STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

Electric and Gas Utilities

2018-2020 Statewide Energy Efficiency Plan

Docket No. DE 17-136

SECOND Motion to Compel Data Responses

NOW COMES the Office of the Consumer Advocate ("OCA"), a party in this docket, and moves pursuant to N.H Code Admin. Rules Puc 203.09(i) and Puc 203.07 to compel Public Service Company of New Hampshire d/b/a Eversource Energy ("PSNH"), Granite State Electric Corp. d/b/a Liberty Utilities ("Granite State"), and Unitil Energy Systems, Inc. ("UES"), to provide responses to data request OCA 3-7 in this docket. The motion supplements, and is similar to, the motion to compel data responses filed on October 17, 2018 that is presently under advisement to the Commission. In support of this second discovery motion, the OCA states as follows:

I. Introduction

As noted above, the Office of the Consumer Advocate filed a motion to compel PSNH to provide certain discovery responses in this docket on October 17. (This pleading will refer to the October 17 motion as the "First OCA Motion to Compel.") The introductory material in the First OCA Motion to Compel, which describes the

nature of this proceeding and recounts its history in summary fashion, is incorporated herein by reference. PSNH filed an objection to the First OCA Motion to Compel on October 26, 2018.

In the meantime, on October 17, 2018, the OCA submitted its third set of data requests to PSNH and the other electric and gas utilities that are the subject of this docket in their shared capacities as administrators of ratepayer-funded energy efficiency programs. This was the last day for the submission of data requests pursuant to the procedural schedule the Commission approved by secretarial letter on October 16, 2018. On October 26, 2018 – the very last day for providing a response under the procedural schedule – PSNH sent the OCA an objection to data request OCA 3-7, indicating therein that it was tendering the objection on behalf of PSNH, Granite State and UES.

Through counsel, the OCA reached out via e-mail to PSNH, Granite State and UES in an effort to comply with the requirement in N.H. Code Admin. Rules 203.09(i)(4) to undertake a good-faith effort to resolve discovery disputes informally prior to resorting to motion practice. Counsel for PSNH rebuffed this entreaty summarily, indicating: "[W]e do not intend to respond to the request." Therefore, as required by Puc 203.09(i)(4), the OCA hereby certifies that it has made a good faith effort to resolve this discovery dispute, regrettably without success yet again.

II. The Applicable Standard

The description of the applicable standard in the First OCA Motion to Compel, which includes detailed citations to Commission and judicial precedent, is

incorporated herein by reference. It suffices here to note, based on the argument in the PSNH objection to the First OCA Motion to Compel, that the OCA and the utilities agree on the appropriate standard for resolving discovery disputes that arise in Commission proceedings. A party seeking to compel discovery responses must simply show that the information sought is relevant to the proceeding or is reasonably calculated to lead to the discovery of admissible evidence. PSNH Objection to Motion to Compel Data Responses at 3, ¶ 4 (citations omitted).[1]

III. Data Request OCA 3-7 and the Objection Thereto

OCA Data Request 3-7 reads as follows:

> Reference EESE [Energy Efficiency and Sustainable Energy] Board resolution of July 11, 2017 directing the utilities to "consider adding certain pilot projects to the Plan, e.g., geo-targeting," and to "review similar programs ongoing in other states to determine how the results of those pilot programs may inform efforts in New Hampshire." For every circuit and each

[1] One exception to this consensus about the applicable legal standard concerns PSNH's reliance on Order No. 25,646, entered in Docket No. DE 11-250 on April 8, 2014. Ironically for present purposes, Docket No. DE 11-250 concerned PSNH's quest for recovery of costs associated with the $400+ million the utility invested in a mercury "scrubber" at its since-divested Merrimack Station in Bow. PSNH sought to compel certain discovery responses of the OCA and other parties even though the questions were not directed to specific witnesses who had filed testimony on behalf of those parties. *See* Order No. 25,646 at 5. The Commission rejected PSNH's arguments in favor of compelled responses. PSNH implies here that Order No. 25,646 stands for the proposition that utilities may not be subjected to data requests in contested administrative proceedings unless the questions relate directly to, or are likely to lead to the discovery of information that could impeach, previously filed written testimony.

The ruling at page 5 of Order No. 25,646 is properly regarded as a fact-specific application of the broad discretion the Commission admittedly has in managing contested cases as they progress toward hearing. Docket No. DE 11-250 was a highly contested proceeding involving a very high profile matter; one could verily hear the exasperation reflected in the Commission's observation that "we must draw some boundaries around discovery in this case." *Id.* There is a difference between limiting a utility's efforts to litigate aggressively against the consumer advocate and nonprofit intervenors in a highly contentious matter and efforts here to obtain information from utilities relating to activities these companies undertake on behalf of and at the expense of their customers. Moreover, even if the Commission were inclined to apply this ruling to the present circumstances it should not do so here because PSNH did not raise this argument in its initial objection to any of the data requests.

substation operated by each regulated electric distribution utility, please provide the following:

a. the nameplate capacity (MW);

b. the portion of nameplate capacity at which demand is viewed to be high enough to trigger the need for a capacity upgrade (i.e. the number of MW of demand considered to be maximum capacity for planning purposes, including accounting for the need to reserve capacity provide redundancy to other areas and/or for other reasons);

c. the 2018 (year to date) peak demand (MW), including the day and time of day it occurred;

d. the actual peak demand (MW) for each of the five previous years (2012 through 2017), including the day and time of day that they occurred;

e. The actual average annual rate of growth in peak demand from 2012 through 2018;

f. Forecast peak demands for each of the next 10 years (if not available for 10 years, please provide for as many years as it is available);

g. The forecast compound average annual rate of growth for the next 10 years (or for as many years as forecast if that is less than 10 years – please specify if less than 10 years);

h. The estimated year – if any – at which a capacity expansion is forecast to be needed to address peak demand growth; and

i. The estimated cost of the capacity expansion identified in the response to the previous sub-part of this question.

PSNH, Granite State and UES objected to OCA 3-7 on three grounds: (1) that the data request is "not relevant to the subject docket or reasonably calculated to lead to the discovery of admissible evidence," (2) that the data request is "based upon an incorrect assumption," and (3) that "collecting the information sought would be

unduly burdensome and time consuming." In connection with its "'good faith effort' obligation to seek informal resolution of the dispute, the OCA learned from counsel for PSNH that the "incorrect assumption" argument is really just an obtuse way of objecting to the use of the word "directing" to describe the 2017 EESE Board action referenced in the first sentence of the data request.

A. Relevancy

With respect to the argument that the data request is not "relevant to the subject docket" or calculated to lead to the discovery of admissible evidence, the OCA incorporates by reference the arguments previously tendered in the First OCA Motion to Compel. It has come through loud and clear that PSNH, Granite State and UES do not want the OCA, or anyone else, to use the instant docket in its current 'update' phase to raise issues related to the role that non-wires alternatives (NWAs) to distribution investments, and the question of geo-targeting of energy efficiency measures. This raises the question of why these utilities, PSNH in particular, are so afraid of this issue.

To the extent that the PSNH objection to the First OCA Motion to Compel truly reflects the position of all three investor-owned electric utilities, they are not really arguing that NWAs and geo-targeting are *irrelevant*; indeed, that would be absurd given that avoiding expensive distribution system upgrades is a quintessential example of what properly deployed ratepayer-funded energy efficiency can do. Rather, these utilities are claiming that certain language from the 2016 Commission-approved settlement agreement embracing the concept of an

Energy Efficiency Resource Standard, and the Commission's 2017 order adopting the utilities' initial three-year plan for implementing the EERS, precludes any effort by the OCA or others to raise these issues here.

No judicial precedent, prior order of the Commission or legal principle applicable to discovery justifies such a ruling. So, perhaps understandably, PSNH resorts in desperation to self-serving interpretations of the words used in the 2016 settlement and order and appends to those interpretations certain unhelpful contentions about the integrity and good intentions of the OCA and its legal staff. *See, e.g.*, PSNH Objection to Motion to Compel Data Responses at 4 n.4 ("this is at least the second time in recent months the OCA has attempted to undermine a settlement to which it is a party when that settlement proves inconvenient").

Page 7 of the Settlement Agreement filed on April 27, 2016 in Docket No. DE 15-137 calls for the implementation of an EERS effective on January 1, 2018 as successor to the "Core" energy efficiency programs that were based upon efficiency goals but on pre-defined revenue streams derived chiefly from the system benefits charge authorized by the Electric Industry Restructuring Act, RSA 374-F. The settling parties agreed on page 7 that for the first three years of the EERS, the utilities would retain the right and opportunity to administer the ratepayer-funded energy efficiency programs, in contrast to the practice in such neighboring states as Maine and Vermont of having a third party serve in this role. This utility-centric energy efficiency paradigm is the key concession made by the OCA and other signatories in 2006 – not, as PSNH, Granite State and UES would have the

Commission conclude now, a sharp and unforgiving delimitation of issues that could be raised via the Commission's annual reexamination of the initial three-year plan.

Arguing to the contrary in its opposition to the First OCA Motion to Compel, PSNH directs the Commission's attention to page 8 of the 2016 Settlement. As noted on page 8 and quoted by PSNH, "[d]uring the first triennium, and for each 3-year period of the EERS thereafter, annual update filings shall be submitted for review by the Commission in an abbreviated *process*" that will "serve as an opportunity to adjust programs and targets and address any other issues that may arise from advancements, including but not limited to, evaluation results, state energy code changes, and/or federal standard improvements" (emphasis added). But "abbreviated process" refers to the timeline of the annual updates, which proceed according to a breathless pace that begins with the utilities' filing in September and is intended to conclude with a final order that can be implemented on January 1. Nothing in this language, with its explicit authorization for program adjustments, precludes the signatories from asking the Commission to adjust the current menu of ratepayer-funded energy efficiency programs for the purpose of causing the utilities to avoid expensive distribution circuit upgrades.

The 2019 Plan Update itself implicitly recognizes that the plan submitted and approved last year does not define the universe of permissible programs and outcomes for the remainder of the triennium. The utilities communicated this recognition by setting forth a table labeled "Summary of Material Changes" at Bates pages 50-51 of their September 14, 2018 submission. These *material* changes

include the development of a new point of sale e-rebate platform and the development of an incentive structure for Energy Star Manufactured Homes. The argument that any settlement agreement's commitment to an abbreviated process precludes signatories from making material changes to the programs cannot be applied asymmetrically. Each settling party has just as great a right as the others to suggest material changes to the programs in connection with the annual updates.

More salient than the language of the 2016 Settlement is the language from the Commission's order approving the agreement, Order No. 25,932 of August 2, 2016 in Docket No. DE 15-157. The Commission's only discussion of the plan update process[2] appears at page 62 of the Order: "An abbreviated annual plan update process during the trienniums, like the process we currently use for the Core dockets, is appropriate and will enable the stakeholders some flexibility to respond to developments in the energy efficiency market during that time." It is precisely this sort of flexibility the OCA seeks to invoke here, and the Commission should ask itself why the utilities are so resolutely determined to thwart the OCA's efforts.

A prime example of this obduracy is the PSNH gloss on the word "abbreviated," in relation to the annual plan update proceedings, which appears at page 10 of the Company's objection to the First OCA Motion to Compel. PSNH makes the outrageous claim that regardless of whatever rights the OCA might

[2] The PSNH Objection to the First OCA Motion to Compel includes several sentences from page 42 of Order No. 25,932, which is simply the Commission's description (as distinct from its discussion) of the 2016 Settlement. Not surprisingly, this paraphrase of certain language from the 2016 Settlement is substantially similar to the language from the Settlement itself. The OCA's position as to the effect of this language for present purposes is identical to its position concerning the excerpts quoted by PSNH from the 2016 Settlement itself.

enjoy under the contested case provisions of the Administrative Procedure Act, the OCA is now contractually foreclosed from asserting those rights by virtue of having signed the settlement agreement in Docket No. DE 15-137 and/or the initial settlement agreement in this docket. *See* PSNH Objection to Motion to Compel Data Responses at 10 (citing the August 8, 2018 decision of the New Hampshire Supreme Court in *Moore v. Grau* to the effect that "settlement agreements are contractual in nature and governed by contract law").

PSNH does not explain which aspect of contract law precludes the OCA from conducting discovery on NWAs here or asking the Commission to include them with the scope of matters to be addressed in the instant proceeding. Even assuming the presence of the essential contractual elements (consideration, offer, acceptance, etc.), PSNH's references to the contractual nature of settlement agreements begs the question of what remedy a utility could possibly obtain from the OCA in connection with a breach-of contract claim. According to the *Restatement (Second) of Contracts*, the customary remedies available are:

(a) awarding a sum of money due under the contract or as damages;

(b) requiring specific performance of a contract or enjoining its non-performance,

(c) requiring restoration of a specific thing to prevent unjust enrichment,

(d) awarding a sum of money to prevent unjust enrichment,

(e) declaring the rights of the parties, and

(f) enforcing an arbitration award.

Restatement (Second) of Contracts, § 345; *see also id.* at cmt. (a) (noting that these are the "principal judicial remedies" but "other remedies such as replevin of a chattel or reformation or cancellation of a writing supplement those listed here"). The utilities are welcome to inspect the OCA offices for evidence of purloined livestock. Beyond that, since it is absurd to contemplate the OCA paying monetary damages to a utility for breaching a settlement agreement, and given that the Commission has no authority to entertain a civil breach-of-contract action against the OCA and award equitable remedies (e.g., specific performance) to a plaintiff in such circumstances, PSNH should either stop making its "breach of contract" argument or test its hypothesis by filing a civil action against the OCA in a court of competent jurisdiction.

B. The "Incorrect Assumption"

In response to the OCA's written inquiry to the utilities complying with the obligation to seek a good-faith resolution to a discovery dispute prior to moving to compel discovery, the OCA learned that the "incorrect assumption" to which the utilities referred is "the same assumption built into some of the questions asked in the previous set from the OCA, and which was described in some of those responses, particularly the response to question OCA 2-11. The EESE Board did not 'direct' or 'require' that any action be taken relative to geo-targeting, and we do not agree that claiming otherwise somehow permits the kind of broad review question 3-7 seems to envision." E-mail of PSNH Senior Counsel Matthew J. Fossum to OCA of October 29, 2018 at 17:09 p.m.

Question OCA 2-11 and the utilities' response thereto is appended to this pleading. It is apparent that this argument relates to a July 11, 2017 resolution of the EESE Board concerning geo-targeting, which is also appended to this pleading. At its meeting of July 11, 2017, the EESE Board was considering certain recommendations from its EERS Committee that were developed following a series of meetings convened to discuss a draft version of the three-year EERS implementation plan that the Commission subsequently approved in revised form in Docket No. DE 17-136. Based on the response to OCA 2-11, and similar argumentation appearing at pages 7-8 of the PSNH Objection to the First OCA Motion to Compel, it appears that the utilities make much of the fact that the EESE Board merely *suggested* (as distinct from instructed or ordered) the utilities add geo-targeting pilot projects to their three-year plan. The utilities apparently see much significance in an apparent ministerial error by which the chair of the EESE Board did not follow through with the EESE Board's instruction, contained in its resolution, that the Board's recommendation be formally transmitted to the Commission via letter.[3]

The utilities are either failing to understand, or are deliberately attempting to obscure, the point the OCA has been making about the EESE Board's July 2017 deliberations. The EESE Board's enabling statute, RSA 125-O:5-a, vests the Board

[3] As noted at page 7, note 8 of the PSNH Objection to the First OCA Motion to Compel, in July of 2017 the Consumer Advocate was serving as Chair of the EESE Board's EERS Committee. The Consumer Advocate succeeded to the chairpersonship of the EESE Board itself in January of 2018 and, thus, in July of 2017 was not responsible for any failure to file a letter with the Commission on behalf of the EESE Board officially transmitting the EESE Board's resolutions concerning EERS implementation.

with precisely no authority to compel, direct or require the utilities to do anything. Rather, in the context of the EERS, the job of the EESE Board is to consult and collaborate with the utilities in an effort to reduce the extent of litigated disputes that must be resolved via contested administrative proceedings before the Commission. *See* Order No. 25,932 at 34-42 (describing the various parties' positions, all of which support the EESE Board serving as a EERS stakeholder advisory board) and 61 (concluding that the EESE Board "is a collection of diverse energy stakeholders, and its involvement in the EERS planning and implantation, as recommended by the Settling Parties, is appropriate" and "requires technical resources consistent with the Settlement"). Therefore, the OCA is *not* contending that the utilities are somehow required by EESE Board action to move forward with an NWA component of its EERS plan. Rather, our point is that the utilities – whose representatives attended all of the relevant meetings of the EESE Board and its EERS Committee -- were on notice that its stakeholder-advisors wanted this to occur but that the utilities, for whatever reason, chose to spurn this advice when they filed their three-year plan for approval in September of last year. It is now time for the Commission to take that EESE Board recommendation seriously.

C. "Unduly Burdensome and Time Consuming"

The claim that requiring a response to OCA 3-7 would be unduly burdensome and time consuming is too conclusory for OCA to rebut in any substantive fashion. Notably missing from the utilities' objection is any claim that they do not have this information. They simply did not want to provide it. It was not unduly burdensome

for PSNH to devote its resources to framing elaborate arguments impugning the integrity of the attorneys employed by the OCA, exploring ministerial shortcomings of the EESE Board's leadership in the summer of 2017, advancing incorrect interpretations of the Right-to-Know Law,[4] and parsing the meaning of "abbreviated" and "including but not limited to," all in service of avoiding regulatory pressure to use geo-targeting of energy efficiency measures as an alternative to expensive investments in distribution infrastructure. If the utilities had the time and resources to do all of that, they can respond to OCA 3-7.

IV. Conclusion

The OCA regrets the ugly turn this proceeding has taken in recent days, as reflected by utility efforts to resist our office's legitimate discovery requests. We do not begrudge PSNH, Granite State or UES their right to ask the Commission not to move in the direction of geo-targeted energy efficiency measures and non-wires alternatives. But they are not merely asking; they are attempting to deploy sharp pleading techniques in an effort to thwart even preliminary efforts to develop this issue so that the Commission might consider it fully and fairly. The "abbreviated" proceeding on which we are now embarked, and the spirit of the settlement

[4] According to PSNH, if the OCA succeeded in obtaining the draft version of PSNH's marginal cost of service study (as it has requested in one of the data requests at issue in the First OCA Motion to Compel), there would be "no reciprocal obligation" of the OCA to turn over draft documents in light of RSA 91-A;5, IX (exempting from public disclosure "preliminary drafts, notes, and memoranda and other documents not in their final form and not disclosed, circulated, or available to a quorum or a majority of the members of a public body"). *See* PSNH Objection to Motion to Compel Data Responses at 9 n. 11. What this argument ignores is the distinction between public disclosure of government records under RSA 91-A and disclosure in discovery under the Commission's procedural rules. As PSNH is well aware, the Commission routinely requires the disclosure in discovery, subject as necessary to a protective order, of material that would be exempt from public disclosure under RSA 91-A.

agreements the utilities are invoking so aggressively here, counsel in favor of the very cooperation and collaboration that the utilities are conspicuously and pointedly eschewing by picking this particular discovery fight with the Office of the Consumer Advocate. The Commission should not allow the utilities to get away with it.

WHEREFORE, the OCA respectfully request that this honorable Commission:

A. Grant the within motion to compel discovery and direct Public Service Company of New Hampshire, Granite State Electric Company and Unitil Energy Services, Inc. to provide a complete responses to OCA Data Request 3-7; and

B. Grant any other such relief as it deems appropriate.

Sincerely,

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October 31, 2018

Certificate of Service

I hereby certify that a copy of this Motion was provided via electronic mail to the individuals included on the Commission's service list for this docket.

D. Maurice Kreis