

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

Electric Distribution Utilities

Development of Alternative Net Metering Tariffs and/or Other Regulatory Mechanisms and
Tariffs for Customer-Generators

Docket No. DE 16-576

Motion *in Limine* for Admission of Certain Exhibits

NOW COMES the Office of the Consumer Advocate (“OCA”), a party in this docket, and seeks a determination *in limine* that certain documentary exhibits to be offered by the OCA be admitted into the record of this proceeding. In support of this Motion the OCA states as follows:

1. This matter is presently scheduled for a week-long merits hearing that commences less than two business days from now, at 9:00 a.m. on Monday, March 23, 2017. Earlier today, the Commission issued a secretarial letter scheduling a telephonic technical session (effectively, a last-minute pre-hearing conference but without a presiding officer) and instructing parties to furnish certain things to the Staff of the Commission by 4:30 p.m. today.
2. Among the items to be furnished today are a “[p]lan for sworn adoption of pre-filed testimony by or for witnesses who will not appear at hearing, either through adoption by another witness or submission of a sworn affidavit.” This is the first notice the parties have received from the Commission suggesting that prefiled testimony by such witnesses will not be admitted unless adopted by another witness or accompanied by an affidavit.
3. The OCA has submitted prefiled written testimony of two witnesses, Lon Huber and Elizabeth Doherty. The OCA does not intend to call either witness at hearing to present

live testimony; Mr. Huber is getting married this weekend and will be out of the country next week on his honeymoon.

4. The OCA is signatory to a settlement agreement into which it has entered with the three electric distribution utilities and certain other parties. Therefore, at hearing, the OCA intends to support the terms of the settlement agreement and does not intend to use next week's hearing to seek approval of either the positions articulated in the testimony of Mr. Huber or Ms. Doherty or the asserted factual bases for those positions. Rather, the OCA wishes to introduce its written prefiled testimony into the record for purposes of demonstrating to the Commission the extent to which the OCA has compromised its initial positions.
5. To the extent the secretarial letter issued earlier today comprises a determination that unsworn prefiled testimony is inadmissible, such a ruling is inconsistent with the applicable section of the Administrative Procedure Act, RSA 541-A:33. Paragraph II of Section 33 explicitly provides that "[t]he rules of evidence shall not apply in adjudicative proceedings." The second sentence of Paragraph II states that "[a]ny oral or documentary evidence may be received," subject to exclusion for being irrelevant, immaterial or unduly repetitious" (emphasis added). Regardless of how labeled, the three documents in question (direct and rebuttal testimony of Mr. Huber; direct testimony of Ms. Doherty) are documentary evidence – and each document is relevant, material and not repetitious for reasons already explained.
6. Paragraph I of RSA 541-A:33 states that "[a]ll testimony of parties and witnesses shall be made under oath or affirmation administered by the presiding officer." Interpreted in context, this language does not render inadmissible prefiled testimony of witnesses who

do not appear and whose statements are thus unsworn. The language merely specifies that when witnesses *do* deliver oral testimony at hearing they must do so under oath or affirmation. To hold otherwise would be to exclude from evidence *any* statements made by persons not present in the hearing room, which would be in direct variance with the statutory language making the Rules of Evidence inapplicable. If the Rules of Evidence applied, a valid hearsay objection could be interposed to many such statements – but by adopting RSA 541-A:33 the Legislature clearly intended a vastly more lenient standard to apply. Automatically applying the requirement of Paragraph I of RSA 541-A:33 to written documents labeled “testimony” inappropriately elevates form over substance.

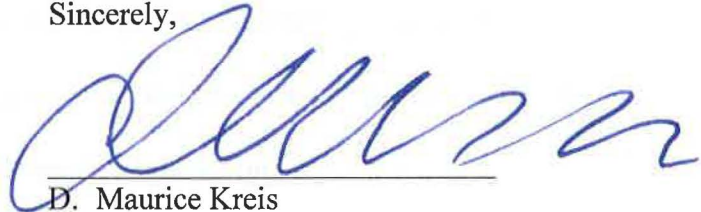
7. To the best of the OCA’s knowledge, no party objects to the admission of the OCA prefiled testimony for the limited purposes described above. The OCA reserves the right to revert to the positions described in its prefiled direct testimony should the Commission not adopt the terms of the settlement agreement to which it is signatory. The appropriate occasion for doing so would be at some future hearing at which the OCA would produce Mr. Huber and Ms. Doherty to adopt their testimony and offer additional testimony by oath or affirmation.
8. Requiring the submission of affidavits in these circumstances – on such late notice and in the wake of the Commission’s Order No. 25,980 (January 24, 2017), declaring this to be “a legislative docket and not an ‘adjudicative proceeding’” within the meaning of the Administrative Procedure Act – would be manifestly unfair and unreasonable. Moreover, it would set a troubling and unwelcome precedent for future proceedings. As the Commission is aware, it is the agency’s longstanding practice to admit prefiled testimony

of absent witnesses when there are no objections. Dispatching that practice for purposes of this proceeding would be a textbook example of how bad cases make bad law.

WHEREFORE, the OCA respectfully request that this honorable Commission:

- A. Determine that the prefiled direct testimony of OCA witnesses Lon Huber and Elizabeth Doherty, and other witnesses who do not intend to appear at the upcoming merits hearing, be admitted as full exhibits, and
- B. Grant any other such relief as it deems appropriate.

Sincerely,

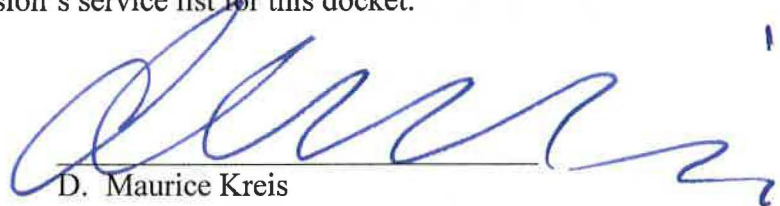


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March 23, 2017

Certificate of Service

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



D. Maurice Kreis