

STATE OF NEW HAMPSHIRE

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OFFICE OF CONSUMER ADVOCATE

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December 19, 2017

19 DEC '17 PM 3:57

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

Re: Docket No. DE 17-136  
Electric and Gas Utilities  
Energy Efficiency Resource Standard 2018-2020 Implementation Plan

Dear Ms. Howland:

Enclosed for filing in the above-referenced docket is an affidavit of Jeffrey Loiter, the witness who prepared prefiled direct testimony on behalf of the Office of the Consumer Advocate (OCA). This filing is being made pursuant to the ruling of Chairman Honigberg at hearing on December 13, to the effect that non-appearing witnesses would have to submit affidavits adopting any written testimony proposed for inclusion in the record pursuant to the settlement agreement presented at hearing.

The OCA respectfully requests that the Commission reconsider this recently adopted practice, which is contrary to longstanding custom at the agency.

At hearing, the Chairman referenced RSA 541-A:33, I as the basis for the emerging requirement that all prefiled testimony must either be adopted by a live witness or verified via affidavit.<sup>1</sup> Section 33 of the Administrative Procedure Act concerns the admission of evidence in adjudicative proceedings; paragraph I of section 33 does indeed require that "[a]ll testimony of parties and witnesses" be "made under oath or affirmation administered by the presiding officer."

However, in light of the applicable canons of statutory interpretation this language should be read in conjunction with paragraph II of the same section, which provides in relevant part that "[t]he rules of evidence shall not apply in adjudicative proceedings" and "[a]ny oral or documentary evidence may be received" (emphasis added). Paragraph II allows the presiding officer to exclude irrelevant, immaterial or unduly repetitious material, requires the presiding

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<sup>1</sup> The Commission made a similar ruling at the hearing held in Docket No. DE 16-576, the net metering proceeding in which there were two rival settlement agreements pending and several parties that were signatory to neither.

officer to give effect to the rules of privilege, and, significantly, provides that “*any part of the evidence may be received in written form* if the interests of the parties will not thereby be prejudiced substantially” (emphasis added).

There is, obviously, no prejudice (much less substantial prejudice) arising out of the admission of unsworn prefiled written testimony in circumstances where all parties have explicitly agreed to such admission by the explicit terms of a settlement agreement or otherwise. When a settlement adopts the longstanding practice of calling for the admission of prefiled testimony as full exhibits, it is always for the purpose of acquainting the Commission with each party’s initial position so as to limn the degree to which compromise has been achieved. It is never a matter of asking the Commission to resolve disputed issues of fact based on testimony that is unsworn, unverified and not subject to cross-examination.

In light of paragraph II, the ‘oath or affirmation’ requirement in paragraph I is properly regarded as a command that, when a witness *does* present live testimony, she do so under oath or affirmation. (Indeed, this can be understood as a key difference between proceedings at the Commission and proceedings at the General Court, given that everything the Commission does is a matter of powers that could be exercised directly by the Legislature.) The applicable provision of the Commission’s procedural rules is to precisely this effect. *See* N.H. Code Admin. Rules Puc 203.23(b) (“All testimony of parties and witnesses, including any prefiled written testimony *adopted by a witness at hearing*, shall be made under oath or affirmation”) (emphasis added). Conversely, refusing to admit documents labeled as “testimony” because they are unsworn and unverified elevates form over substance, as was illustrated by the Commission’s admission into evidence of one party’s filing because it was labeled “comments” rather than “testimony.” *See* Exhibit 9 (Comments of intervenor Acadia Center).

An additional reason for the Commission to reconsider its recently adopted gloss on RSA 541-A:33 is that it amounts to a half-measure on the road to a slavishly literal interpretation of the Administrative Procedure Act. Paragraph I plainly requires the *presiding officer* to administer oaths and affirmations, so an affidavit executed in the presence of a distant notary simply does not meet the statutory requirement. The interpretation of RSA 541-A:33 proposed by the OCA would allow the Commission to avoid this problem while restoring a practice that has long served parties appearing before the agency very well. It would also avoid the situation in which a party could technically deem the Commission to have rejected a settlement when, as here, the agreement calls for the admission of prefiled testimony and allows signatories to revert to their original positions unless all settlement terms are adopted.

Finally, the OCA respectfully requests the Commission to consider the fact that this problem does not arise when the prefiled testimony at issue is prepared by employees of either the OCA or the Commission itself. It is never a challenge for these witnesses to appear personally to adopt their testimony. The issue arises when it becomes necessary to engage the services of outside experts, who bill by the hour and likewise recover ancillary expenses from the sponsoring organization. The ratepayers ultimately bear these costs, as amply illustrated by the petition now under advisement to the Commission in Docket No. DE 17-160 (the Eversource Energy request for recovery of nearly \$500,000 in costs associated with certain consultants to the OCA and Commission Staff).

The Commission has a longstanding practice of encouraging parties to resolve contested cases via settlement "because it is an opportunity for creative problem solving, allows the parties to reach a result in line with their expectations, and is often a better alternative to litigation." Order No. 26,080 (Nov. 29, 2017) in Docket No. DE 17-124 (approving sale of Eversource hydro-electric generation facilities) at 21, citing *Granite State Electric Co.*, Order No. 23,966 (May 8, 2002) at 10 and RSA 541-A:31, V(a). Reverting to the previous and correct interpretation of the Administrative Procedure Act would be consistent with this policy of encouragement. The OCA therefore respectfully recommends such an approach to the Commission in future proceedings.

Thank you for considering our views and best wishes for the holidays.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Maurice Kreis', written in a cursive style.

D. Maurice Kreis  
Consumer Advocate

Encl.

cc: Service list, via e-mail

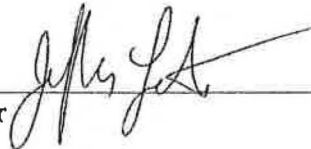
AFFIDAVIT

I, Jeffrey Loiter, being duly sworn, depose and state as follows:

1. My name is Jeffrey Loiter and I am employed as a Parter with Optimal Energy, Inc. located at 10600 Route 116 in Hinesburg, Vermont, 05461. In that capacity, I have been engaged by the Office of the Consumer Advocate (OCA) to provide expert assistance and testimony in connection with New Hampshire Public Utilities Commission (PUC) Docket No. DE 17-136, in which the PUC is considering a three-year plan submitted by the state's electric and gas utilities for implementation of the Energy Efficiency Resource Standard previously approved in Docket No. DE 15-137.
2. On November 1, 2017 I submitted prefled direct testimony in Docket No. DE 17-136, which the PUC provisionally admitted into evidence as Exhibit 4.
3. I hereby adopt Exhibit 4 as my sworn testimony in this proceeding, intending that such adoption have the same effect as if I had appeared personally before the PUC and given under oath the written answers to the questions posed to me in those exhibits.

Dated this 19<sup>th</sup> day of December, 2017.

Jeffrey Loiter



State of Vermont  
County of Chittenden

19<sup>th</sup> The foregoing affidavit was subscribed and sworn to before me by Jeffrey Loiter this day of December, 2017.

Commission Expires:

2/10/19

Notary Public/Justice of the Peace

