



# The Discovery Process

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**NARUC Energy Regulation  
Partnership Program Presentation**

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# Before Proceedings

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- Presentations by Petitioner (“The Dog & Pony Show”)
  - Amount of Request
  - Customer Bill Impacts
  - Rate of Return / Return on Equity
  - Major Issues



# During Proceedings:

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- 1. Considerations Governing Discovery
- 2. Methods of Beginning Discovery
- 3. Confidentiality Issues
- 4. Objections to Discovery
- 5. Cost of Discovery
- 6. Time for Discovery



# 1. Considerations Governing Discovery:

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- Keep it simple and easy
  - By giving the litigants access to facts which tend to support or undermine their own position or their adversary's, the Office of Administrative Law's rules on discovery are intended to streamline the hearing process and enhance the possibility of settlement.



# 1. Considerations Governing Discovery:

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- Goals:
  - Streamlining through Settlement:
    - Exchange information on the road to hopefully achieving consensus on all or some of the contested issues and streamlining the process.
  - Build a record upon which the Board can make a final decision.



# 1. Considerations Governing Discovery:

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- Discovery Rules for BPU matters:
  - Codified in the New Jersey Administrative Code (“N.J.A.C.”) at N.J.A.C. 1:1-10.
  - Extremely liberal in scope in order to attain the streamlining goal.
    - A request for discovery will not be denied merely because the information sought may be inadmissible in evidence at the hearing.
    - If the information sought “appears reasonably calculated to lead to the discovery of admissible evidence” – the party seeking the information WINS!!



# The Beauty Point I

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- We're the host of the party. We get, but don't have to give!
  - The Board is the regulator and has responsibility for ultimately deciding the case. Therefore, discovery is generally unavailable from the Board or Board Staff. The Board is neither a party to the proceeding nor is asserting a position in respect to the outcome, but is solely providing the forum for the resolution of the dispute.



## 2. Methods of Beginning Discovery:

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- Informal – Casual is Good
  - Administrative law discovery is intended to be expeditious and uncomplicated. (this stuff is complicated enough!!!). Therefore, the parties are obliged to exhaust all less formal opportunities to obtain discoverable material before utilizing the methods of formal discovery.
  - Methods
    - Voluntary exchange of information
    - Sending out standardized written interrogatories at the outset
    - Consultation and discovery conferences
      - Informal, non-transcribed meetings of the party's and their experts



## 2. Methods of Beginning Discovery:

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- Formal

- Methods

- i. Written interrogatories;
- ii. Production of documents, computer programs (more recent technological advancement) or other objects;
- iii. Permission to enter upon land or other property for inspection and other purposes;
- iv. Requests for admission; and
- v. Depositions



## 2. Methods of Beginning Discovery:

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- Depositions:
  - Rarely used in BPU proceedings. Depositions are available only on motion for good cause shown. Such motions must be served on all parties.
  - Factors weighed and considered by ALJ or Commissioner deciding a motion for a deposition:
    - Need for the deposition;
    - Alternative means of obtaining the information;
    - Requested location and time for the deposition;
    - Hardship; and
    - Matters of expense, privilege, trade secret or oppressiveness.
      - If an order granting a deposition is issued, it will specify a reasonable period during which the deposition must be concluded.



# 3. Confidentiality Issues

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- Happy Birthday OPRA!! (Ha Ha Ha)
- BPU proceedings often concern highly sensitive corporate information which is entitled to protection
  - Customer information
  - Employee salaries
  - Income tax information
  - Security measures taken at utility installations
- Often utilities want to provide the above information in order to expedite matters, but they want their privacy rights to be respected.
- The public's right to know versus the utilities' right to privacy took center stage in 2002.



## 3. Confidentiality Issues

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- On January 8, 2002, the New Jersey Legislature expanded New Jersey's Right to Know Law, N.J.S.A. 47:1A-1 et seq.
- The Open Public Records Act, affectionately known as ("OPRA"), opened up a much broader category of documents to potential public disclosure.
  - Includes commercially-sensitive documents, which the Board would not have the authority to require, but which may be entrusted to the Board in an effort to freely and fully cooperate with a Board request for information from a utility.



## 3. Confidentiality Issues

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- Concerns:
  - While it is important that the public have access to government records, OPRA might exert a chilling effect on the free and voluntary flow of information and actually hurt the regulatory process.
  - Some have suggested, OPRA might discourage a regulated entity from voluntarily providing the Board with information that is not required by law.



## 3. Confidentiality Issues

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- These concerns have been alleviated:
  - On July 21, 2003 the Board adopted new rules at N.J.A.C. 14:1-12 to provide a reasonable level of protection to the legitimate confidentiality interests of the regulated community.
  - The Board, in consultation with the Attorney General's Office developed a standardized confidentiality agreement for use in most contested proceedings.
  - These measures appear to have assuaged people's concerns and the free flow of information does not appear to have suffered.



## 4. Objections to Discovery

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- Informal and Streamlined Process:
  - Disagreements normally resolved informally between the parties:
    - Objections to discovery requests
    - Responses or failures to respond
  - If the parties cannot “work and play well together,” the parties are permitted to contact ALJ or Commissioner / Commissioner designee.



## 5. Cost of Discovery

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- The Beauty Point II – We get, don't have to give AND Don't Have to Pay!!!
  - Although the cost of discovery is typically borne by the party seeking discovery in BPU proceedings, where the information requests mostly come from Board Staff and the Division of the Ratepayer Advocate, the utility bears the expense.
  - Pursuant to the administrative code, a State agency authorized by law to represent the public interest is not required to pay the cost of discovery if the person from whom the discovery is sought is entitled to recover the cost of discovery from others. N.J.A.C. 1:1-10.3(b)
- The Beauty Point II – Not so Beautiful – We all pay!



## 6. Time for Discovery

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- Parties should commence discovery immediately.
- Discovery is to be completed at least five days before the evidentiary hearing or by a date ordered by the ALJ or Commissioner at the pre-hearing conference.
- Although the OAL rules set forth a time frame for responding to discovery requests, a party receiving a request need only provide “a schedule” for reasonable compliance with the request within 15 days of receipt.
- Most BPU cases, discovery schedule set at the pre-hearing conference.