puc 203.26 – Control of Hearing:** The provisions of proposed Puc 203.26(a) and (b) appear unnecessary, given the provisions of proposed Puc 203.17 (c) which allow the Commission to exclude any person, "if it finds that person to have demonstrated a disregard for Commission practices and procedures or otherwise disrupted Commission proceedings." The Department recommends that the Commission cite the authority for taking such action.

3) **Part Puc 20 – Adjudicative Proceedings**

- **Puc 204.01 – Discovery:**

Subsection (a): The rule (among other things) clarifies that the OCA (*if a party to the matter*) "shall have the right to conduct discovery." (emphasis added). The term "matter" is not defined in the rules, and the Department recommends that the term "adjudicative proceeding" be used to be consistent. Therefore, the Department recommends the following changes in

italics: "The petitioner, the Department, the OCA (if a party to the *adjudicative proceeding*), and any person granted intervenor status shall have the right to conduct discovery in an adjudicative proceeding pursuant to this rule."

The second sentence of subsection (a) requires that discovery requests and responses "be filed with the commission pursuant to Puc 203.04." The Department recommends that this sentence be deleted. It is inconsistent with current practice, and it is important for the parties to be able to engage in discovery between themselves and then decide which information is filed with the Commission.

Subsection (b): Under subsection (b), i.e. the petitioner's automatic disclosures, the provision at (b)(1)e., requires that the petitioner specify whether the petitioner has "consulted" with the Department and OCA regarding its petition. The Department and OCA may not be a party in every proceeding or may be the petitioner. Given this the section should clarify the circumstances under which parties must "consult," with the Department or OCA relative to filing a petition.

Subsection (j)(1): It appears that the reference to Puc 203.08(b) does not fit and should be Puc 203.08(a).

Subsection (j): The proposed rule contains a second paragraph (j) which references "technical sessions." Technical session is not defined in the proposed rule although it is defined in the existing rule at Puc 102.22.

- **Puc 204.06 – Status Conference:** The definition of status conference and this provision which provides that the PUC may convene a status conference are misaligned because the definition indicates that a status conference is meant to inform the Commission of the progress of issues, while the rule states that the Commission may call a status conference to resolve substantive issues. Puc 204.06 states, "[a]t any time during a proceeding the presiding officer may schedule one or more status conferences to assess the progress of a matter *or to resolve any interim procedural or substantive issues* that the Commission finds will promote a more efficient conduct of the proceeding" (emphasis added). In Puc 202.21, "Status conference" is defined as "a hearing required by the commission in order to *inform* the commission of the status and progress of issues presented in a proceeding." "Informing," the Commission and "resolving substantive issues" are very different endeavors and the Commission should clarify the purpose of a status conference and amend the definition and/or cite to this statutory authorization accordingly.
- **Puc 204.07 – Consolidation of Hearings:** Puc 204.07(a), the Department suggests that the term "application," be removed. While included in current Commission rules, since the creation of the Department, the Commission no longer receives "applications." Additionally, the term "cases," should be changed to "proceeding," as defined in the Initial Proposal's Puc 202.17.

Regarding Puc 204.07(b), the Commission should include a definition of "record," and use that term instead of "docket record," for purposes of clarity.

Regarding Puc 204.07(c)-(d), as the Department is a party to many Commission dockets, these sections should be amended to clarify who will bear the cost of consolidated hearings. The Commission is not authorized to assess the Department for any costs.

- **Puc 204.08 – Settlement:** Regarding Puc 204.08 generally, this section as included in the Initial Proposal does not include references to a stipulation of facts. While this section aligns with most of the existing rule, Puc 203.20 *Settlements and Stipulation of Facts*, references to "stipulation" in the title of the rule and sections within it are removed. The commission should reconsider removing references to a "Stipulation of Facts," because, for example, if parties cannot resolve how an issue should be decided (i.e. through settlement) but could agree to narrowing the factual disputes by submitting a stipulation of facts, the proposed rules do not provide for such a filing. Filing a Stipulation of Facts would likely reduce administrative burdens and promote the efficient conduct of the proceeding and having rules to guide this process is recommended. If references to "Stipulation of Facts" are reinserted, the Commission should also include the current language of Puc 203.20(d) which binds the Commission to factual stipulations submitted by parties.

Regarding Puc 204.08(a), the term "participants" should be changed to "parties" because "participants" is the term used for "non-adjudicative proceedings." If the Commission is intending Puc 204.08 to apply to both adjudicative and non-adjudicative proceedings, that should be explicitly clarified in the rules, and the terms "participants or parties," should be incorporated.

Regarding Puc 204.08(c), a settlement that is filed and not contested by either party should always be included as evidence in the record. This rule seems to indicate that the Commission may or may not do so. The Department recommends that the word "may," be changed to "shall" in Puc 204.08 (c)

Regarding Puc 204.08(d), the Department recommends that the Commission the current 5 business day deadline for the filing of settlements. As often noted in PUC decisions, settlements are an effective method of resolving issues outside of the hearing room, thereby promoting orderly resolution and reducing administrative burdens/costs. Settlement negotiations typically reach a breakthrough the closer the parties get to a hearing. As parties commonly wish to avoid a hearing, the Department anticipates that a 15-day deadline may increase requests for late-filed settlements, and possibly may stifle some opportunities for settlement. Fewer settlements or compressed settlement periods imposes a fiscal impact on the department that the Commission did not attempt to quantify before requesting a fiscal impact statement. The rule change will likely require the additional investment of staff hours.

Regarding Puc 204.08(f), the Commission does not have the authority to require the Department of Energy to certify that a settlement is just and reasonable and serves the public interest. This rule should be removed.

- **Puc 204.10 – Exhibits:** The Department has identified several issues within Puc 204.10 as currently proposed. First, regarding Puc 204.10(b), the Department is concerned that, as written, oral testimony at a hearing cannot be considered as evidence because it is not an exhibit. Thus, the Department recommends deleting 204.10(b). Second, Puc 204.10(e)(1) would be very difficult, to comply with if a party is to follow the pre-marking requirements of Puc 204.10(c)(3). Finally, Puc 204.10(f) should be clarified because Puc 204.11(b) of the proposed rules requires pre-filing exhibits and Puc 204.11(c) only allows filing exhibits at the hearing if the "material is new or was otherwise unavailable."
- **Puc 204.11 – Pre-marked Exhibits and Witness Lists:** Puc 204.11 raises significant concerns. First, the rule doesn't contemplate entering an exhibit for cross examination purposes because a party cannot know what statements will be made by a counter-party's witness until all are present and testifying at the hearing. For example, the proposed rule does not account for a situation where a witness testifies at the hearing inconsistently with a statement in a data request response and thus a party wants to use that data response as an exhibit, but it is otherwise was not filed. A party seeking to enter the data request as an exhibit could not argue the "material is new or was otherwise unavailable," as required in the rule. This requirement is in direct conflict with the right to cross examination described in Puc 204.13(a) because the party would be unable to develop a true disclosure of facts. Additionally, for clarification purposes, Puc 204.11(d) should reference "exhibits" rather than "evidence" as Puc 204.11 governs exhibits.
- **Puc 204.13 – Cross-Examination:** The Office of the Consumer Advocate (OCA) should also be listed, as they do not fall under the definition of "any persons granted intervenor status" but it is expected they would be allowed to conduct cross-examination. The Department also recommends clarifying that cross-examination be limited to topics relevant to issues within the noticed scope of the proceeding.
- **Puc 204.15 – Order of Proceeding:** The Department recommends revising this language to be consistent with the language in proposed Puc 204.14, rather than applying only to petitioners and hearings on petitions. Since the party seeking relief through a petition, application, motion or complaint has the burden of proof, that party should have the opportunity to open and close. Additionally, the Department recommends revising "open and close any part of the proceeding" to "present first and last in any hearing in the proceeding," or language along those lines. This is because the Commission technically opens and closes proceedings as well as opens and closes hearings in proceedings. At a minimum, the language should be amended to say, "hearings in proceedings" rather than "proceedings" in order to be consistent with the definitions and use of "hearing" and "proceeding" elsewhere in the proposed rules.
- **Puc 204.16 – Official Notice:** The Department recommends clarifying whether the "relevant portion of the record of other proceedings" in proposed Puc 204.16(b) refers to non-adjudicative proceedings as well as adjudicative proceedings. It also appears that

"relevant portion of" should be removed from the language in the proposed rule, as it is not consistent with the language in RSA 541-A:33, V(b). Relatedly, it appears that the material referenced in proposed Puc 204.16(e) would be covered under that language in (b).

For consistency with the language in RSA 541-A:33, VI, the Department recommends adding "including any staff memoranda or data" to the language in proposed Puc 204.16(f). The Department also recommends that "preliminary reports" be defined.

- **Puc 204.17 – Views and Inspections:** Proposed Puc 203.15 (b)(3), in the "General Requirements" section, already allows for views within a "Place of Hearings" section. It would also be helpful to clarify whether there may be views in both adjudicative and non-adjudicative proceedings. If allowed in both, the proposed rule for "Views and Inspections" could likely replace the "Place of Hearings" rule and be inserted into Puc 203.

The Department also recommends clarifying who is responsible for paying for views and inspections, and whether views and inspections can be requested and performed at any part in the proceeding. The rule should also clarify that all parties and participants have the opportunity to participate in views and inspections.

- **Puc 204.18 – Recess and Adjournment:** The Department recommends this rule require the Commission to make a finding that to do so will promote the orderly and efficient conduct of the proceeding.
- **Puc 204.19 – Record for Decision:** The term "record" should be defined in the Definitions section of the Puc 200 rules. The term "whole administrative record" should also be defined and include clarification of what is included in the whole administrative record. For statutory consistency, the Department recommends adopting language consistent with that in RSA 541-A:31, VI.
- **Puc 204.20 – Reopening the Record:** As noted previously, it would be helpful to define the term "record." The Department also recommends removing the language "and before a decision is made" in proposed Puc 204.20(a) in order to avoid potential conflict with "order" and "decision" language in other proposed rules including, but not limited to, Puc 203.19 on Orders Nisi, 204.01 on Discovery, and Puc 204.24 on Final Decisions.

The Department recommends that this rule state that parties are allowed to request further hearing on any additional evidence submitted pursuant to this proposed rule.

- **Puc 204.21 – Recording and Puc 204.22 – Transcripts:** The Department recommends that the Commission revise proposed rules Puc 204.21 and Puc 204.22 to be consistent with the language and requirements of RSA 541-A, including the language in RSA 541-A:30-a and RSA 541-A:31.

For example, the language in RSA 541-A:31, VII requiring that, "[t]he entirety of all oral proceedings shall be recorded verbatim by the agency" appears broader than the "sound recording of the hearing" referenced in proposed Puc 204.21. The Department recommends the PUC adopt the referenced statutory language to avoid confusion. The Department also recommends that the Commission use language consistent with the RSA 541-A:30-a, VII requirement that a copy of such recordings be retained, "at least 30 days after the opportunity for all administrative and judicial appeals has been exhausted," as opposed to, "60 days following the order or ruling by commission on the issues presented" in proposed Puc 204.21. That would ensure that the commission procedural rules are compliant with corresponding statutory requirements.

As far as transcripts of proceedings, the Department suggests that the Commission outline how such transcripts will be ordered. The current rule Puc 203.31 indicates that the Commission shall order a transcript, "pursuant to a contract between the commission and stenographic reporter," and RSA 541-A:31, VII uses the language, "such record shall be transcribed by the agency," and "only the transcription made by the agency from its verbatim record shall be the official transcript of the proceeding." The Department recommends that the Commission establish the procedure by which it will order transcripts and outline that procedure in the proposed Puc 200 rules.

Although proposed Puc 204.21 contemplates a situation where a party may have a stenographer present at a hearing and provide a copy of the transcript to the Commission, the proposed rules do not appear to contemplate a situation where a party requests a copy of the sound recording and orders a transcript using the recording. The Department recommends that the proposed Puc 200 rules provide for such a scenario and require that any transcripts produced in a proceeding be posted to the Commission's website and made available to all parties or participants in the proceeding.

The Department also recommends the Commission adopt a procedure in the proposed Puc 200 rules to ensure that the confidentiality of any information afforded confidential treatment in a proceeding be protected throughout the recording and transcription process.

- **Puc 204.23 – Rehearing:** The Department recommends that the Commission revise proposed Puc 204.23 to add that the Commission will take action on the motion as required by RSA 365:21 and RSA 541:3. The Department also recommends that proposed Rule 204.23 clarify that the Commission may take action on a motion without requiring oral argument.
- **Puc 204.25 – Retention of Decisions:** The Department recommends that the 5-year time period apply only to the original signed decision, but that a paper or electronic copy of all Commission decisions be retained permanently.
- **Puc 204.26 – Certifying a Question of Law:** This proposed rule, in part, allows the Commission or a requesting party to transfer any question of law arising during a Commission proceeding if it determines that "[t]he decision involves a controlling

question of law about which there is substantial ground for difference of opinion" and "[a]n immediate review will materially advance the completion of the adjudication."

Parties in contested cases often present different opinions for how controlling law should be interpreted, and the Commission is tasked with deciding how to apply the law to the facts of the proceeding. Parties may apply for rehearing should they believe the Commission misinterpreted or incorrectly applied the controlling law, and subsequently may appeal to the New Hampshire Supreme Court if desired.

The Department understands that RSA 365:20 broadly allows the Commission to, "at any time reserve, certify and transfer to the supreme court for decision any question of law arising during the hearing of any matter before the commission." The proposed Puc 204.26 language sets standards that may unnecessarily restrict that statutory authority. Given the current statutory authority in RSA 365:20 for the Commission to transfer any question of law during the hearing of any matter at any time the Department does not believe that proposed Puc 204.26 is needed – indeed, it may create procedural confusion and limit the Commission's authority.

- **Puc 204.27 – Submission of Formal Complaints:** The Department notes that the reference in proposed Puc 204.27(a) to the Department's En 1200 rules may cause confusion, as the En 1200 rules define "customer" differently than the proposed Puc 100 rules. It may, therefore, be unclear as to what extent the En 1200 rules apply. The Department recommends revising proposed Puc 204.27(a) to state that any person wishing to make a formal complaint that falls under the category of complaints described in RSA 365:1 must exhaust all remedies pursuant to RSA 365:1-4 concerning the complaint process at the Department.

The Department also recommends eliminating the language "shall cause a copy of the complaint to be forwarded to the utility named in the complaint" from proposed Puc 204.27(c), as that action would already have been performed by the Department pursuant to RSA 365:2.

- **Puc 204.28 Investigations:** Generally, the Department does not believe that the section of the proposed rule is necessary, as it does not appear to develop a procedure for investigations beyond what is already outlined in RSA 365:5.

If the section is retained, the Department recommends changing "shall" in proposed Puc 204.28 to "may," so as to leave the Commission with more discretion. Criteria to show under what instances an investigation is required would have to be developed with the use of the word, "may" in accordance with the NH Rulemaking Manual.

The Department is also concerned that the term "or other matter" does not fall within the authority granted to the Commission under RSA 365:5, as the statute limits such investigations or inquiries to enumerated matters concerning public utilities. The term "or

other matter" in the proposed rule thus suggests an authority more broad than is given to the commission under RSA 365:5.

Finally, as RSA 365:5 appears to grant authority for non-adjudicative proceedings, the Department recommends removing this proposed section from the adjudicative proceedings section.

- **Puc 204.29 – Declaratory Rulings:** The Department recommends that "Declaratory Ruling" be defined, consistent with RSA 541-A:1.

Sincerely,

/s/ Marie-Helene Bailinson

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