

THE STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

Docket No. DE 12-097

Electric Utility Customers

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

Public Service Company of New Hampshire's
Motion to Compel
RESA to Respond to Data Requests

August 24, 2012

Pursuant to N.H. Code Admin. Rules Puc § 203.07(e) and 203.09(i), Public Service Company of New Hampshire (“PSNH” or the “Company”) hereby moves the New Hampshire Public Utilities Commission (the “Commission”) to compel the Retail Energy Supply Association (“RESA”) to respond to PSNH data requests 1-18, 1-19, 1-21, 1-22, 1-25, 1-27, 1-32, 1-33, 1-35, 1-37, 1-39, 1-40, 1-41, 1-42, 1-44, 1-45, 1-50, 1-51, 1-54, 1-55, 1-59, and 1-71.

In support of this Motion, PSNH states as follows:

1. 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.

2. On July 27, 2012, pursuant to the procedural schedule set forth in the Prehearing Conference Order, Order No. 25,389, PSNH submitted data requests to RESA. *See*, Appendix A, Attachment 1, ¶37.¹

3. On August 6, 2012, RESA submitted objections to PSNH's questions (copy attached as Appendix B, ¶77). On August 10, 2012, RESA submitted responses to PSNH's data requests (copy of responses relevant to this motion are attached as Appendix C, ¶102). In this later document RESA purportedly "responded" to twenty of its previous objections, with the caveat "notwithstanding and without waiving RESA's objections, RESA responds as follows:"² In accordance with N.H. Code of Admin. Rule Puc 203.09(i)(4), PSNH has made a good faith effort to informally resolve the dispute regarding the questions objected to by RESA. *See* Appendix A, ¶26.

4. It is well established that "New Hampshire Law favors discovery."³ The standard for discovery in Commission proceedings is broad and extends to information that is relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence.⁴ The Commission will typically deny discovery requests "only when [it] can perceive of no circumstance in which the requested data will be relevant."⁵ A party in a legal proceeding in New Hampshire is entitled to "be fully informed and have access to all evidence favorable to his

¹ ¶# refers to the Bates sequential page number required by Rule Puc 203.04(a)(3).

² PSNH notes that although RESA purports to have provided qualified responses to certain questions, eight of those responses include a variation of "RESA cannot answer this question." The Company submits that an answer claiming that an answer cannot be provided is not really an answer at all.

³ *City of Nashua*, 91 NH PUC 452, 454 (2006).

⁴ *Re Investigation into Whether Certain Calls are Local*, 86 NH PUC 167, 168 (2001).

⁵ *Re Pub. Serv. Co. of N.H.*, 86 NH PUC 730, 730-31 (2001); *Re Lower Bartlett Water Precinct*, 85 NH PUC 371, 372 (2000).

[or her] side of the issue. *This is true whether the issue is one which has been raised by him or his opponent, and whether the evidence is in the possession of his opponent or someone else.*”⁶

5. RESA objected to 24 of PSNH’s data requests. Of those requests, certain of RESA’s objections generally revolve around the concept that RESA does not have the requested information “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” or “that it would be unduly burdensome to compile the information requested.” These questions include numbers 18, 19, 21, 22, 25, 27, 32, 55, 59, and 71 (the “Member Objection Questions”).

6. Each of the ten Member Objection Questions is intended to elicit information relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence.⁷ Also, as recently cited in Docket No. DE 11-250, *Public Service Co. of New Hampshire*, Order No. 25,398 (Aug. 7, 2012):

In the context of civil litigation, New Hampshire law favors liberal discovery, *see, e.g., Yancey v. Yancey*, 119 NH 197, 198 (1979), and discovery is regarded as “an important procedure ‘for probing in advance of trial the adversary’s claims and his possession or knowledge of information pertaining to the controversy between the parties.’” *Johnston v. Lynch*, 133 NH 79, 94 (1990) (citing *Hartford Accident etc., Co. v. Cutter*, 108 NH 112, 113 (1967)). Consistent with Superior Court Rule 35(b) regarding the scope of discovery, we require parties to show that the information being sought in discovery is relevant to the proceeding or is reasonably calculated to lead to the discovery of admissible evidence.

7. PSNH disputes the validity as a ground for objecting to a relevant discovery question RESA’s claims that the information requested is somehow “imprudent for RESA to gather . . . from its member companies because it is protected from disclosure among members by law and or/agreement respecting antitrust principles, [or] that it would be unduly burdensome to compile

⁶ *Scontas v. Citizens Ins. Co.*, 109 N.H. 386, 388 (1969) (emphasis added).

⁷ *See Investigation into Whether Certain Calls are Local*, Order 23,658 (2001) at 5.

the information requested... .” RESA is the party that asked for this docket to be established;⁸ it further asked to become a Party in this proceeding.⁹

8. In its May 24, 2012 “Petition to Intervene,” RESA stated that its “participation would be in the interests of justice,” (para.6) because “RESA members are active participants in the retail competitive markets for electricity, including the New Hampshire retail electric market” (para. 6) and “RESA's participation as a party in this docket conserves resources for the Commission and other participants that might otherwise have to respond to participation by multiple individual RESA member companies seeking to protect their own interests” (para. 7). RESA cannot gain entry as an intervenor in this proceeding based on an allegation that such intervention would be more efficient for the Commission and other parties than having multiple individual RESA member companies participate, and then refuse to respond to relevant questions because its individual members are not participating. If RESA has legal prohibitions on fulfilling its obligations as a full Party intervenor - - such as fully and completely responding to discovery - - it should reconsider its intervenor status in this proceeding, not hide behind tenuous objections.

9. The issue of RESA using its status as an organization as a shield against responding to discovery questions regarding information in the possession of its member is not new. In Massachusetts Department of Public Utilities Docket 07-64, RESA interposed similar objections to discovery questions received by it. The Hearing Officer’s Ruling on RESA’s objections noted:

RESA objects on the basis that the information requests are overly burdensome, and would force its individual member companies, who are not parties to this proceeding, to

⁸ See *Electric and Gas Utility Customers*, Order No. 25,389, *1 (July 3, 2012) (“On April 16, 2012, the Retail Energy Supply Association (RESA) filed a letter requesting that the Commission open a generic proceeding to investigate purchase of receivables . . .”).

⁹ See Order No. 25,389, *2 (“Petitions to intervene were timely filed before the prehearing conference by . . . RESA . . .”).

make unreasonable investigations. I find that these arguments are without merit.

Department precedent states that the costly or time-consuming nature of complying with a discovery request would not ordinarily be a sufficient reason to avoid discovery where the requested material is relevant and necessary to the discovery of evidence. *Riverside Steam & Electric Company, Inc.*, D.P.U. 88-123, at 10 (Hearing Officer Ruling on Motion to Compel) (December 21, 1988), *citing Kozlowski v. Sears, Roebuck & Company*, 73 F.R.D. 73, 76 (D. Mass. 1976). **As a trade association, if RESA chooses to intervene as a full party in an adjudication, and present testimony and argument which represent the consensus viewpoint of its member companies, it incurs the corresponding obligation to respond to information requests that are reasonably calculated to lead to the discovery of admissible evidence, even if the questions seek information about its member companies.**¹⁰

10. More recently the issue of an association having to provide information in the possession of its members was addressed by the U.S. Surface Transportation Board. In STB Docket No. FD 35557, on February 27, 2012, the Presiding Officer found “that individual members (Member Organizations) of the Western Coal Traffic League (WCTL) are subject to discovery in this proceeding... .”¹¹ The Presiding Officer continued:

Here, while the Member Organizations are not parties to the proceeding in their individual capacities, they have a clear interest in the proceeding and will obviously be affected by its outcome. Indeed, the impact of this case on the Member Organizations is neither derivative nor indirect. To the contrary, there is no separate impact of the tariff on the WCTL as an organization — the impact of any ruling on the BNSF tariff is directly upon the Member Organizations that would be shipping under the tariff. Likewise, the effects of the tariff on individual shippers are also known, in the first instance, by the Member Organizations.¹²

¹⁰ DPU Hearing Officer Ruling, December 14, 2007, DPU 07-64 (emphases added) (Attached at Appendix A, Attachment 2, B 50).

¹¹ *Reasonableness of BNSF Railway Co.*, 2012 WL 628774 (S.T.B.) (Attached at Appendix A, Attachment 3, B 64). Similar to RESA, the Member Organizations of the WCTL are all electric utilities or their affiliates. *Id.*, fn 1.

¹² *Id.*

11. The Presiding Officer’s holding included **“The Member Organizations cannot avoid legitimate discovery…”** and **“The Member Organizations will be subject to reasonable discovery.”**¹³

12. The Presiding Officer’s decision was appealed to the full STB. On June 21, 2012, the STB upheld the Presiding Officer’s decision.¹⁴ The STB noted the concerns raised by other trade associations that they will “be forever leery of participating in proceedings before this agency—and many will not do so—if they believe their members will be subject to onerous retaliatory discovery requests... .”¹⁵ **“But the valuable role of trade associations cannot shield their members from reasonably tailored discovery of relevant information in appropriate cases.”**¹⁶

13. The situation in this proceeding has additional reasons why RESA cannot shield its members from discovery. First, the testimony it prefiled comes from two of those members. Indeed, an entire page of RESA’s testimony is dedicated to describing Exelon (“the largest competitive U.S. power generator”) and Direct Energy (“one of North America’s largest energy and energy-related services providers.”) In addition, RESA members TransCanada and Direct Energy requested, and were granted, full party intervenor status in this proceeding; both were required to “to work through RESA for all discovery and Commission proceedings.”¹⁷

14. Based upon the Massachusetts Department of Public Utilities ruling involving RESA, the reasoning in the recent decision of the Surface Transportation Board, the filing of testimony by

¹³ *Id.* (emphases added).

¹⁴ *Reasonableness of BNSF Railway Co.*, 2012 WL 2378133 (S.T.B.) (Attached as Attachment 4).

¹⁵ *Id.*

¹⁶ *Id.* (emphasis added).

¹⁷ *See* Order No. 25,389, *8 and fn. 3.

RESA from two of its member companies, and the direct intervention of individual RESA members, PSNH disputes RESA's objections to the ten Member Objection Questions and requests an order compelling RESA to provide responsive answers to those questions.

15. Furthermore, a detailed review of the ten Member Objection Questions also indicates that the information sought is within the scope of this proceeding; clearly falls within New Hampshire's liberal discovery standard; and pertains to the controversy at hand.¹⁸

16. In Question 1-18 PSNH asked:

Are any of RESA's members regulated utilities, owned regulated utilities, or have corporate affiliates that are regulated utilities?

a) If so, please list such members and list each of their associated regulated utility entities, and the states where such regulated utilities operate.

b) If so, do any of those associated regulated utility entities have Purchase of Receivables, Customer Referral, or Electronic Interface programs similar to those discussed in RESA's testimony? List all such utilities and the similar programs each has, if any.

c) For those associated regulated utility entities that have Purchase of Receivable programs, please provide a listing of the discount rate for each customer class that each utility presently charges.

RESA responded to PSNH 1-18 as follows:

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 would be unduly burdensome to compile the information requested, that the information may be more readily available from a more convenient and less burdensome source, namely the applicable electric distribution utilities or from a publicly available source, and that it is irrelevant to this proceeding and not reasonably calculated to lead to the discovery of information that would be admissible in this proceeding.

17. This explanation is contrary to the stance that RESA has set forth from the inception of this docket. First, this docket was initiated in response to RESA's April 16, 2012, letter

¹⁸ In an effort to minimize redundancy, all of the data requests and responses are not repeated in their entirety. The full text of data requests and responses relevant to this motion is available in Appendix B, § 77. The RESA objections referred to herein are taken from RESA's August 6th submission.

requesting that the Commission open a generic proceeding and conduct an investigation into purchase of receivables, customer referral, electronic interface programs and other retail electric market enhancements as soon as possible.¹⁹ Further, in its May 24, 2012, “Petition to Intervene,” RESA stated that its “participation would be in the interests of justice,” (para.6) because “RESA members are active participants in the retail competitive markets for electricity, including the New Hampshire retail electric market” (para. 6) and “RESA's participation as a party in this docket conserves resources for the Commission and other participants that might otherwise have to respond to participation by multiple individual RESA member companies seeking to protect their own interests” (para. 7). In its Petition, RESA also expressly “reserves the right to fully participate in this docket, including through motion practice, discovery, pre-filed and live testimony, direct and cross-examination and briefs.” (para. 8). Despite RESA’s reservation of the “right” to fully participate in this docket – including discovery – RESA is seemingly refusing to fully adhere to its obligation under Rule Puc 203.09 to respond to discovery requests.

18. In Question 1-19, PSNH asked, “[h]ave any of the affiliates of your companies ever taken a position on Purchase of Receivables in any other jurisdiction? If so, please provide a summary of those positions.” RESA responded to PSNH 1-19 as follows:

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 unduly burdensome to compile the information requested, that the information may be more readily available from a more convenient and less burdensome source, namely the applicable electric distribution utilities or from a publicly available source, and that it is irrelevant to this proceeding and not reasonably calculated to lead to the discovery of information that would be admissible in this proceeding.

¹⁹ Order of Notice, DE 12-097, May 3, 2012.

19. RESA’s argument is unpersuasive. In its testimony, RESA explicitly claims that it “represents the interests of a broad and diverse group of energy suppliers who share the common vision that competitive energy markets deliver a more efficient, customer-oriented outcome than the regulated utility structure.”²⁰ RESA goes on to state that its conclusion that “market enhancements are needed in New Hampshire” is “[b]ased on RESA member experience in numerous other jurisdictions.”²¹ PSNH asked the question in an effort to determine if any of RESA’s affiliates had additional views about the purchase of receivables program and to retrieve more information about the members’ experiences in other jurisdictions. For RESA to now claim that the information is not in RESA’s possession nor likely to lead to the discovery of admissible information is unpersuasive as the question is based on a premise asserted by RESA.

20. In Question 1-21, PSNH asked, “[w]hich of RESA’s members sell electricity to retail electric customers in New Hampshire?” RESA responded to PSNH 1-21 as follows:

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, that it would be unduly burdensome to compile the information requested, that the information may be more readily available from a more convenient and less burdensome source, namely the applicable electric distribution utilities or from a publicly available source, and that it is irrelevant to this proceeding and not reasonably calculated to lead to the discovery of information that would be admissible in this proceeding.

21. In its testimony, RESA explicitly states that its “members currently serve residential, commercial and industrial (“C&I”) and institutional customers in New Hampshire and other jurisdictions in North America that have enacted retail choice.”²² Further RESA testified that “medium and large commercial and industrial customers in New Hampshire have enjoyed the

²⁰ Direct Testimony Daniel Allegritti, Marc Hanks, and Christopher Kallaher, pg. 5, lines 22-24.

²¹ *Id.*, pg. 7, lines 8-10.

²² *Id.*, pg. 6, lines 2-4.

benefits of a robust competitive market for some time,”²³ Disclosure of the information sought in Question 1-21 will provide PSNH with the opportunity to determine RESA’s understanding of the intricacies of the New Hampshire market, as well as the necessity of implementing any new measures to aid the competitive market. Further, the question is based on a premise asserted by RESA.

22. In Question 1-22, PSNH asked, “[f]or those RESA members that do sell electricity to retail electric customers in New Hampshire, please provide a listing by customer class (residential, commercial, industrial, streetlighting) that each member has served by month from 2010 to present.” RESA responded to PSNH 1-22 as follows:

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 would be unduly burdensome to compile the information requested, that it is irrelevant to this proceeding and not reasonably calculated to lead to the discovery of information that would be admissible in this proceeding, and that it is seeking commercial or financial information that is protected under RSA 91-A:5.

23. As indicated above, in its testimony, RESA explicitly states that its “members currently serve residential, commercial and industrial (“C&I”) and institutional customers in New Hampshire and other jurisdictions in North America that have enacted retail choice.”²⁴ Further RESA testified that “medium and large commercial and industrial customers in New Hampshire have enjoyed the benefits of a robust competitive market for some time,”²⁵ The information sought in question 1-22 will determine if a purchase of receivables program is even necessary. RESA’s argument that the information is protected under RSA 91-A:5 is also unpersuasive.

²³ *Id.*, pg. 7, lines 6-7.

²⁴ *Id.*, pg. 6, lines 2-4.

²⁵ *Id.*, pg. 7, lines 6-7.

RSA 91-A:5, provides an exception which limits a citizen’s “right to inspect all public records in the possession of the Commission.”²⁶ This statute does not, however, provide RESA with a viable objection for supplying a response.²⁷ As the request will likely lead to admissible evidence the Commission should compel RESA to respond. Should the Commission determine that this or any other information sought by PSNH be subject to protective treatment under RSA 91-A, PSNH is willing to enter into a standard non-disclosure agreement.

24. Question 1-25 reads, “[p]age 6, lines 14-15 of RESA’s testimony states, ‘the residential and small commercial customer migration statistics in each of the electric distribution utilities service territories in particular are concerning.’” Subsection c of the question asked RESA to “[p]lease list each RESA member that is actively soliciting residential and small commercial customers in each of the electric distribution utilities’ service territories.” Subsection d asked, “[f]or those RESA members listed in response to subsection c, please provide details of each member’s active solicitation program.”

25. RESA responded to PSNH 1-25 as follows:

Objection: RESA objects to paragraphs c. and d. of the request on the basis that it seeks information which is not in the possession, custody or control of RESA, that it would be unduly burdensome to compile the information requested, that it is irrelevant to this proceeding and not reasonably calculated to lead to the discovery of information that would be admissible in this proceeding, and that it is seeking commercial or financial information that is protected under RSA 91-A:5, and that the information may be more readily available from a more convenient and less burdensome source, namely the applicable electric distribution utilities or from a publicly available source like the NH Commission.

26. RESA’s objection is inadequate. A response to Question 1-25 would provide insight into whether RESA’s members are making any attempt to solicit residential or small commercial

²⁶ *Re National Grid USA et al.*, DG 11-040, Order No. 25,370 (May 30, 2012).

²⁷ *See* RSA 91-A:5, IV.

customers, and if so, the methods of solicitation used by competitive suppliers, to assess if a Purchase of Receivables program is in fact needed “to facilitate robust and sustainable competition.”²⁸

27. Question 1-27 reads, “[p]age 7, lines 6-8 of RESA’s testimony states, ‘While medium and large commercial and industrial customer[s] in New Hampshire have enjoyed the benefits of a robust competitive market for some time, the same cannot be said about the residential and small commercial market segments.’ Please identify which RESA members, if any, have actively marketed to the residential and small commercial market segments, the time(s) when such marketing activities took place, and describe those marketing activities.”

28. RESA responded to PSNH 1-27 as follows:

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, that the information can be obtained from a publicly available source, 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.

29. Similar to the response in Question 1-25, this request would allow PSNH and the Commission to determine if a purchase of receivables program is a necessary or proper solution or if the root cause lies with the lack of marketing efforts by the competitive suppliers.

30. Question 1-32 states:

On page 7, lines 19-20, RESA’s testimony refers to RSA 374-F:3, VI, saying that the NH law requires that restructuring be implemented in a manner that benefits all consumers equitably and not one customer class to the detriment of another. For those RESA members that serve retail customers in New Hampshire, do each of them charge the same energy cost to all customer classes? If not, for each such RESA member serving retail customers in New Hampshire, please list the following four customer classes in order of increasing cost of energy charged: industrial, commercial, residential, and streetlighting.

31. RESA responded to PSNH 1-32 as follows:

²⁸ Direct Testimony Daniel Allegretti, Marc Hanks, and Christopher Kallaher, pg. 7, line 10.

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 is argumentative, that it would be unduly burdensome to compile the information requested, that it is irrelevant to this proceeding and not reasonably calculated to lead to the discovery of information that would be admissible in this proceeding, and on the basis that it is seeking commercial or financial information that is protected under RSA 91-A:5.

32. In RESA's testimony, it explicitly states that the "[a]doption of the market enhancements being recommended here will greatly assist in bringing those benefits to the small customers, thus ensuring more equitable sharing of the benefits of the market and compliance with the restructuring law."²⁹ The information sought in Question 1-32 will provide admissible information pertaining to the effects and alleged benefits of the purchase of receivables program, customer referral, and electronic interfacing. Also, the request is based on a premise asserted by RESA.

33. Question 1-55 provides:

On page 11, line 9, RESA's testimony asks the question, "Will the EDC be financially harmed by POR?" The other side of that question is "Will competitive suppliers benefit from POR?"

- a. What is the average profit per month for [sic] that a RESA-member competitive supplier receives from serving a residential customer?
- b. What is the average rate of return on equity (or the overall average rate of return) by a RESA-member competitive supplier company? If average rate of return for RESA-member companies is unavailable, what is the average rate of return for the companies for whom the witnesses are employed?
- c. Please provide all documents, reports, studies supporting this response.

RESA responded to PSNH 1-55 as follows:

Objection: RESA objects to the request on the basis that it is argumentative, 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 would be unduly burdensome to compile the information requested, that it is irrelevant to this proceeding and not

²⁹ *Id.*, pg. 7, line 24 & pg. 8, lines 1-2.

reasonably calculated to lead to the discovery of information that would be admissible in this proceeding, and on the basis that it is seeking commercial or financial information that is protected under RSA 91-A:5.

34. In Order No. 25,389, the Commission determined that the scope “of this proceeding [would] include an examination of the costs and benefits of purchase of receivables”³⁰ Disclosure of the requested information will provide admissible information regarding the benefits received by competitive suppliers. This information will provide guidance into how a program would be structured for New Hampshire, and if such a program is actually warranted. Further, RESA’s argument that this information is “not in the possession, custody or control of RESA” is unpersuasive. In Order No. 25,389, the Commission, granted Direct Energy intervenor status “subject to the condition that Direct Energy be required to work through RESA for all discovery and Commission proceedings.”³¹ As such, Direct Energy should be obligated to disclose the requested information.

35. PSNH Question 1-59 pertains to the costs and impacts of a customer referral program.

RESA responded to PSNH 1-59 as follows:

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.

36. As noted in paragraph 34, the Commission determined that the scope “of this proceeding [would] include an examination of the costs and benefits of purchase of receivables”³² Disclosure of the requested information will provide admissible information directly pertaining

³⁰ Order No. 25,389, *7.

³¹ Order No. 25,389, *8.

³² Order No. 25,389, *7.

to the implementation, structure, and costs and benefits associated with those proposed enhancements. Given RESA and its members' experience in New Hampshire and other jurisdictions, their responses will likely lead to admissible evidence.³³

37. PSNH Question 1-71 pertains to effects of “enhancing access to customer information.”

RESA responded to PSNH 1-71 as follows:

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.

38. RESA has positioned itself as being a source of information pertaining to certain “retail market enhancements.”³⁴ The information requested in Question 1-71 will provide admissible information directly pertaining to the implementation, structure, and costs and benefits associated with those proposed enhancements. Given RESA and its members' experience in New Hampshire and in other jurisdictions, their responses will likely lead to admissible evidence.³⁵

39. RESA objected to PSNH Question 1-33, which reads, “Your testimony states that your proposed market enhancements would accomplish the purpose of RSA 374-F:1, I. How will adoption of your proposals benefit customers who choose to purchase energy service from PSNH?” RESA responded that “RESA objects to the request on the basis that it is asking for speculation, that it is argumentative, and that it is based on a faulty premise.” RESA testimony

³³ See Direct Testimony Daniel Allegretti, Marc Hanks, and Christopher Kallaher, pg. 7, lines 8-12.

³⁴ Direct Testimony Daniel Allegretti, Marc Hanks, and Christopher Kallaher, pg. 6, lines 2-4 (“members currently serve residential, commercial and industrial (“C&I”) and institutional customers in New Hampshire and other jurisdictions in North America that have enacted retail choice.”).

³⁵ See *Id.*, pg. 7, lines 8-12.

explicitly provides that “[o]ne of the stated purposes of the NH restructuring law was to reduce costs for *all* consumers by harnessing the power of competitive markets . . . [and c]learly the proposed market enhancements would help to accomplish this purpose.”³⁶ PSNH sought information regarding how RESA’s proposed market enhancements would affect customers who choose to purchase energy service from PSNH. The information requested - - impacts on energy service customers - - is no more speculative than the alleged benefits to customers who choose to take energy from competitive suppliers which is the subject of RESA’s testimony. The question is neither argumentative nor is it based on a faulty premise. It seeks information that is directly relevant to the subject of this proceeding as set forth in the Order of Notice (“comment from utilities and interested parties regarding the benefits and customer impacts of such programs, including the impact on customers who remain on supply offered by the applicable distribution utility”) and adopted in the Prehearing Conference Order. PSNH requests that the Commission compel RESA to respond to this question.

40. RESA objected to PSNH Question 1-35, which addresses RESA’s testimony concerning an example of how a purchase of receivables program would work. In Question 1-35, PSNH asked questions based on the example contained in RESA’s testimony. RESA objected to the questions on the basis “that it [sic] asking for speculation, that it is argumentative, and that it is based on a faulty premise.” The question is neither speculative nor argumentative, and it is a hypothetical based upon the premise contained in RESA’s testimony. The question is clearly within the scope of this proceeding, and the information requested goes directly to the issue of “the benefits and impacts of such programs.” PSNH requests that RESA respond to this question.

³⁶ *Id.*, pg. 7, lines 17-19 (emphasis added) (internal citation omitted).

41. RESA objected to PSNH Question 1-37, which addresses RESA's testimony concerning the difficulty and expense to suppliers of conducting credit checks and billing. RESA objected to the questions on the basis "that it is argumentative, that it asks for speculation, and that it is irrelevant to this proceeding and not reasonably calculated to lead to the discovery of information that would be admissible in this proceeding." The question is neither argumentative nor speculative; it is based upon matters contained in RESA's testimony. The question is clearly within the scope of this proceeding, and the information requested goes directly to the issue of "the benefits and impacts of such programs." PSNH requests that the Commission compel RESA to respond to this question.

42. RESA objected to PSNH Question 1-39, which asked whether the Commission's regulations allow the state's regulated electric utilities to disconnect customers for failure to pay amounts owed to a competitive supplier. RESA also objected to PSNH Question 1-40, which asked a question that was related to the subject of Question 1-39, "Are the state's utilities always able to disconnect a customer for nonpayment?"

43. RESA objected to these questions on the basis that "the information may be more readily available from a more convenient and less burdensome source, namely the applicable electric distribution utilities or from a publicly available source like the NH Commission, that it is seeking information that is easily available to PSNH and that it is asking RESA to do legal research and to state a legal conclusion."

44. RESA's testimony at pages 8 and 9 raises and discusses the issue of the ability of electric distribution companies to disconnect customers for nonpayment. In fact, the very question posed by PSNH in question 39 is encompassed in the question at the bottom of page 8 of RESA's testimony which asked, "What options does the local EDC have under a POR program should a

customer of a competitive supplier fail to pay the charges for competitive commodity supply service?” RESA’s testimony in response to this question is “In the event a customer of a competitive supplier does not pay charges owed for commodity supply service provided by the customer’s supplier, the EDC would have the same recourse it has where the utility is the provider of default service to the customer, i.e. assessment of late fees and disconnection of service.” PSNH’s questions (“Do the Commission’s regulations allow the state’s regulated electric utilities to disconnect customers for failure to pay amounts owed to a competitive supplier?” and “Are the state’s utilities always able to disconnect a customer for nonpayment?”) go directly to this testimony, and require either a “Yes” or “No” answer. It seeks no more of a legal conclusion than what RESA has already included in its testimony. RESA’s sixty-seven word objections to these “Yes” or “No” questions belies the objections’ claims that a response would be burdensome. PSNH requests that the Commission compel RESA to respond to these questions.

45. RESA objected to PSNH question 41 which inquired about moratorium periods when the state’s utilities may not be allowed to disconnect customers for non-payment. This question also relates to RESA’s testimony on pages 8 and 9 cited above. The information requested is directly relevant to RESA’s testimony, and responsive to this docket’s scope concerning “the benefits and customer impacts of such programs” on customers. PSNH requests that the Commission compel RESA to respond to this question.

46. RESA objected to PSNH question 42, which asked whether “implementation of a POR program provide[s] opportunities for “gaming” by competitive suppliers.” RESA objected to this question on the grounds that “the question is vague and overbroad and it uses an undefined term, ‘gaming.’” PSNH believes that the meaning of the term “gaming” as used in the context of

this question is understood by RESA. RESA used this term in its “Petition of Retail Energy Supply Association for a Declaratory Ruling” filed with the Connecticut Department of Public Utility Control on May 29, 2007, which the DPUC docketed as its Docket No. 07-05-41. In that Petition, RESA requested waiver of a standard service provision which was intended in part “to prevent ‘gaming’ by suppliers.” RESA Petition to DPUC at 2. The Petition goes on to discuss the potential “gaming” problem. Moreover, the concept of “gaming” has been a topic in myriad utility regulatory proceedings where RESA participated as a party, including, *inter alia*:

- *Petition of NSTAR Electric*, Massachusetts DTE Docket 05-84 (2006) (“RESA argues that in order to accept the proposed tariff changes, the Department should require NSTAR Electric to present evidence that (1) a pervasive gaming problem exists...” and “RESA contends that, rather than ‘gaming,’ frequent switching results from customers making informed decisions about the management of their energy costs - and that this is the ‘hallmark of a robust and well-functioning’ market.”)
- *Illinois Commerce Comm’n On Its Own Motion*, Docket 09-0592 (2011) (“Because this provision lacks details, RESA and BlueStar both believed that the potential for gaming is high....”)
- *Petition of PPL Electric Utilities Corporation For Approval of a Competitive Bridge Plan*, Pennsylvania PUC Docket No. P-00062227 (2007) (“The ALJ found that neither FES nor RESA, *et al.* established on the record that gaming will not occur....”).

It is somewhat disingenuous for RESA to object that it cannot respond to a question regarding “gaming” because that term is vague, undefined or overbroad. PSNH urges the Commission to compel RESA respond to this question.

47. RESA objected to PSNH question 44. This question requests information from RESA regarding the ability of competitive suppliers to mitigate the problem of unpaid or delinquent bills by requiring the payment of deposits by customers. PSNH also asked whether a two-month deposit would “be sufficient to eliminate ‘the credit risk associated with payment loss’ discussed on page 9, line 197” of RESA’s testimony.

48. RESA objected to this question on the basis that “the information may be more readily available from a more convenient and less burdensome source, namely the applicable electric distribution utilities or from a publicly available source like the NH Commission, that it is seeking information that is easily available to PSNH and that it is asking RESA to do legal research and to state a legal conclusion.”

49. The Commission ruled in its Prehearing Conference Order that this proceeding would “include an examination of the costs and benefits of purchase of receivables...”³⁷ If the underlying issue facing competitive suppliers of uncollected or delinquent bills could be mitigated via the use of customer deposits, such information would be material and relevant to this proceeding. RESA’s notion that the state’s electric distribution companies or the NHPUC could respond to whether a two month deposit requirement would eliminate “the credit risk associated with payment loss” is curious. Obviously, PSNH believes such a deposit would indeed be sufficient to eliminate that risk - - but the underlying statement appears in RESA’s testimony, and PSNH requests that the Commission compel RESA to respond to question 44.

50. PSNH’s question 45 asked:

If a POR program was instituted, would such a program result in the payment of all bills by all customers?

- a. With a POR program in place would there continue to be payment loss to suppliers or utilities as a result of uncollectible bills?
- b. If there will continue to be payment loss as a result of uncollectible bills, who ultimately bears the costs of such uncollectible bills?
- c. Does RESA agree that a POR program syndicates the risk of loss across all customers?

51. RESA objected to this question, as follows: “RESA objects to the request on the basis that the question is vague and overbroad and it uses undefined terms; it is unclear what ‘payment

³⁷ Order No. 25,389, *7.

of all bills by all customers' means." PSNH felt that the question referring to "payment of all bills by all customers" would be understood in the context of this proceeding and RESA's testimony. However, in the letter attached as Appendix A, PSNH clarified this question to read "If a POR program was instituted would such a program result in the payment of all bills rendered by the state's electric distribution companies which include charges for energy service provided by competitive suppliers by all customers receiving such bills?" Despite that clarification, RESA has not withdrawn its objection. PSNH requests that the Commission compel RESA to respond to question 45.

52. RESA objected to PSNH question 50. This question requests information regarding RESA's testimony that "by implementation of a POR program 'Customers take advantage of existing rate-base resources, thereby avoiding duplicative costs'"; remarking on the benefits of "maximiz[ing]the utilization of the existing rate-based utility resources"; and further remarking on "the benefits of 'greatly reducing duplicative administrative and cash management functions.'" The specific questions asked were:

- a. Do competitive suppliers incur costs to obtain the electric energy, capacity, and other products necessary to supply their retail customers?
- b. If the answer to subpart a is in the affirmative, aren't those costs duplicative of services also performed by the state's utilities?
- c. Aren't all services and administrative costs incurred by competitive suppliers duplicative of similar services and costs of the state's utilities? If, the answer to this question is not in the affirmative, please explain in detail what services performed and costs incurred by competitive suppliers are not duplicative.
- d. Would RESA characterize its proposal to implement a POR program as an effort to recapture an economy of scope what was lost following restructuring?

53. RESA objected on the basis that the question "is argumentative and that it is seeking information that is irrelevant to this proceeding and not reasonably calculated to lead to the

discovery of information that would be admissible in this proceeding.” The information sought by PSNH is directly related to the testimony provided by RESA, and is responsive to the issue in this proceeding. Therefore, PSNH requests that the Commission compel RESA to respond to this question.

54. RESA objected to PSNH question 51, which, referencing RESA's testimony referring to “lower prices currently offered by retail suppliers” asked, “Can RESA guarantee that prices offered by competitive retail suppliers will always be lower than standard offer (default energy service) provided by each of the state's utilities?” RESA objected on the basis that the question “calls for speculation and predictions about future prices.” PSNH’s question did not ask will competitive suppliers prices always be less than standard offer prices; the question was can RESA guarantee that they will always be less than standard offer prices. In light of RESA’s objection that such a guarantee would require speculation and predictions about future prices, it appears that RESA is capable of responding to the question asked - - with a response in the negative. Hence, PSNH requests that the Commission compel RESA to respond to question 51.

55. RESA objected to PSNH question 54. This question relates to RESA's testimony which states, “a well designed POR program would significantly contribute to the public policy objective to help reduce costs for all consumers by harnessing the power of competitive markets.” Based on this testimony that a POR would significantly contribute to a reduction of costs, PSNH asked whether that testimony amounted to a guarantee that a well-designed POR program will reduce costs for all consumers, with additional subparts relating to customers who remain on standard offer or default service.

56. RESA’s objection to question 54 was, “that it is argumentative, that it would be unduly burdensome to compile the information requested, that it is seeking information that is irrelevant

to this proceeding and not reasonably calculated to lead to the discovery of information that would be admissible in this proceeding, and on the basis that the information may be more readily available from a more convenient and less burdensome source, namely the applicable electric distribution utilities or from a publicly available source.” RESA testified that a purchase of receivables program would reduce costs for all consumers. PSNH asked whether this testimony amounted to a guarantee that a purchase of receivables program would reduce costs for all consumers. That is hardly an argumentative question. If RESA’s testimony means what it says, the answer is straightforward. The questions relating to standard offer customers in states where such “well-designed, non recourse POR programs” have been established would aid in the understanding of whether all customers in such states are benefitted or harmed by implementation of a purchase of receivable program. Therefore, PSNH requests that the Commission compel RESA to respond to this question.

57. RESA came to the Commission asking that it implement programs that are impose significant burdens and costs on the utilities and their customers, yet when asked to produce information about its efforts to affect the markets for customer choice, RESA hides behind legal objections and claims of confidentiality. The Commission should look past these objections and require RESA to share information of its members so that the need for its proposals can be adequately assessed.

58. PSNH requests that RESA provide full, accurate and complete answers as required by Commission rules and precedent. As “active participants in the retail competitive markets for electricity, including the New Hampshire retail electric market,” RESA’s members are in possession of information which is relevant to the proceeding or reasonably calculated to lead to

the discovery of admissible evidence.

WHEREFORE, for the reasons expressed herein, PSNH respectfully requests that the Commission:

- A. Compel RESA to respond to PSNH's Data Requests 1-18, 1-19, 1-21, 1-22, 1-25, 1-27, 1-32, 1-33, 1-35, 1-37, 1-39, 1-40, 1-41, 1-42, 1-44, 1-45, 1-50, 1-51, 1-54, 1-55, 1-59, and 1-71; and
- B. Grant such other and further relief as justice may require.

Respectfully submitted,

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

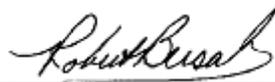
Dated: August 24, 2012

By: 
Robert A. Bersak
Assistant Secretary and Associate General Counsel
Public Service Company of New Hampshire
780 No. Commercial Street
P.O. Box 330
Manchester, NH 03105-0330

(603) 634-3355
bersara@PSNH.com

Certificate of Service

I hereby certify that a copy of this Motion has been served electronically on the persons on the Commission's service list in Docket No. DE 12-097 in accordance with Puc 203.11 this 24th day of August, 2012.



Robert A. Bersak