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Ms. Debra A. Howland
Executive Director
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, New Hampshire 03301-7319

RE: Docket No. DE 16-693, Public Service Company of New Hampshire
Petition for Approval of Power Purchase Agreement with Hydro Renewable Energy Inc.

Dear Ms. Howland:

In an effort to avoid surprise, I am writing to advise the Commission and, by copy of this letter, other parties and putative parties to the above-referenced proceeding, of certain positions the Office of the Consumer Advocate (OCA) intends to take at the Prehearing Conference to be conducted on Monday, November 7, 2016.

I. Procedural Bifurcation

First and foremost, the OCA intends to request that the Commission reconsider its decision (as set forth in the Order of Notice issued on October 25, 2016) to deviate from the ordinary course of contested administrated cases by making certain threshold legal determinations (after briefing by the parties) prior to discovery, submission of additional pre-filed testimony and the development of a factual record at an evidentiary hearing. According to the Order of Notice, the initial phase will produce a decision on whether the proposed Power Purchase Agreement between petitioner Public Service Company of New Hampshire (PSNH) and Hydro Renewable Energy Inc. (HRE) "is allowed under New Hampshire law." It is only if this initial phase yields an affirmative answer that the Commission will then "open a second phase of the proceeding to examine the appropriate economic, engineering, cost recovery, and other factors" presented by the PSNH proposal.

This, of course, is similar to the approach the Commission followed in Docket No. DE 16-241, in which the Commission ruled in Order No. 25,950 (October 6, 2016) that it was inconsistent with New Hampshire law for PSNH as an electric distribution utility to impose upon retail electric customers the financial obligations associated with 20 years of firm natural gas capacity on a pipeline project being developed by an affiliated entity. The unprecedented nature of such a proposal in legal terms – essentially, to treat an electric utility as if it were a natural gas utility – and the extensive discovery and record development that full consideration of such a plan would have required – made it sensible to address issues of New Hampshire law at the outset.

The instant petition does not present the Commission and the parties with the same challenges. Although the PSNH proposal here has a significantly novel component – the proposed inclusion of the contract’s costs and benefits in PSNH’s nonbypassable Stranded Cost Recovery Charge (SCRC) – in every other respect this appears to be a garden variety wholesale power contract between a distribution utility and a wholesale power producer. Therefore, the process of evaluating the terms of the agreement and, as necessary, developing testimony and cross-examination, is far less formidable than it would have been in Docket No. DE 16-241.

Indeed, the opportunity to conduct discovery, to develop testimony, and potentially to negotiate a settlement agreement with the other parties to the proceeding may have the salutary effect of narrowing or even eliminating the legal disputes this docket raises. This is the central basis of the OCA’s suggestion that the Commission reconsider the approach described in the Order of Notice and, instead, develop a procedural schedule of a more conventional nature.

II. Intervention Requests

The OCA’s interest in an orderly proceeding, in which the Commission can discharge in an efficient and fair manner its RSA 363:17-a role as the arbiter between the interests of PSNH’s shareholders and its customers, prompts the OCA to raise certain concerns about the intervention requests that are pending in this docket. The OCA neither supports nor opposes any of these requests but intends to raise certain concerns about them at the Prehearing Conference.

Wholesale competitors of HRE – specifically, the New England Power Generators Association (NEPGA) and Next Era Energy Resources LLC – seek party status in what they describe as an effort to promote the viability and fairness of New England’s wholesale power markets. These are matters within the jurisdiction of the Federal Energy Regulatory Commission, not the New Hampshire Public Utilities Commission.

Other potential intervenors – specifically, the Office of Energy and Planning (OEP), the New England Ratepayers Association (NERA) and the Conservation Law Foundation (CLF) – assert amorphous interests that may be properly understood as a desire to use this docket as a forum for addressing some of the broader policy questions that admittedly swirl around this particular Power Purchase Agreement. *See* OEP Intervention Petition at 1 (requesting intervenor status because the OEP “has long been an active participant” in matters related to electric restructuring); CLF Petition at 2 (“CLF and its members, including but not limited to members who are [PSNH] customers and members who will be directly affected by the proposed Northern Pass transmission line and its effect on the electric market, have a strong and direct interest in the

outcome of this proceeding *and the various issues it implicates*") (emphasis added); and NERA Petition at 1 ("Our members are individuals and businesses in New Hampshire and the other five New England states who are concerned about the high costs of electricity in the region and its impact on our economy").¹

It is the respectful suggestion of the OCA that the Commission scrutinize these assertions rigorously against the intervention standard set forth in the relevant provisions of the Administrative Procedure Act, RSA 541-A:32. To become an intervenor, a potential party must state "facts" that demonstrate the party has "rights, duties, privileges, immunities or other substantial interests" that may be affected by the proceeding. *Id.* at paragraph I. Alternatively, the Commission has discretionary authority to grant intervenor status when it is "in the interests of justice" to do so. *Id.* at paragraph II.

In this case, the interests of justice suggest that the Commission should, to the fullest extent possible, narrow the battleground here so that the case becomes simply an examination of whether what PSNH is proposing is fair, reasonable and lawful to both the utility's owners and the utility's customers. There are other forums – e.g., the FERC, ISO New England, the New England Power Pool, and the Site Evaluation Committee – and other Commission dockets that are far more appropriate places to air concerns about wholesale markets, transmission projects and the ongoing experiment known as electric industry restructuring.

Admittedly, the Commission seems to suggest otherwise via the cornucopia of legal and policy issues referenced in the Order of Notice. *See* Order of Notice at 2-3 (referencing the policy principles in RSA 374-F, the Federal Power Act, the recent decision in Docket DE 16-241, and the recently approved agreement by which PSNH is divesting the remainder of its generation portfolio, etc.). It has consistently been the Commission's practice to promote due process by casting a wide net in orders of notice so that the public is duly warned of the issues that may be addressed. This, however, does not preclude the Commission from narrowing and refining the issues along the lines suggested in this letter in light of what transpires at the Prehearing Conference. Regardless of how the Commission limns the issues to be resolved in this case, and regardless of the sequence in which the Commission addresses them, the rehearing process authorized by RSA 541:3 ultimately provides a safety valve that assures all parties of the right to be heard on issues affecting them regardless of whether they are granted intervenor status initially.

III. Motion for Confidential Treatment

Finally, the OCA wishes to remind the Commission of the pendency of PSNH's motion for confidential treatment and the objection interposed by the OCA on July 1, 2016. No party has responded to the arguments made by the OCA on July 1, particularly the central contention that even assuming (manifestly without conceding) that some power purchase agreements merit

¹ The NERA petition also states that it is "important" for an independent organization "which advocates on behalf of New Hampshire ratepayers" to participate in a proceeding such as this one. The Legislature has agreed. *See* RSA 363:28, I (creating the OCA as an "independent agency") and II (vesting OCA with the power and duty to "initiate, appear or intervene in any proceeding concerning rates, charges, tariffs and consumer services" when "the interests of residential utility consumers are involved").

confidential treatment this one is simply too important and too unique to be considered in secret in light of the RSA 91-A balancing test adopted by the New Hampshire Supreme Court. The OCA therefore will ask the Commission to rule from the bench at the Prehearing Conference that the pending motion for confidential treatment be denied.

If you have any questions about the foregoing, please contact our office. Thank you.

Sincerely,

A handwritten signature in blue ink, appearing to read "Donald M. Kreis", written in a cursive style.

Donald M. Kreis
Consumer Advocate

cc: Service list via electronic mail