THE STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DE 16-576

ELECTRIC DISTRIBUTION UTILITIES

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

REVISED REQUEST BY ENERGY FREEDOM COALITION OF AMERICA TO AUTHORIZE THE DEPOSITIONS OF JAMES VOYLES AND DAVID HOLT OF THE CONSUMER ENERGY ALLIANCE

Energy Freedom Coalition of America ("EFCA"), by and through its attorneys, Preti Flaherty, Beliveau & Pachios, LLP, petitions the Public Utilities Commission ("Commission") to authorize EFCA to conduct depositions of James Voyles regarding his testimony filed on behalf of Consumer Energy Alliance ("CEA") in the above-captioned matter dated October 21, 2016 and of David Holt, President of CEA, regarding the CEA testimony, the positions taken nationally by CEA on distributed generation, including solar, and net metering; the retention of Borlick Associates, LLC by CEA; and preparation of reports for CEA by Borlick Associates, LLC. This request is made in accordance with Puc Rule 203.09(j). In support of this request, EFCA states as follows:

I. BACKGROUND.

1. This proceeding was initiated by the Commission by Order of Notice dated May 19, 2016. The proceeding was opened pursuant to RSA 362-A:9, XVI, "to develop new alternative net metering tariffs, which may include other regulatory mechanisms and tariffs for customer-generators."

2. CEA petitioned to intervene in this proceeding on June 8, 2016.

3. In its Petition to Intervene, CEA stated that it "is a national non-profit organization that represents almost 300 companies with hundreds of thousands of employees and more than 400,000 individual supporters," that it "represents a host of energy consumers, producers and providers," and that it advocates "sensible policies that advance the use of solar power."

4. On October 24, 2016, in accordance with the procedural schedule established by the Commission, CEA filed the testimony of James Voyles, Esq. In his filed testimony, Mr. Voyles repeatedly (11 of 20 footnotes)[1] cites to a report apparently performed by Borlick Associates, LLC, and attaches such report (the "Borlick Report") to his testimony as though to offer it in evidence. CEA has proffered no witness from Borlick Associates, LLC, or any witness other than Mr. Voyles.

5. Prior to offering testimony as a witness in this proceeding, Mr. Voyles entered his appearance as the attorney for CEA. No other attorney has entered an appearance for CEA; Mr. Voyles has not withdrawn his appearance.

6. Parties filed written data requests directed to Mr. Voyles and CEA on or before November 4, 2016, in accordance with the revised procedural schedule approved by Secretarial Letter dated August 15, 2016. Among the requests directed to Mr. Voyles was a set of questions from EFCA.

7. Mr. Voyles on behalf of CEA provided written responses to the data requests of parties other than EFCA on or before November 14, 2016, in accordance with the then-applicable revised procedural schedule. Mr. Voyles provided responses to the data requests of EFCA on December 2, 2016.

[1] Pre-Filed Testimony of Consumer Energy Alliance, Docket No. DE 16-576 (October 21, 2016) at page 3, footnotes 3, 5 and 6; page 4, footnotes 8, 9 and 10; page 5, footnotes 11, 12 and 13; page 7, footnote 18; and page 8, footnote 20.

8. Mr. Voyles' responses to EFCA data requests were incomplete. Mr. Voyles objected to providing the consulting agreement between CEA and Borlick Associates, LLC, whose report apparently provides much of the basis for Mr. Voyles' testimony, and to any related proposal or scoping documents used for the development of the Borlick Report.[2]

II. WHY EFCA SHOULD BE PERMITTED TO DEPOSE CEA OFFICIALS.

9. As CEA has deliberately positioned itself in the proceeding, it has begun to confuse the record by providing apparently unsupported and inadmissible information and by proffering its counsel of record as the witness testifying to that information. CEA compounded these problems by delaying responses to data requests of EFCA until December 2, 2016. In addition to the delay, CEA refused to answer EFCA's critical question about the origins and development of the Borlick Report.

10. Mr. Voyles has appeared first as attorney of record for CEA, and then as its only witness. This raises the unanswered question of the nature of Mr. Voyles' testimony: is it lay testimony, expert testimony or an attorney's improper oral advocacy? More confusingly, attorney Voyles' pre-filed testimony relies heavily (11 times specifically)[3] on a report (and appends it for apparent admission into evidence) apparently prepared for CEA by persons who do not appear at all as witnesses. This compounds the uncertainty Mr. Voyles has already created by attempting to testify as CEA's attorney about the Borlick Report. In this regard,

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[2] "Question 4: Please provide a copy of the contract and scope or work between CEA and Borlick Associates, and any request for proposal or scoping documents used for the development of the 'Incentivizing Solar Energy: Analysis of U.S. Solar Incentives' report attached to your testimony.

Answer prepared by Attorney Voyles, Counsel, CEA: CEA objects to this question as the contract and other documents requested are confidential agreements between private parties and are unnecessary to this proceeding."

[3] *See* footnote 1, above.

EFCA would seek to discover the goals of CEA in commissioning the Borlick Report and the roles of CEA, Mr. Voyles, and Mr. Holt in guiding or preparing the Borlick Report.

11. EFCA or others could move to strike Mr. Voyles' testimony, but would do so in nearly total darkness about CEA, its intentions, message, and the bases for its message. Adjudication of such a motion likely would require a hearing for the determination of facts. This problem can most appropriately be avoided by permitting EFCA to depose Mr. Voyles and Mr. Holt, both employees of CEA. Both of these CEA employees must be deposed to ensure EFCA can discover the intended nature and scope of CEA's participation in this case. For example, Mr. Voyles might contend he is solely CEA's attorney and assert the attorney-client privilege.

12. By further example, CEA repeatedly has said it supports solar, but its website lists as members a number of prominent opponents of distributed generation, including solar, and net energy metering. CEA obviously has a right to its opinion and to present that opinion to the Commission. Those advocacy rights, however, must be pursued in ways that follow well established rules designed to produce a complete, truth-seeking and accurate record. In this instance, EFCA and other parties have every right to review testimony, once proffered, that is properly sourced, substantiated, and subject to discovery and cross examination as to how CEA's advocated policies would ostensibly "advance the use of solar power."

13. Rather than risking disruption of the procedural schedule, it is most appropriate for the Commission to order depositions of Mr. Voyles and Mr. Holt to achieve access to the necessary information from CEA. The deposition or depositions could take place in Washington, D.C., CEA's apparent place of business. EFCA has acted promptly to request these depositions, especially in light of CEA's unjustified nearly month-long violation of the November 4, 2016 deadline for data responses.

14. Information from the two depositions is necessary for EFCA, and perhaps others, to determine whether and on what basis to file dispositive motions or, alternatively, to conduct meaningful cross examination.[4] The confusion at hand was created by CEA, a sophisticated party well aware of the Commission's rules. Permitting the requested depositions is both just and reasonable and promotes judicial economy, i.e., it avoids wasting the time and resources of the parties and the Commission in formal hearings.

III. APPLICABLE LAW.

15. Puc Rule 203.09(j) provides that:

> The commission shall authorize other forms of discovery, including technical sessions, depositions and any other discovery method permissible in civil judicial proceedings before a state court when such discovery is necessary to enable the parties to acquire evidence admissible in a proceeding.

16. Under Puc 203.09(j), parties do not have an absolute right to conduct depositions. *See, e.g.,* Order No. 25,566 (2013).[5] Unless agreed to by the parties, the use of depositions as a discovery tool must first be authorized by the Commission. *Id.* at 3.

17. The Commission has stated that it will not generally "issue subpoenas to compel deposition testimony unless a party can establish that the Commission's standard discovery

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[4] *See, e.g., Hall v. Clifton Precision*, 150 F.R.D. 525, 528-29, 531 (E.D. Penn. 1993) ("The underlying purpose of a deposition is to find out what a witness saw, heard, or did—what the witness thinks. A deposition is meant to be a question-and-answer conversation between the deposing lawyer and the witness. There is no proper need for the witness's own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers. ... It is the witness—not the lawyer—who is the witness. As an advocate, the lawyer is free to frame those facts in a manner favorable to the client, and also to make favorable and creative arguments of law. But the lawyer is not entitled to be creative with the facts."); *see also*, Cochran et al., ABA Section of Litigation 2012 Annual Conference, *"But the Examination Still Proceeds": A Primer on Surviving the Difficult Deposition*," 5 (2012) ("In short, the deposition—when used properly—is (and was designed to be) the most powerful truthseeking tool in the civil litigator's toolbox. It allows for 'live' questioning and follow up. Fed R. Civ. P. 30(c). The permissible scope is much broader than would be permitted at trial. Fed. R. Civ. P. 26(b)(1) (allowing discovery of relevant, inadmissible information so long as it is "reasonably calculated to lead to the discovery of admissible evidence.").")

[5] PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, Investigation of Scrubber Costs and Cost Recovery, Docket DE 11-250, Order Compelling Deposition ORDER NO. 25,566 (August 27, 2013)("Order No. 25,566").

procedures are inadequate." *Statewide Electric Utility Restructuring Plan*, 82 NH PUC 325, 327 (1997).

18. The Commission has also stated that "to satisfy the 'necessary' standard, the party seeking the deposition must demonstrate a substantial need for the information that is the subject of the deponent's testimony and that the party could not, without undue hardship, obtain the information by other means. Order No. 25,566 (2013) at 3-4.

19. The Commission has previously found that need is demonstrated where relying on traditional written discovery requests are an inadequate means to acquire necessary evidence. *Id.* at 4-5.

20. In these unique circumstances, the current discovery mechanisms are inadequate and the Commission should exercise its discretion[6] to authorize EFCA to take the requested depositions in the interests of establishing an "orderly and systematic presentation of evidence and argument [which] is critical to the evaluation of the interests of all parties involved[]"[7] in this complex case.

21. Through its obfuscation of the role of Mr. Voyles in this proceeding and the evidentiary nature of the Borlick Report, as well as its delayed and inadequate responses to data requests, CEA risks unfairly muddling the record in this complex proceeding. The confusion created by CEA necessitates depositions to clarify the record before hearings so that the Commission can make a reasoned decision based on the systematic presentation of evidence and

[6] "Our rules of practice and procedure could not anticipate every type of situation that could arise at a hearing. No set of rules can anticipate all of the various differences and difficulties that any given case will present. Thus, the rules of practice and procedure contain the requisite discretionary power for the commission to form the procedure for a hearing which will afford due process to all and which will expedite the disposition of the proceeding. It is desirable for our rules to contain discretionary provisions. This allows the commission to individualize the hearing procedure to adequately accommodate and satisfactorily protect the interests, rights, and responsibilities of all parties, including the commission. Our discretion in these matters allows us wide opportunities in the way of permitting effective participation in administrative proceedings." *Re Public Service Company of New Hampshire*, Docket DR 77-49, Order No. 12,803 (June 17, 1977).

[7] *Re Public Service Company of New Hampshire*, Docket DR 77-49, Order No. 12,803 (June 17, 1977).

argument as part of a robust and clear record. In the context of an analogous ratemaking proceeding, the Commission has stated:

> The nature of the rate proceeding before us is essentially complex, involving not only issues of law and legal procedure but also methods of accounting and principles of finance, economics, and engineering. It is a proceeding in which the commission may engage experts to assist it in these complex determinations. It is a proceeding in which the orderly and systematic presentation of evidence and argument is critical to the evaluation of the interests of all parties involved. This is an additional reason to commend these responsibilities to trained persons to represent the various interests before us.

Re Public Service Company of New Hampshire, Docket DR 77-49, Order No. 12,803 (June 17, 1977). This proceeding is similarly complex, involving law and procedure, as well as accounting, finance, economic, and engineering. To deal with the inherent complexity, the Commission likely welcomes the help of "trained" experts to assist in making multifaceted technical determinations. It is imperative that such expertise must be made part of a clear record through an "orderly and systematic presentation of evidence and argument." CEA, however, has potentially jeopardized the orderly and systematic presentation of evidence and argument in this case by proffering its attorney of record as an apparent expert witness, without providing any of the requisite qualifications, and then using that attorney-expert to bootstrap a third party technical report in to the record. As such, CEA has blurred the lines between argument and reliable evidence and already needlessly wasted time and resources. The Commission should authorize EFCA to depose Mr. Voyles and Mr. Holt to clarify the record and ensure that, going forward, issues of attorney-client privilege and unreliable hearsay lead do not lead to further confusion in an already complex case.

IV. THE DEPOSITIONS OF JAMES VOYLES AND DAVID HOLT ARE NECESSARY FOR EFCA TO ACQUIRE EVIDENCE ADMISSIBLE IN THIS PROCEEDING.

22. The pre-filed testimony of Mr. Voyles relies heavily on a report commissioned by CEA and produced by Borlick Associates, LLC, titled "*Incentivizing Solar Energy: An In-Depth Analysis of U.S. Solar Incentives*" (2016) (the "Borlick Report"). Over half of the footnotes in Mr. Voyles testimony cite this 58-page report, which Mr. Voyles also attached to his testimony. The Borlick Report ostensibly "describes and quantifies" solar incentives, specifically quantifying the Net Energy Metering incentive "using a computer model specifically developed for this report."[8] The computer model "performs all of the calculations needed to estimate the 25-year annual streams of incentives and avoided costs, and then discounts them to obtain their respective present values on January 1, 2015."[9] The Borlick Report also purportedly "describes all of the underlying report assumptions, input data, and data sources."[10]

23. New Hampshire Rules of Evidence 701 and 702 govern the admissibility of lay and expert testimony in courts of law. These rules should guide the Commission, although they do not govern the Commission. A lay witness may testify "in the form of opinions or inferences" that "are ... rationally based on the perception of the witness, and ... helpful to a clear understanding of the testimony or the determination of a fact in issue." N. H. R. Evid. 701. An expert witness may testify if "qualified as an expert by knowledge, skill, experience, training, or education" and "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." N.H. R.Ev. 702. The New Hampshire Supreme Court has explained the differences between expert and lay testimony:

[8] Borlick Report, at 18.
[9] Id.
[10] Id.

> Expert testimony involves matters of scientific, mechanical, professional or other like nature, which requires special study, experience, or observation not within the common knowledge of the general public. In contrast, lay testimony must be confined to personal observations which any lay person would be capable of making.

State v. Cochrane, 153 N.H. 420, 422 (2006) (quotations and citations omitted). "If in order to testify a witness must possess some training or expertise that is atypical of the public at large, the witness should be treated as an expert." *State v. Martin*, 142 N.H. 63, 66 (1997).

24. The party offering the expert testimony bears the burden of establishing that testimony or opinion of the expert meets the *Daubert* standard. *See State v. Hammond*, 144 N.H. 401, 406 (1999). The trial court must act as a gatekeeper, ensuring a methodology's reliability before permitting the fact-finder to determine the weight and credibility to be afforded an expert's testimony. *Baker Valley Lumber, Inc. v. Ingersoll-Rand Company*, 148 N.H. 609 (2002) (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)). The *Daubert* standards are essentially codified in RSA 516:29-a.

25. Through the heavy reliance on and attachment of a third-party report, Mr. Voyles appears to be holding himself out as an expert on the substance of that report, attempting to give such report credibility and weight in this proceeding. However, Mr. Voyles has not established his credentials as such an expert. Indeed, Mr. Voyles retains his initial status as the attorney of record for CEA.

26. As demonstrated in his December 2, 2016 response to EFCA's data requests, Mr. Voyles has degrees in psychology (2010), new media business management (2014), and law (2014). Further, his professional experience is primarily as a lawyer, with some limited experience as a teacher of law and of organizational management. Neither his education nor his experience would appear to provide the requisite expertise to offer expert testimony in this proceeding, let alone in the analyses purportedly contained in the Borlick Report.

27. Mr. Voyles provides no evidence that he was involved in the development of the Borlick Report.

28. The information provided by Mr. Voyles in response to written discovery does not demonstrate any prior appearances as an expert witness and does not identify the publication of any academic articles that would support the conclusion that he possesses the requisite expertise to offer expert testimony regarding the reliability of the Borlick Report, including the reliability of its methodology and assumptions, or testimony about the preparation of the report.

29. As a result, EFCA cannot conclude Mr. Voyles is qualified to testify about economics and computer modelling—specifically the computer model created for the Borlick Report which "performs all of the calculations needed to estimate the 25-year annual streams of incentives and avoided costs, and then discounts them to obtain their respective present values on January 1, 2015."[11] Similarly, EFCA cannot conclude Mr. Voyles is qualified to testify about the "underlying report assumptions, input data, and data sources" of the Borlick Report.[12]

30. As noted, Mr. Voyles is also appearing as counsel for CEA in this proceeding. His appearance as counsel and as a witness presents substantial problems under New Hampshire rules. New Hampshire Rule of Professional Conduct 3.7, Lawyer as Witness, states:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
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> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) disqualification of the lawyer would work unreasonable hardship on the client.
>
> (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

[11] Borlick Report, at 18.
[12] Id.

The rationale for such rule is clear: "[c]ombining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client." ABA Model Rule Comment, Rule 3.7, Lawyer as Witness (2004)(included as an official comment to New Hampshire Rule of Professional Conduct 3.7). Further, "[t]he tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness." *Id.*

31. "The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof." *Id.* This rationale supporting a strong presumption against lawyer-witnesses is strongly implicated by Mr. Voyles' unabashed attempt to wear multiple hats in this proceeding.

32. Through the deposition of Mr. Voyles, EFCA will seek to further explore his qualifications as an expert, and his knowledge of and participation in the preparation of the Borlick Report as well as the basis and need for his appearance as both counsel and witness for CEA in this proceeding.

33. Mr. Voyles' qualifications are relevant and admissible regarding the weight, if any, that should be afforded to his testimony by the Commission. Again, authorizing depositions would be a more efficient use of Commission and party resources than conducting a hearing regarding these issues.

34. Mr. Holt serves as President of CEA. As President, Mr. Holt has overall responsibility for the strategic direction and positions of the organization. Mr. Voyles works for

Mr. Holt and is presumably directed by Mr. Holt as to his actions. Mr. Holt is therefore the person likely to have the greatest knowledge of CEA's retention of Borlick Associates, LLC and positions to be advocated in this case. Rather than EFCA solely confronting the issue of Mr. Voyles true role and knowledge during hearings, the far better course is to depose both Mr. Voyles and Mr. Holt, so that EFCA can be certain as to what CEA's positions are.

35. Mr. Holt serves as President of CEA. As President, Mr. Holt has overall responsibility for the strategic direction and positions of the organization. Mr. Voyles works for Mr. Holt and is presumably directed by Mr. Holt as to his actions. Mr. Holt is therefore the person likely to have the greatest knowledge of CEA's retention of Borlick Associates, LLC and positions to be advocated in this case. Rather than EFCA solely confronting the issue of Mr. Voyles true role and knowledge during hearings, the far better course is to depose both Mr. Voyles and Mr. Holt, so that EFCA can be fully to understand what CEA's positions are in this case.

36. Through the deposition of Mr. Holt, EFCA would seek to explore the decision to offer Mr. Voyles as a witness in this proceeding, the involvement of Mr. Holt in the development of the testimony of Mr. Voyles, the scope of the engagement of Borlick Associates, LLC by CEA, the involvement of CEA in the development of the Borlick Report, including its development of assumptions and methodologies, any proposal or scoping documents for the Borlick Report, and the policy goals of CEA as an organization generally and particularly with respect to net energy metering and the encouragement of solar power

37. The situation is directly analogous to the facts presented in Order No. 25,566, in which the witness offered was not the individual with key factual information. In that order, the Commission ordered the deposition of Gary Long, former president of PSNH, on matters

regarding which the proffered witness was not the relevant decision-maker. As president of CEA, Mr. Holt possesses relevant information, the nature of which is described above, that is beyond the knowledge of Mr. Voyles.

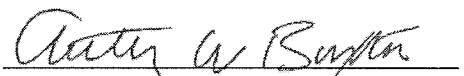
WHEREFORE, Energy Freedom Coalition of America respectfully requests that the Public Utilities Commission:

A. Grant EFCA's Request to Conduct the Depositions of James Voyles and David Holt;

B. Order counsel for EFCA and CEA to arrange promptly a schedule, time and place for the two depositions; and

C. Grant such other and further relief as may be just.

Respectfully submitted,

December 13, 2016 By: 

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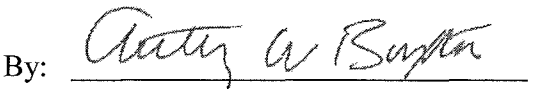
CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of December, 2016, seven copies of the foregoing were hand delivered to the Commission, as well as copies to the Service List as listed on the NHPUC website.

December 13, 2016 By: 

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