

THE STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

ELECTRIC UTILITY CUSTOMERS
Docket No. DE 12-097

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE'S
MOTION FOR LEAVE TO REPLY TO
THE RETAIL ENERGY SUPPLY ASSOCIATION'S
OBJECTION TO PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE'S
MOTION TO STRIKE AND ACCOMPANYING REPLY

Public Service Company of New Hampshire ("PSNH" or the "Company") hereby moves for leave to reply to the "Objection to Public Service Company of New Hampshire's Motion to Strike Portions of RESA's Pre-filed Testimony" (the "Objection") filed by the Retail Energy Supply Association ("RESA") on January 17, 2013, with the New Hampshire Public Utilities Commission ("Commission"). By that Objection RESA, in violation of PSNH's due process rights, attempts to thwart statutory requirements, regulatory deadlines, and the Commission's decision in Order No. 25,439 issued in this proceeding.¹

For administrative efficiency, PSNH includes its reply with this motion. In support of its motion and reply, PSNH states as follows:

1. Recently, the Commission noted that although its rules permit the filing of motions and objections thereto, the rules do not specifically contemplate the filing of replies to objections and that replies shall not be considered absent authorization. *Freedom Ring*

¹ PSNH files this motion and reply reluctantly, but feels compelled to do so in light of the nature of the statements and accusations contained in RESA's Objection.

Communications LLC d/b/a BayRing Communications, Order No. 25,327 (Feb. 3, 2012)

at 8. PSNH believes that in making its Objection, RESA has misstated both PSNH's position and the requirements of Order No. 25,439 issued by the Commission on December 7, 2012, and that at least some of the arguments in its Objection are based upon such misstatements. Moreover, the Objection contains an untimely objection to discovery, an untimely request for rehearing, and introduces issues far-afield from PSNH's underlying Motion to Strike. Accordingly, PSNH requests leave of the Commission to reply to RESA's Objection to clarify PSNH's position and understanding of the Commission's order, as well as to respond to the arguments of RESA. PSNH's reply follows below.

2. On April 16, 2012, the Commission received a request from RESA to open a docket to investigate purchase of receivables, customer referral, electronic interface programs, and other retail market enhancements asserting that that such programs "are important tools to promote the development of retail electric markets for the residential and small commercial customer segments." RESA Letter dated April 12, 2012 at 2.
3. On July 13, 2012, RESA submitted the direct testimony of Daniel W. Allegretti, Vice President, State Government Affairs – East for Exelon Corporation; Marc A. Hanks, Senior Manager of Government & Regulatory Affairs for Direct Energy Services, LLC; and Christopher H. Kallaher, Senior Director of Government & Regulatory Affairs for Direct Energy. Section III of that testimony, beginning on page 15, was dedicated to

“Electronic Interface,” and contained a proposal to “allow suppliers direct access to key customer usage and account data.”

4. On July 27, 2012, pursuant to the procedural schedule set forth in Order No. 25,389, PSNH submitted data requests to RESA. PSNH question 1-71 to RESA reads as follows:

On page 16, beginning on line 12, RESA’s testimony discusses “What benefit(s) will result from enhancing access to customer information.”

- a. Is RESA aware of any competitive suppliers that have been accused of violating applicable rules in place that are intended to protect consumers or the competitive marketplace? If so, please provide a listing of all such alleged violations known to RESA.
- b. Have any RESA members been accused of any such violations? If so, please provide all documents, correspondence, orders, and the like detailing the allegations, the competitive suppliers’ responses thereto, and the action (if any) taken by the respective state or federal agency.

5. On August 6, 2012, RESA objected to certain data request questions of PSNH, including question 1-71. On August 24, 2012, PSNH submitted a Motion to Compel RESA to respond to data requests, including PSNH 1-71. In that Motion to Compel, at ¶37 PSNH expressly noted, “PSNH Question 1-71 pertains to effects of ‘enhancing access to customer information.’” As noted in PSNH’s Motion to Compel, RESA’s objection stated:

Objection: RESA objects to the request on the basis that it is seeking information which is not in the possession, custody or control of RESA and it would be imprudent for RESA to gather the requested information from its member companies because it is protected from disclosure among members by law and or/agreement respecting antitrust principles, that it calls for speculation, and that the information can be obtained from a publicly available source.

6. On December 7, 2012, the Commission issued Order No. 25,439 “Order Addressing Motions to Compel” and granted PSNH’s request to compel a response to PSNH 1-71.

Specifically, the Commission stated:

RESA objected to the question on the grounds that the question seeks information not in its possession or control and that it would be imprudent for RESA to inquire of its members for the information. Notwithstanding and not waiving its objection, RESA provided a response which essentially repeated its objection. PSNH said that the question was based on RESA’s assertion in its testimony that it has information pertaining to certain retail market enhancements. PSNH said that the answer will provide admissible information directly pertaining to the implementation, structure, costs and benefits associated with those enhancements. We agree with PSNH that the question relates to RESA’s testimony and will likely produce admissible evidence, and we grant the motion to compel a response to PSNH 1-71.

Order No. 25,439 at 19. The Commission further concluded that “In the event that RESA fails to provide responses to associated data requests where the motion to compel has been granted, the *related* testimony shall be stricken from the record.” *Id.* at 22 (emphasis added).

7. By letter dated December 21, 2012, RESA averred that it “[did] not believe that it can obtain all of the information requested” in PSNH data request 1-71 and, rather than respond to the question as ordered by the Commission, it chose to withdraw one sentence of its pre-filed testimony on page 16, lines 12-17. RESA Letter Withdrawing Portion of Testimony (Dec. 21, 2012).
8. On January 11, 2013, PSNH filed its Motion to Strike contending, in relevant part, that withdrawing one sentence did not comply with the Commission’s directive in Order No. 25,439. As PSNH noted in its underlying Motion to Compel, question 1-71 relates to the

topic of “enhancing access to customer information,” and therefore the testimony related to PSNH 1-71 was all testimony concerning “enhancing access to customer information” beginning at page 8, line 15 and continuing through page 16, line 17. *See* PSNH Motion to Strike (Jan. 11, 2013) at 5-6.

9. On January 17, 2013, RESA filed its Objection contending that: when it “looked again” at the Commission’s order and PSNH 1-71 the “breadth of the question became even more apparent”, and that subsection (a) of the question was not limited in certain respects; because it could not respond with a “sufficient level of certainty as to [the response’s] completeness” it would “strike the portion of the testimony cited in the request”; PSNH was now attempting to broaden the reach of its request; other companies in other states are subject to the programs at issue; PSNH has an incentive to delay the docket; PSNH is attempting to thwart these programs; and the laws and Constitution of the State of New Hampshire are implicated in PSNH’s Motion to Strike. *See* RESA’s Objection at 2-4. None of these contentions provides any valid basis for objecting to PSNH’s Motion to Strike.

10. RESA’s recent contention that it “looked again” and then determined that the question was, in its estimation, excessively broad, is nothing more than a further objection to that data request and is not a basis for objecting to PSNH’s Motion to Strike. The time for objecting to the question on such a basis, governed by New Hampshire Code of Administrative Rules Puc 203.09(g)(1), is 10 days following receipt of the request. That Rule also requires objections to “[c]learly state the grounds on which they are based.”

Rule Puc 203.09(g)(2). Pursuant to this docket's procedural schedule, PSNH served its data requests on RESA on July 27, 2012. The 10-day window for clearly stating grounds for objecting to question 1-71 has long passed. Rule Puc 203.09(h) further provides that "Failure to object to a data request or requests for documents within 10 days of its receipt without good cause shall be deemed a waiver of the right to object." RESA's new objections to question 1-71, made 174 days after its receipt of the question; 146 days after the filing of PSNH's Motion to Compel; and 41 days after the issuance of Order No. 25,439 are untimely and violative of this Commission's rules by any reasonable standard.

11. In its original objection, RESA stated that it would not answer the question because it did not have the information, it believed it imprudent to gather the information, the request called for speculation, or the information was publicly available. Despite RESA's original objections, the Commission nevertheless concluded that the question should be answered. Only now does RESA contend that it believes the question too broad to be answered because it covers too many entities in too many locations. The deadline for such objections was August 6, 2012 – 10 days after RESA's receipt of the data request. RESA's untimely further objection should be rejected by the Commission.

12. If RESA believed that the Commission's Order No. 25,439 compelling it to respond to this question was wrong, it should have sought rehearing of that Order from the Commission. By statute (RSA 541:3) a motion seeking reconsideration would have been due by January 7, 2013; no such motion was filed. RESA cannot now get a "second bite at the apple" by raising a new objection to a question it chooses not to answer in pursuit

of a different result from that ordered by the Commission in the December 7, 2012 Order.

13. Further, and significantly, at no point in its Objection does RESA discuss subpart (b) of PSNH question 1-71. Subpart (b) relates solely to information involving RESA's members, and requests information about any allegations of consumer protection violations, the responses to them and whether any actions were taken by a state or federal agency. RESA, in its Objection, contended that by its Motion to Strike, PSNH was attempting to redraft its question and that PSNH should "do its own work to support what will presumably be an argument about the 'trustworthiness of competitive suppliers' (see p. 5 of the Motion), i.e. that customers will be harmed if the Commission adopts purchase of receivables, customer referral and electronic interface programs because there are suppliers somewhere who have been accused of violating rules, notwithstanding whether those suppliers were found to have actually violated such rules." RESA Objection at 3-4. Such a statement is tantamount to an admission by RESA that the information sought is indeed relevant to this proceeding - - it just refuses to supply it.

14. Through subpart (b) of PSNH 1-71, PSNH has attempted to do precisely what RESA recommends. PSNH has sought information from RESA's members about whether they have been accused of violations of certain rules protecting customers, as well as information about their responses to those accusations and whether any official actions by state or federal authorities were taken. On pages 15 and 16 of its testimony, RESA contended that enhanced access to customer information should be provided - - information which has been deemed private and confidential by both this Commission

and the New Hampshire Supreme Court. PSNH has sought information about whether there have been concerns about RESA's members' compliance with consumer protection rules, which would include protections regarding the use of and access to such information. PSNH has not attempted, and is not attempting, to redraft its question to capture more testimony than was related to its original question, as indicated in ¶37 of its Motion to Compel.

15. As was made clear in PSNH's Motion to Strike, if RESA cannot or will not provide the information requested in question 1-71 which clearly relates to conduct regarding the proper use of customer data, particularly by its members, RESA should not be permitted to argue to the Commission that enhanced access to customer information is appropriate or necessary.
16. Moreover, Order No. 25,439 provided that if RESA did not provide an answer to a question for which PSNH's motion to compel was granted, "the *related* testimony shall be stricken from the record." Order No. 25,439 at 22 (emphasis added). In its Objection, RESA adopted an extremely narrow interpretation of the Commission's order by referring to "the portion of the testimony *cited* in the request." RESA Objection at 3 (emphasis added). In so doing, RESA has substituted its judgment about the scope of the Commission's order for that of the Commission itself. In Order No, 25,439, the Commission stated:

PSNH said that *the answer will provide admissible information directly pertaining to the implementation, structure, costs and benefits associated with those [market] enhancements*. We agree with PSNH that the question relates to RESA's testimony and will likely produce

admissible evidence, and we grant the motion to compel a response to PSNH 1-71.

Order No. 25,439 at 19 (emphasis added). In agreeing with PSNH's argument, the Commission concluded that information pertaining to the implementation, structure, costs and benefits of RESA's proposed market changes was relevant and worthy of a response. PSNH question 1-71 sought information about the potential benefits and costs of enhancing access to customer information. Nowhere in Order No. 25,439 did the Commission limit its conclusion to the single summary sentence in RESA's testimony, but instead referenced all testimony related to the request. Moreover, the order does not state that only that portion of the testimony specifically *cited* in the request shall be stricken for failure to respond; rather, the order states that the *related* testimony shall be stricken from the record. PSNH reasserts, as it did in its original Motion to Strike, that the testimony related to PSNH 1-71 is the testimony at page 8, line 15 through page 16, line 17 covering enhanced access to customer information. Again, PSNH is not broadening the reach of its data request, but is seeking to have the testimony reflect the expectation of the Commission that to the extent a question is not answered, the related testimony be stricken. RESA is attempting to avoid the issue by taking an unreasonably narrow interpretation of the Commission's order.

17. As to RESA's contention that such programs exist in other states, such contentions are not relevant to the instant matters. The Commission ordered that to the extent RESA did not respond to PSNH 1-71, the related testimony should be stricken and PSNH, in its Motion to Strike, contended that the related testimony is more than the very narrow sentence RESA has offered to strike. Whether similar programs exist in other states is

not remotely relevant to whether RESA has complied with the Commission's order by agreeing to strike one sentence from its testimony, and is not a basis to reject PSNH's motion.

18. With respect to RESA's contentions that PSNH has an interest in delaying this proceeding or thwarting the proposed programs, such arguments are not only irrelevant, but also completely unsupported by the facts. RESA requested that this docket be opened and filed testimony requesting that certain "market enhancements" be instituted, including that the state's utilities provide enhanced access to customer information. Upon being questioned about how such information had been protected elsewhere, both more generally and by RESA's members specifically, RESA objected to the question and refused to answer. PSNH, therefore, moved to compel a response in line with the Commission's rules. The Commission rejected RESA's objection to this and other questions, and agreed that a response should be provided or the related testimony stricken. Thereafter RESA, rather than seek rehearing or clarification from the Commission, determined for itself which testimony it believed was "related" to the request and agreed to withdraw one sentence. PSNH, again in accordance with the Commission's rules and precedent, and after making a good-faith effort to resolve this matter, filed its Motion to Strike on the basis that RESA had not complied with the Commission's Order to strike the related testimony.

19. PSNH has acted at all times in conformity with the Commission's rules for the conduct of adjudicative proceedings such as this in seeking either that RESA provide information the

Commission has agreed is relevant, or that RESA withdraw the testimony related to the request as had been ordered by the Commission. To claim that PSNH is causing a delay based upon what RESA speculates is an inappropriate motive, and to further claim that such a delay has anything to do with PSNH's requests that RESA comply with the Commission's order, is unnecessary, serves no useful purpose in this, or any, docket, and is not a valid basis to reject PSNH's Motion to Strike.

20. Finally, RESA invokes provisions of New Hampshire law and the State Constitution to claim that this docket is in line with them because it is about "implementing programs and mechanisms that are being used in other states to enhance the range of viable suppliers." RESA Objection at 4. Even if that were true – and PSNH does not concede that it is – it is irrelevant to the instant matter. As with the above arguments, whether these proposed market changes are consistent with New Hampshire law or principles set out in the New Hampshire Constitution has no bearing whatsoever on whether RESA has complied with the Commission's order by striking one solitary sentence from its testimony after choosing not to respond to relevant discovery.

21. PSNH's Motion to Strike is premised upon the argument that through Order No. 25,439 the Commission required RESA to undertake one of two acts. It could either answer PSNH's question about enhanced access to customer information fully, accurately and truthfully, or it could strike the testimony related to the question. RESA did neither and now contends that PSNH is the cause of delays in this docket. The Commission should

not entertain the new, unfounded and irrelevant arguments raised by RESA in its Objection, and should grant PSNH's Motion to Strike.


WHEREFORE, PSNH respectfully requests that the Commission:

- A. Grant Leave for PSNH to Reply to RESA's Objection to PSNH's Motion to Strike;
- B. Grant PSNH's Motion to Strike; and
- C. Order such further relief as may be just and equitable.

Respectfully submitted,

Public Service Company of New Hampshire

1/22/13
Date

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CERTIFICATE OF SERVICE

I hereby certify that, on the date written below, I caused the attached Motion and Reply to be served pursuant to N.H. Code Admin. Rule Puc 203.11.

1/22/13

Date



Matthew J. Fossum