

THE STATE OF NEW HAMPSHIRE  
BEFORE THE  
NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION

DE 12-097

ELECTRIC AND GAS UTILITIES

Investigation into Purchase of Receivables, Customer Referral and Electronic  
Interface for Electric and Gas Distribution Utilities

Objection to Public Service Company of New Hampshire's Motion to Compel

NOW COMES the Retail Energy Supply Association ("RESA"), an intervenor in this docket, and objects to Public Service Company of New Hampshire's ("PSNH") August 24, 2012 Motion to Compel RESA to Respond to Data Requests ("Motion"). In support of this objection RESA states as follows:

1. On July 13, 2102 RESA filed the joint testimony of Daniel Allegretti, Marc Hanks, and Christopher Kallaher. On July 27, 2012 PSNH propounded 73 data requests on RESA. On August 6, 2012 RESA objected to twenty-four of the data requests (3, 4, 18, 19, 21, 22, 25, 27, 32, 33, 35, 37, 39, 40, 41, 42, 44, 45, 50, 51, 54, 55, 59, 71) and on August 10, 2012 RESA responded (at least in part) to all but four of these requests (3, 4, 18 and 19), notwithstanding its objection, and responded to the remaining data requests. On August 15, 2012 PSNH's counsel wrote to RESA's counsel and on August 20, 2012 RESA's counsel responded. See Attachment A to this Objection. On August 23, 2012, as a result of the technical session RESA provided revised responses to PSNH Data Requests 1-38, 1-54, and 1-59. See Attachment B to this Objection. On August 24, 2012 PSNH filed the Motion.

2. As the Commission noted in the Order of Notice and the Commission's Prehearing Conference Order in this docket, the issues in the docket are limited to whether purchase of receivables, customer referral and electronic interface programs will promote customer choice consistent with the restructuring principles of RSA 374-F:3, whether the resulting rates associated with the programs are just and reasonable pursuant to RSA 378:5 and 7, and an examination of the costs and benefits of these programs, including the recovery of the associated costs. In that Order of Notice the Commission also cited its order in DE 10-160 where the Commission had said that it would open a generic proceeding to explore whether these kinds of programs should be implemented in New Hampshire "to support customer choice in energy supply" for smaller customers.

3. As the Commission noted in a recent order, when addressing motions to compel "we consider whether the information being sought is relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence." "[I]n general, discovery that seeks irrelevant or immaterial information is not something we should require a party to provide." *City of Nashua*, Order 24,681 (2006) at 2." Order No. 25,398, issued August 7, 2012 in DE 11-250, page 2.

4. RESA's objections to PSNH's data requests start from the basis that responses to these requests would not be relevant to the issues in this docket nor would they be reasonably calculated to lead to the discovery of information that would be admissible in this proceeding. Data requests that seek information such as company-specific information of individual RESA members, many of whom may not participate in the New Hampshire market, including whether they are regulated utilities, are owned by regulated utilities and whether each of those entities have POR, customer referral or

electronic interface programs, and the discount rate for each customer class that each such utility presently charges (1-18), seek information that goes far beyond the scope of this docket. PSNH is also asking which of RESA's members sell electricity in NH's market (1-21), a listing by customer class that each member has served (1-22), and details of each member's active solicitation program in NH (1-25). PSNH asks for information about marketing activities (1-27) and goes even farther afield from the issues in this docket and asks for information about what RESA members charge their customers for energy by customer class (1-32). PSNH also asks for the average profit and rates of return of RESA members (1-55). In 1-59, which is really a nine-part question, and for which RESA provided a revised response as a result of the technical session (see Attachment B), PSNH asks a number of questions about marketing information pertaining to RESA members. PSNH also seeks information pertaining to violations that may have been committed by any RESA member in any jurisdiction (1-71). The information that PSNH is seeking is not relevant to the issues the Commission laid out in the Order of Notice and would not lead to the discovery of information that would be relevant to those issues and therefore would not be admissible in this proceeding. The Commission has clearly articulated the scope of the docket and that scope does not include an examination of the detail of all of RESA's members in all of the jurisdictions in which they operate, especially where PSNH is seeking competitively sensitive information.

5. RESA does not have in its possession the kind of information that has been requested and RESA members have no obligation to provide this information to RESA. Collection of this information would be a very arduous task and, for the reasons

explained further in this document, would require the use of an unaffiliated, neutral third party to collect this information. Moreover, the collection and dissemination of commercially sensitive information by a trade association, such as RESA, could have serious implications under both the Sherman Anti-Trust Act and applicable NH anti-trust law and is contrary to RESA's anti-trust policy.

6. Gathering all of the information PSNH is seeking from RESA's 22 members about their practices in each state in which each of those members are doing business would be extremely time consuming and burdensome. As noted above, it is difficult to know which RESA members might ultimately decide to become involved in the NH market, depending on whether the Commission ultimately adopts a POR program and what it entails, and when RESA members might enter the market if they do in fact decide to make such entrance. RESA fails to see how the extensive detail about operations in other states that PSNH is seeking is relevant to this docket.

7. PSNH has cited a Massachusetts DPU ruling in support of its motion, but the underlying issues and underlying data requests at issue in that case were far less comprehensive than the ones at issue in this docket. The information requests at issue in that case pertained "to the amount of renewable energy being supplied by RESA member companies to customers within Massachusetts and NSTAR Electric's service territory." Hearing Officer Ruling, D.P.U. 07-64, p. 7. Compare that with for example GS 1-7: "Please describe in detail the credit check process used by each member of RESA prior to enrolling residential customers, small commercial customers, and large commercial and industrial customers." The data requests which PSNH is asking would apply to all 22 of

RESA's members in all of the states in which they operate. PSNH is seeking information that is overreaching and not relevant to this docket.

8. There is no need to delve into the marketing practices of each of the RESA member companies in order to review the importance of a POR program or customer referral and electronic interface programs. The testimony provided by expert RESA witnesses as well as the expected cross examination will adequately and appropriately provide a record that is in alignment with the stated scope of this proceeding. The discovery at issue does nothing to further the scope of this case nor does it contribute to the Commission's desire to advance the development of retail markets for residential and small commercial customers in New Hampshire.

9. RESA also wants to make the Commission aware of two orders, one issued by the State Corporation Commission in Virginia and one by the California Public Utilities Commission, copies of which are attached to this Objection as Attachments C and D respectively. In the Virginia Order, a utility sought to amend the Virginia State Corporation Commission rules to permit interrogatories and requests for production of documents to be sent to individual members of an association appearing in a Commission proceeding. The Commission said that permitting discovery "on non-parties to a proceeding – *i.e.*, individual members of an association – is not reasonable and should not be adopted." See p. 7 of Attachment C. Similarly, the California Public Utilities Commission reversed an ALJ's discovery ruling which had directed a cable association to compel its members to answer data requests: "We do not believe that members of an association should automatically be subject to discovery merely because they are a member of an association... Such a result would be unduly burdensome on the individual

members.” See p.7 of Attachment D. The California Commission went on to note that if the information is being sought from individual members it is “unlikely that the association possesses or has control over that sort of information.” That is exactly the case here, and for the same reasons this Commission should deny the Motion to Compel.

10. Granting the Motion to Compel would have a chilling effect on the participation by groups like RESA in Commission proceedings. Participation by groups such as RESA provides many advantages to the Commission and all parties involved in cases before the Commission. The U.S. Supreme Court has explicitly recognized the many benefits for adjudicatory bodies of group participation. See International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, et al. v. Brock Secretary of Labor, 477 U.S. 274 at \*289 - 290 (1986). By combining efforts, members of groups such as RESA provide case efficiencies (including putting on witnesses and other aspects of a case) into a single party, thereby eliminating duplication of efforts by all parties to a case. Additionally, working together allows RESA and other groups to combine their expertise and thereby provides the Commission with a stronger and more complete record to make its decisions. Permitting this kind of discovery on each RESA member, especially on those who have elected not to participate or fund this particular RESA activity, could deprive this Commission of future participation by groups like RESA and the expertise that retail marketers can bring to advancing New Hampshire state policy as it relates to electric restructuring. New Hampshire’s shopping statistics demonstrate there is still significant progress to be made and RESA members want to be a part of furthering this marketplace. However, the burdens associated with responding as individual members to such discovery would likely dampen enthusiasm for

entering this market and actively participating through RESA in Commission cases going forward.

11. Even if the information requested could meet the relevance test and the other bases for objection could be overcome, the suggestion that a non-disclosure agreement and a protective order would resolve RESA's concerns is incorrect. A protective order and non-disclosure agreement is an imperfect solution, especially where the information would be shared with other commercial entities. In the event of a breach it will be both costly and difficult to establish with accuracy the extent of the damages suffered by each affected RESA member. Such mechanisms also do not prevent the transfer of information which may occur when personnel change jobs and find themselves working for a competitor. In short, these mechanisms should not be used unless there is a strong and compelling need for the information, something which is not the case here.

12. The burden of proving the necessity of compelling RESA to provide responses to these overreaching data requests falls on PSNH. RESA submits that PSNH has not met that burden. Admin. Rule Puc 203.25.

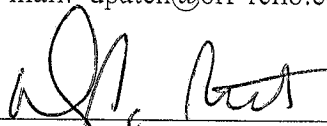
13. For the reasons cited above RESA believes that PSNH's Motion to Compel should be denied.

WHEREFORE, RESA respectfully requests that this honorable Commission:

- A. Deny PSNH's Motion to Compel; and
- B. Grant such further relief as it deems appropriate.

Respectfully submitted,

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Douglas L. Patch

September 4, 2012

Certificate of Service

I hereby certify that on this 4th day of September, 2012 a copy of the foregoing motion was sent by electronic mail to the Service List.

  
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Douglas L. Patch

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