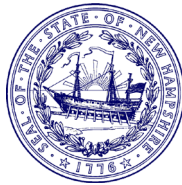


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October 29, 2024

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 Final Proposal Draft

Dear Chairman Goldner:

Pursuant to the Rulemaking Notice filed by the Public Utilities Commission (PUC and/or Commission), the Department of Energy (Department) provides these comments regarding the PUC's *draft* Final Proposal. The Department provided high-level comments relative to the Puc 200 rules during the public comment hearing held on July 16, 2024 on the PUC Initial Proposal and the October 11, 2024 public hearing on the *draft* Final Proposal. The Department now provides a comprehensive set of comments including recommended edits and language changes to the *draft* Final Proposal of the Puc 200 rules.

Upon review of the Initial Proposal (Notice No. 2024-110), the Department requested that the PUC 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). The Department expressed that 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 had concerns about the ability to enforce them if the Commission repeals or amends them. *See* RSA 12-P:14. Where the NHPUC's *draft* Final Proposal relative to amendment of Puc Ch. 200 rules includes the repeal of the above referenced sections, the Department has proceeded by filing rulemaking to adopt En 201.05 Waiver of Rules. The ability to waive rules is necessary for the administration of the Department. Relative to the rules concerning confidentiality, the Department will rely upon the provisions of RSA 91-A and will adopt rules for filing claimed confidential materials in its upcoming En 200 rules.

The Department remains concerned following the PUC's revision of their draft Puc 200 rules that some items create a fiscal impact to the Department due to the advancement of deadlines and increased responsibilities imposed on the Department by the PUC. The Department has identified and reasserted concerns at: (1) Puc 203.08(a)(5) pertaining to the requirement that Petitioners including the Department and customers conduct a fiscal analysis when submitting petitions; (2) Puc 203.22

pertaining to testimony based on proprietary models; (3) Puc 204.09 relative to cost sharing of consolidated hearings; (4) Puc 204.10(d) which expands the time for filing settlements from 5 days in the existing rule to 10 days in the *draft* Final Proposal and (5) Puc 204.19 which would mandate briefs by the Commission rather than “allowing” parties to submit briefs.¹

1) **Part Puc 201.01 Purpose and Scope**

The Department recommends that the PUC reinsert the word “fair,” instead of “lawful.” The PUC Administrative Rules are the law and, therefore, it is redundant to use the word “lawful.”

2) **Part Puc 202 – Definitions**

The Department recommends that the PUC amend or include following definitions as described below.

- **Puc 202.07 - “Hearing,” “Pre-Hearing Conference,” “Status Conference” and “Technical Session”:** The definition of “hearing” no longer includes “any prehearing conferences or status conferences pursuant to Puc 204.05 and Puc 204.06.” (This is due to a revision in the *draft* Final Proposal deleting the last sentence.) The Department questions whether the definition of “hearing” as amended remains broad enough to include pre-hearing conferences and status conferences?

Looking at the Notice of Proceeding section at proposed Puc 204.04, the scope of such notices is the same for hearings and prehearing conferences even though RSA 541-A, V(c) includes specific requirements/frameworks for what is done and required at prehearing conferences and what should presumably be included in a notice. The Department believes that the notice requirements for each should be clarified consistent with RSA 541-A:31.

The *draft* Final Proposal at Puc 202.16 includes this definition for prehearing conference: “a convening by the presiding officer pursuant to RSA 541-A:31,V.” This sentence feels as if a word is missing because it is not clear what is being convened.

¹ Proposed Puc 203.08(a)(5) requires that “[a]ll petitions shall include a statement of estimated financial impact, in dollars, the petition will have if granted. Puc 204.09(c) requires that “[t]he cost of consolidated hearings shall be borne equitably by the parties.” Puc 203.23 provides that “[i]n any proceeding in which a party or participant presents testimony relying upon a proprietary model, the party or participant shall make the model available for use by the commission and other parties or participants and provide clear instructions as to the use of the model. To the extent parties or participants require confidential treatment of proprietary models, they shall file a motion for confidential treatment pursuant to Puc 203.13. Puc 204.10(d) provides that “[s]ettlements shall be filed no less than 10 business days prior to the hearing unless otherwise ordered, except as provided in (e). If the settlement is filed late, the commission shall determine whether to reschedule the hearing based on the determination in (e). Puc 204.19 (a) states that “[t]he commission shall require parties to submit briefs at any point in a proceeding if the commission determines that such briefing would assist the commission in its determination of the legal issues presented.”

In comments dated August 26, 2024, the Department discussed the problems with the discrepancies in the Initial Proposal between the definition of “status conference” at Puc 202.21 and section Puc 204.06 entitled “Status Conference.” At that time, we asked that the Commission clarify the purpose of a status conference.² The *draft* Final Proposal deletes the status conference definition at Puc 202.21 (previously “a hearing required by the commission in order to inform the commission of the status and progress of issues presented in a proceeding,”) and includes status conference within the definition of pre-hearing conference. The *draft* Final Proposal has no definition of status conference. The Department believes each are different (one generally takes place at the beginning and the other during the adjudicative matter) and separate definitions should be restored.

In its August 26th letter, the Department had recommended that Technical Session (which is referenced in current Puc 203.09 (j)) be defined and procedures for them be established. The Department restates that request now and that the rules should distinguish between technical sessions where the PUC Commissioners are present and those where the PUC Commissioners are not.

- **Puc 202.17 – “Proceeding”:** In comments dated August 26, 2024, the Department recommended retaining the existing Puc 102.16 definition of proceeding, i.e., “a docketed case commenced by the Commission.” Alternatively, the Department recommends “an adjudicative or non-adjudicative matter assigned a docket number by the commission.” The Department’s rationale for recommending keeping the existing Puc 102.16 definition was that there appeared no reason to make the change and that the current definition also allows for inclusion of dockets that no longer appear on the Commission’s website. The Department believes that placement of a matter on the PUC website should not be controlling and recommends that references to the website be deleted from this section.
- **“Technical Statement”:** Because technical statements are submitted frequently in adjudicative proceedings, the Department recommends that the rules include a definition of a Technical Statement.

3) **Part Puc 203 – General Requirements**

- **Puc 203.08 – Specific Pleadings:**

Puc 203.08 (a)(5): In the Department’s letter of August 26, 2024, the Department discussed the language of this section that states: “[a]ll petitions shall include a statement of financial impact the petition will have if granted.” The Department recommended that this provision be removed or amended because a petitioner

² See Department letter in DRM 24-086/NH Code of Administrative Rules Puc Ch. 200 Procedural Rules, New Hampshire Department of Energy Comments dated August 26, 2024, Page 8 of 14.

will not always know the exact financial impact and some petitions may have no financial impact.

The Department stated in written comments and again at the public comment hearing on October 11, 2024 that 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.

The Department has also expressed that this provision will discourage the filing of consumer complaints, the procedure for which is already quite complicated for consumers to negotiate easily (especially pro-se complainants).

In prior written comments the Department suggested that "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." The PUC has added the word "estimated," per the Department's suggestion but has not excepted the Department petitions or consumer complaints from the fiscal impact requirement; and the Department re-asserts its request for such exceptions.

- **Puc 203.19 – Commission Record Requests:** In the Department's letter of August 26, 2024, the Department recommended that the language of this section (numbered Puc 203.20 in the Initial Proposal) be made more specific such that record requests be limited to matters officially noticed in the proceeding pursuant to proposed Puc Rule 204.04. The Commission did not follow this recommendation, which the Department re-asserts herein. Under the proposed rule, record requests seeking information that is beyond the scope of the noticed proceeding could be permitted.

Other Matters of Concern:

- Responses to record requests should not automatically become part of the record. Parties should be allowed to question admission on relevance, materiality or that the information is unduly repetitious.
- Record requests should be limited to adjudicative proceedings similar to Discovery – see proposed Puc 204.03.
- 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.

- 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 203.22 – Testimony based on proprietary models:** The Department recommends this section be deleted and that instances where a party relies on a propriety model and another party, or the Commission, seeks to review that model be handled on a case-by-case basis. At a minimum, this section should be limited to adjudicative proceedings. The Department is concerned that this proposed rule, which would broadly apply to all cases where a witness relied on a proprietary model, 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 (including potentially competitors), despite any harm to the consultant that may result. There is also the potential that the rule would lead to consultants having to develop models specific to certain proceedings (to avoid sharing proprietary models) 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, with the extra 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 (which will require confidential treatment, restricted hearings, redacted transcripts, etc.) will make hearings more complicated.

- **Puc 203.24 – Withdrawal of Presiding Officer or Commissioner:** In the Department’s letter of August 26, 2024, the Department recommended replacing “case” with “proceeding.” This section uses both words and the Department recommends standardizing the section by using “proceeding” throughout to remove any ambiguity. Also, in Puc Rule 203.24(a), the Department recommends that “or” be inserted after “party” and before “participant.”
- **Puc 203.25 – Control of Hearing:** The provisions of proposed Puc 203.25(a) and (b) appear unnecessary, given the provisions of proposed Puc 203.16(d) 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 excluding disruptive person(s).

4) **Part Puc 204 – Adjudicative Proceedings**

- **Puc 204.03 – Discovery:**

Subsection (a): The second sentence of subsection (a) requires that discovery requests “be filed with the commission pursuant to Puc 203.04.” The Department had recommended that an earlier iteration of this sentence (which required requests and responses to be filed with the Commission) be deleted. The Department continues to be concerned that including the Commission in the discovery phase of every proceeding, even to this degree, is generally 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. At a minimum, this requirement should be adopted on a proceeding-by-proceeding basis.

Subsection (j): Technical session is not defined in the proposed rule although it is defined in the existing rule at Puc 102.22.

- **Puc 204.07 (d)(4):** The Department recommends the words “ if applicable, an estimated” be inserted between the words “and” and “timeline.”

- **Puc 204.09 – Consolidation of Hearings:**

In the Department’s letter dated August 26, 2024 regarding Puc 204.09(b), the Department had asked for a definition of “record,” and to use that term instead of “docket record,” for purposes of clarity. It remains unclear what a “docket record” is. The Department requests that this be clarified.

Additionally, the Department sought clarification regarding Puc 204.09(c)-(d), relative to who will bear the cost of consolidated hearings, as the Commission is not authorized to assess the Department for any costs. It does not appear the Commission changed (c) and (d). The Department recommends that this rule exclude the Department from any cost sharing.

- **Puc 204.10 – Settlement:** In prior comments the Department had recommended keeping the reference to “stipulation of facts” as it exists in current Puc 203.20. The Department believes including stipulations of fact is consistent with RSA 541-A:31,V(a) and is potentially useful. The Commission should reconsider removing references to a “stipulation of facts” to allow, for example, a situation where parties could not resolve an issue through settlement but could agree to narrowing the factual disputes by submitting a stipulation of facts. Filing a stipulation of facts could 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 204.10(d), the Department recommends that the Commission maintain the current 5 business day deadline for the filing of settlements. While the Commission did reduce the time from 15 days in the Initial Proposal to 10 days in the *draft* Final Proposal, the Department reasserts its recommendation of keeping the 5 business days timeframe. 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 10-day deadline may increase requests for late-filed settlements, and possibly may stifle some opportunities for settlement.

- **Puc 204.12 – Exhibits:** Puc 204.12(d)(1) requires a blank space on the first page of each exhibit. The Department believes this will be very difficult to comply with if a party also follows the pre-marking requirements of Puc 204.12(b)(3).
- **Puc 204.13 – Pre-marked Exhibits and Witness Lists:** Puc 204.13 (c) raises a significant concern for the Department because the rule does not seem to contemplate entering an exhibit for cross examination purposes. A party cannot know what statements will be made by a counter-party’s witness until that witness testifies at a hearing. For example, a witness could testify at a hearing inconsistently with a statement in a data request response and the cross-examining party may want to introduce that data response as an exhibit for impeachment, even though it had not been otherwise filed. The cross-examining party could not legitimately argue the “material is new or was otherwise unavailable” as required in the proposed rule. This requirement would unduly restrict the right to cross examination described in Puc 204.15(a). The Department recommends a new provision that excepts exhibits used to impeach a witness from the requirements of pre-filing.
- **Puc 204.13 – Cross-Examination:** In comments submitted on August 26, 2024, the Department recommended clarifying that cross-examination be limited to topics relevant to issues within the noticed scope of the proceeding. The Department recommends that such limitation also apply to Commissioner questions.
- **Puc 204.17 – Order of Proceeding:** The Department recommends broadening the applicability of this provision beyond just petitions to be consistent with the language in proposed Puc 204.16, which deals with burden of proof. Under Puc 204.16, the party seeking relief through a “petition, application, motion or complaint” has the burden of proof, and that party should have the opportunity to open and close.

- **Puc 204.19 – Briefs:** 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 because the Department will now be required to staff itself to meet the requirement.
- **Puc 204.20 – Views and Inspections:** This provision obviates the needs for Proposed Puc 203.14 (c), which also allows for views. Only one view provision should be adopted, and the placement of the provision would depend on whether views will be undertaken in all proceedings (Puc 203) or only in adjudicative proceedings (Puc 204).
- **Puc 204.22 – Record for Decision:** The term “record” should be defined in the Definitions section of the Puc 200 rules.
- **Puc 204.23 – 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 204.23(a) in order to avoid potential conflict with “order” and “decision” language in other proposed rules including Puc 203.08 on Orders Nisi, Puc 204.03 on Discovery, and Puc 204.25 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 203.20 – Recording and Puc 203.21– Transcripts:** The Department recommends that the Commission revise proposed rules Puc 203.20 and Puc 203.21 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 203.20. The Department recommends the PUC adopt the referenced statutory language to avoid confusion.

- **Puc 204.28 Investigations:** The Department recommends that this section be deleted. The Department does not believe that the section of the proposed rule is necessary, as it does not appear to develop procedures for investigations beyond what is already outlined in RSA 365:5.

The Department is also concerned that the term “or other matter within its jurisdiction” seeks to broaden 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 within its jurisdiction” in the proposed rule thus suggests an authority broader than is given to the Commission under RSA 365:5.

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

Thank you for your attention and consideration.

Sincerely,

/s/ *Marie-Helene Bailinson*

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