APPENDIX A

PSNH'S LETTER TO COUNSEL FOR RESA

PER RULE PUC 203.09(i)(4)

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A Northeast Utilities Company

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August 15, 2012
Via e-mail

Douglas L. Patch, Esq.
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One Eagle Square
Concord, New Hampshire 03301

Re: NHPUC Docket No. DE 12-097
RESA's Responses to PSNH Data Requests

Dear Doug:

I am writing regarding RESA's August 6, 2012, objections to certain of PSNH's data requests in NHPUC Docket No. DE 12-097. RESA has objected to the following questions in PSNH's set 1: 3, 4, 18, 19, 21, 22, 25, 27, 32, 33*, 35*, 37*, 39, 40, 41, 42, 44, 45, 50, 51, 54, 55, 59, and 71. (The questions denoted by asterisks are those where responses were provided notwithstanding and without waiving RESA's objections.) Pursuant to Rule Puc 203.09 (i)(4), PSNH is hereby making a good-faith effort to resolve its dispute concerning the questions objected to by RESA.

As you are no doubt aware, 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. *Re Investigation into Whether Certain Calls are Local*, 86 NH PUC 167, 168 (2001). The Commission will typically allow "wide-ranging discovery" and will deny discovery requests only when it "can perceive of no circumstance in which the requested data would be relevant." *Re Lower Bartlett Water Precinct*, 85 NH PUC 371, 372 (2000). A party in a legal proceeding in New Hampshire is entitled to "be fully informed and have access to all evidence favorable to his side of the issue. This is true whether the issue is one which has been raised by him or by his opponent, and whether the evidence is in the possession of his opponent or someone else." *Scontsas v. Citizens Insurance Co.,* 109 N.H. 386, 388 (1969). *See also, Public Service Co. of New Hampshire*, Order No. 25,398 (August 7, 2012).

This docket was initiated in response to RESA's April 16, 2012 letter 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. (Order of Notice, DE 12-097, May 3, 2012.)

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.

Many 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").

On July 13, 2012, RESA submitted prefiled direct testimony in this docket. The witnesses on that testimony were 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. Almost an entire page of testimony (page 5) is dedicated to describing Exelon and Direct Energy.

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. Each of the ten Member Objection Questions request such discoverable information from RESA's members.

- Question 18 generally seeks information regarding purchase of receivable programs or other competitive supplier programs administered by any affiliates of RESA members.

- Question 19 generally seeks information regarding whether any affiliates of RESA's members have taken positions on purchase of receivables programs in other jurisdictions.

- Question 21 generally seeks a listing of RESA members that sell electricity to retail electric customers in New Hampshire.

- Question 22 generally seeks a listing of by customer class of retail customers served by RESA members in New Hampshire.

- Question 25 c and d, generally seeks information regarding the efforts of RESA members to attract residential and small commercial customers in each of the state's electric distribution utilities' service territories.

- Question 27 generally seeks information regarding RESA's statement in its testimony that "While medium and large commercial and industrial customer 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."

- Question 32 generally seeks information regarding RESA's testimony referring to the RSA 374-F:3, VI.

- Question 55 generally seeks information regarding RESA's testimony related to the question "Will the EDC be financially harmed by POR?" PSNH asks for information regarding "Will competitive suppliers benefit from POR?"

- Question 59 generally seeks information regarding the costs and impacts of its testimony proposing a customer referral program.

- Question 71 generally seeks information relating to the question in RESA's testimony regarding "What benefit(s) will result from enhancing access to customer information." As customer information has been treated in a confidential manner by the Commission, PSNH requested information regarding any accusations of violations of consumer protection rules by competitive marketers.

All of PSNH's questions are attached hereto in full in Attachment 1.

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. *See, Investigation into Whether Certain Calls are Local*, Order 23,658 (2001) at 5. Also, as recently cited in *Public Service Co. of New Hampshire*, Order No. 25,398 (August 7, 2012):

> In the context of civil litigation, New Hampshire law favors liberal discovery, *see, e.g., Yancey v. Yancey*, 119 NH 197, 198 (l979), 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.

A cursory review of the ten Member Objection Questions is all that is needed to determine 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.

PSNH disputes 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 the information requested… ." RESA asked that this docket be established; it further asked to become a Party in this proceeding. 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.

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 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.**

Hearing Officer Ruling, December 14, 2007, DPU 07-64 (emphases added) (Attached as Attachment 2.).

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… ." (2012 WL 628774 (S.T.B.)) (Attached as Attachment 3.) (Similar to RESA, the Member Organizations of the WCTL are all electric utilities or their affiliates. *Id.,* fn 1.) 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.

The Presiding Officer's holding included "**The Member Organizations cannot avoid legitimate discovery…"** and **"The Member Organizations will be subject to reasonable discovery."** *Id.*

The Presiding Officer's decision was appealed to the full STB. On June 21, 2012, the STB upheld the Presiding Officer's decision. (2012 WL 2378133 (S.T.B.) (Attached as Attachment 4.)) 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… ." *Id* **"But the valuable role of**

trade associations cannot shield their members from reasonably tailored discovery of relevant information in appropriate cases." *Id.*

The situation in this proceeding includes an added reason why RESA cannot shield its members from discovery - - 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.")

Based upon the Massachusetts Department of Public Utilities ruling involving RESA, the reasoning in the recent decision of the Surface Transportation Board, and the filing of testimony by RESA from two of its member companies, PSNH disputes RESA's objections to the ten Member Objection Questions and requests that RESA provide responsive answers to those questions.

Moving on to other questions, RESA objected to PSNH questions 3 and 4. Both of these questions requested information concerning pro-ration of customer payments between a utility and a supplier. RESA objected on the basis that the information requested was irrelevant because RESA was not seeking pro-ration of customer payments. PSNH appreciates the information that RESA is not seeking pro-ration of customer payments in this proceeding; however, that position does not make the information requested irrelevant to this generic investigation.

In the Order of Notice, the Commission stated, "The Commission will solicit 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." In the Prehearing Conference Order, Order No. 25,389, the Commission stated, "The order of notice described the types of information the Commission would be soliciting from the parties. Except as may be inconsistent with the rulings on scope made above, the parties are expected to address such matters in their testimony."

PSNH's questions 3 and 4 request information that is in the possession of RESA or its members that is relevant to the topic of this proceeding. PSNH requests that RESA respond to these questions.

RESA objected to PSNH question 33, which sought information regarding about how RESA's proposed market enhancements would affect customers who choose to purchase energy service from PSNH. REA objected to this question on the grounds that it was "asking for speculation, that it is argumentative, and that it is based on a faulty premise." 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 RESA respond to this question.

RESA objected to PSNH question 35, which addresses RESA's testimony concerning an example of how a purchase of receivables program would work. In question 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.

RESA objected to PSNH question 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 RESA respond to this question.

RESA objected to PSNH question 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 40, which asked a question that was related to the subject of question 39, "Are the state's utilities always able to disconnect a customer for nonpayment?"

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."

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 RESA respond to these questions.

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 RESA respond to this question.

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 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 a bit disingenuous for RESA to object that it cannot object to a question regarding "gaming" because that term is vague, undefined or overbroad. PSNH requests that RESA respond to this question.

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.

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."

The Commission ruled in its Prehearing Conference Order that this proceeding would "include an examination of the costs and benefits of purchase of receivables…." 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 RESA respond to question 44.

PSNH's question 45 asked:

Q-PSNH 1-45. 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. lf 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?

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 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, PSNH will clarify 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? With that clarification, PSNH requests that RESA respond to question 45.

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?

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 RESA respond to this question.

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 predicitions about future prices, it appears that RESA is capable of responding the the question asked - - with a response in the negative. Hence, PSNH requests that RESA respond to question 51.

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.

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's 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 RESA respond to this question.

PSNH requests that RESA reconsider its objections to PSNH's questions and provide full, accurate and complete answers as required by Commission rules and precedent. As any motion to compel must be made within 15 business days of receiving the applicable response or objection (Rule Puc 203.09 (i)(2)), PSNH requests that you respond not later than August 20, 2012.

Very truly yours,

Robert A. Bersak
Assistant Secretary and
Associate General Counsel

Attachments

cc: Discovery Service List

Attachment 1

PSNH's Questions to RESA

DE 12-097

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

PSNH's Data Requests to RESA – Set #1

1. Could implementation of a POR mechanism result in increased costs to customers?

2. Could implementation of a POR mechanism result in the shifting of the risk of collection of debt from the supplier to the utility's customers?

3. Could pro-ration of customer payments between a utility and a supplier potentially lead to increased service terminations?

4. Is pro-ration of customer payments in the public interest?

5. Do you agree that retaining the status quo is in the best interests of customers because it will impose no additional burdens upon customers?

6. Would customers bear any adverse impacts from implementation of a POR program?

7. Would implementation of a POR program influence the motivation for suppliers to follow prudent credit practices?

8. If a POR program was implemented, wouldn't the risk for collecting the debt that otherwise would have been borne by the supplier shift to the utility's customers?

9. Could implementation of a POR program create the potential for adverse customer billing issues?

10. If a POR program is implemented is it possible that a supplier will become less diligent in calculating its commodity billing amounts because the supplier is guaranteed that the receivable will be purchased by the utility?

11. Could implementation of a POR program place the utility in the middle of a supplier/customer dispute regarding the energy portion of a customer's bill?

12. What is the role of the EDC, the competitive supplier and the Commission in any billing dispute that may arise for an account subject to a POR program?

13. Will suppliers pass on to their customers any costs incurred from implementation of, and their participation in, a POR program?

14. If all costs of implementation of a POR program remain with the utility, will the utility's customers ultimately bear those costs?

15. Would a POR program shift the risk and costs of collection from the supplier to the utility's customers?

16. Are there third-party businesses that specialize in buying receivables that suppliers can use to achieve the same result as a POR program?
    a. Has RESA explored the possibility of using any such third-party vendors?
    b. If so, what is the range of discount rates such vendors have required?

17. If the Commission decides to implement a POR program, is eighteen months a reasonable period to provide utilities for program implementation?

18. Are any of RESA's members regulated utilities, owned by 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.

19. Have 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.

20. Have Mr. Hanks or Mr. Kallaher ever testified before the NHPUC? If so, please list all dockets in which each of them has provided testimony.

21. Which of RESA's members sell electricity to retail electric customers in New Hampshire?

22. For 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.

23. Is it RESA's position that competition drives down prices?

24. On page 6, line 10, RESA's testimony discusses "potentially other retail market enhancements." Please list all such other retail market enhancements referred to by that testimony.

25. Page 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."
    a. Please list the electric distribution companies referred to in this statement.
    b. Please provide the customer migration statistics referred to in this statement by customer class for each of the electric distribution utilities' service territories.
    c. Please list each RESA member that is actively soliciting residential and small commercial customers in each of the electric distribution utilities' service territories.
    d. For those RESA members listed in response to subquestion c, please provide details of each such member's active solicitation program.

26. Is it RESA's opinion that competitive suppliers will always be in a position to supply energy at rates less expensive than that offered under PSNH's energy service rate?

27. Page 7, lines 6-8 of RESA's testimony states, "While medium and large commercial and industrial customer 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. Page 7, lines 12-13 of RESA's testimony states, "RESA urges the Commission to consider and then adopt the retail market enhancements as they are proposing in this testimony so than an increasing number of customers can benefit from the competitive retail market in New Hampshire." Isn't it true that all customers within PSNH's service territory presently have the opportunity to select a competitive supplier if they so desire?

29. Is it RESA's position that the only way to "harness[ ] the power of competitive markets" is to mandate that the costs of uncollectible receivables be socialized across all of a host utility's customers?

30. If the programs discussed in RESA's testimony were all implemented, is it a certainty that electric energy supply costs would be reduced for all consumers?

31. If the programs discussed in RESA's testimony were all implemented, is it a certainty that electric energy supply costs would be reduced for retail customers taking energy supply under PSNH's energy service? If the answer to this question is yes, please describe in detail why.

32. 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.

33. 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?

34. On page 8, line 4, the question uses the term "non-recourse." What is meant by that term?

35. On page 8, lines11-13 of RESA's testimony, the following example of how a POR program works was provided: "assuming a 1% discount rate and a $100 receivable, an EDC would pay the Supplier $99 and retain $1 as compensation for bad debt risk and approved program implementation costs."
    a. Suppose that the $100 receivable was the result of a competitive supply contract with a medical emergency customer insulated from termination for non-payment. What recourse would the utility have to collect that $100 receivable?
    b. Suppose that instead of charging that medical emergency customer $100 for energy supply, the competitive supply contract with that customer resulted in a cost of energy of $100,000.
        i. Under the example used by RESA, under a POR program with an assumed discount rate of 1%, how much of that $100,000 receivable would the utility have to pay the supplier?
        ii. What is the likelihood that the utility would be able to recover that $100,000 receivable created by the agreement between a third-party competitive supplier and that medical emergency customer?
        iii. If that $100,000 receivable is ultimately uncollectible, who takes the loss?

36. On page 8, lines 14-16, RESA's testimony states, "It should be noted that RESA believes a POR program is an appropriate transitional tool to an eventual state whereby suppliers would provide a consolidated billing service."
    a. Please provide all details concerning the "consolidated billing service" referred to.
    b. As the POR program is considered to be a "transitional tool" by RESA, would such a POR program continue to be offered once suppliers provided the consolidated billing service referred to?
    c. If suppliers provided the end-state consolidated billing service desired by RESA, would those suppliers be willing to purchase the receivables of the state's electric companies on the same terms as the ones which RESA is asking for in this proceeding?
    d. Are there any jurisdictions where suppliers provide consolidated billing service today? If so, please identify those jurisdictions, and state whether those suppliers offer POR programs to that jurisdiction's utilities.

37. On page 8, lines 18-20, RESA's testimony states "POR programs are usually designed for the mass market customers, the residential and small commercial market segments, which otherwise can be difficult and expensive for a supplier to individually conduct a credit check and bill."

a. Is the cited difficulty and expense of conducting credit checks and issuing bills unique to competitive energy suppliers?
b. Would RESA agree that the cost of credit checks and billing customers is a normal cost of business?
c. Are cable, telecommunications, or broadband providers also faced with the difficulty and expense of conducting credit checks and issuing bills?
d. Is it RESA's position that utilities should be forced to offer billing and POR programs for other industries, such as cable, telecommunications, or broadband providers?

38. Is a utility's ability to disconnect a customer for non-payment a fundamental tenet of a POR program?

39. 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?

40. Are the state's utilities always able to disconnect a customer for non-payment?

41. Are there moratorium periods when the state's utilities are not allowed to disconnect customers for non-payment?
    a. If so, please identify those periods.
    b. During any such periods identified in response to subpart a, are competitive suppliers able to terminate their arrangements with customers during those time periods?
    c. Are there any times of year when a competitive supplier is not able to terminate their arrangements with a customer for non-payment?
    d. Are there certain classes of customers who are never subject to disconnection for non-payment by the state's utilities? If so, identify those types of customers.
    e. For the customer types listed in response to subpart d, are competitive suppliers able to terminate their arrangements with those customers for non-payment?

42. Does implementation of a POR program provide opportunities for "gaming" by competitive suppliers? If the answer is yes, please detail all such opportunities.

43. On page 9, RESA's testimony discusses the process required for a competitive supplier to terminate their arrangement with a customer. Is it RESA's position that the process described is more onerous than that required of a utility in New Hampshire that seeks to disconnect a customer?

44. Is there any legal impediment restricting competitive supplier from mitigating the possibility of unpaid or delinquent bills by requiring customers to post a deposit?
    a. Wouldn't the requirement for a deposit equivalent to two months of energy costs be sufficient to eliminate "the credit risk associated with payment loss" discussed on page 9, line 19?

b. Do any of RESA's members serving residential or small commercial customers in New Hampshire require deposits of any customers?

45. 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?|

46. Under RESA's proposal for a POR program, would competitive suppliers have the ability to choose which of its customers' receivables are a part of the POR program, and which customer receivables are not part of the POR program (i.e. "all in, all out")?
    a. Have any jurisdictions implemented POR programs requiring "all in, all out"? If so, list such jurisdictions.

47. Under RESA's proposal for a POR program, would receivables that must be purchased by the state's utilities include only amounts related to actual electricity supply?
    a. If the answer to the question above is in the negative, please list all other receivables that RESA proposes should be included in the scope of charges that must be purchased by a utility.

48. Under RESA's proposal for a POR program, would receivables that must be purchased by the state's utilities include receivables that pre-exist the implementation of the POR program?
    a. If so, please provide a listing of the current outstanding receivables in New Hampshire for each RESA member that is a competitive supplier in New Hampshire, itemized by EDC.

49. On page 10, lines 4-6, RESA's testimony states, "For customers, the biggest advantage of a POR program is simplicity. Each month a residential or small commercial customer will receive just one consolidated bill from their local utility and only needs to make one payment for both delivery and commodity supply services." Isn't it true that under the consolidated billing option offered by the state's utilities today that each residential or small commercial customer taking service from a competitive supplier which has opted to receive such consolidated billing services receives just one consolidated bill from their local utility and only needs to make one payment for both delivery and commodity supply services?

50. On page 10, lines 6-7, RESA's testimony states that by implementation of a POR program "Customers take advantage of existing rate-base resources, thereby avoiding duplicative costs… ." Similarly, on page 10, line 23, RESA testifies of the benefits of "maximiz[ing]the utilization of the existing rate-based utility resources." And, on page

12, line 12, RESA discusses the benefits of "greatly reducing duplicative administrative and cash management functions."

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?

51. On page 10, line 14, RESA's testimony refers to "lower prices currently offered by retail suppliers." 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? If the answer to this is in the affirmative, please explain in detail the basis of RESA's answer.

52. On page 10, lines 17-19, RESA's testimony states, "For the EDCs, a discount rate mechanism will compensate EDCs for any uncollectibles associated with retail competitive supply, making the EDC whole and not subject to any price risks." If a POR program takes the risk of uncollectibles away from both competitive suppliers and the EDCs, who ultimately bears those risks and the concomitant costs?

53. In its proposed POR program, is RESA proposing to have one discount rate applicable to all suppliers' receivables?

54. On page 10, lines 19-22, RESA's testimony 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."
    a. Is RESA guaranteeing that implementation of a well-designed POR program will reduce costs for all consumers?
    b. In the states where RESA alleges "well-designed, non-recourse POR programs have been established, e.g., Connecticut, New York, Illinois, Maryland, and Pennsylvania" (p. 10, lines 11-13), are there retail electric customers that continue to receive their electric supply from standard offer, default service, provider-of-last-resort service, or some similar offering provided by an EDC in such state?
    c. If the answer to subpart b is in the affirmative, please provide a listing of the number of retail customers that continue to receive electric supply from the EDC, by state, utility, and customer class.

55. 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 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.

56. On page 11, line 9, RESA's testimony asks the question, "Will the EDC be financially harmed by POR?" The RESA answer to that question is, 'No."
    a. Is it RESA's testimony that the sum of dollars collected from retail customers plus the discount rate compensation retained under the POR program would ALWAYS equal or exceed the total collectibles purchased by the utility?
    b. If the answer to subpart a is in the affirmative, please explain in detail why.
    c. If the answer to subpart a is in the negative, please explain why such failure does not equate to financial harm to the EDC.
    d. Is RESA proposing that the costs of a POR program be fully-reconciled on an historic basis so that any costs not recovered by a utility are ultimately recovered from the competitive suppliers that were "undercharged"?
    e. Would RESA agree to such a fully-reconciling POR program?
    f. Is a fully-reconciling POR program consistent with RESA's request for a "non-recourse" POR program? Please explain your response.
    g. Would RESA-member competitive suppliers agree to post adequate security to ensure that funds are available to compensate a utility in the event that the discount rate fails to fully account for any losses incurred from implementation of a POR program?

57. Page 12, lines 7-11 of RESA's testimony states, "In order to establish and maintain a properly functioning market that provides the greatest opportunity for customer choice, the most important element is to develop a procurement process for utility backstop supply service where costs are appropriately categorized between bypassable and non~bypassable charges, updated fairly regularly and frequently in order to properly track with changing market conditions."
    a. Please provide details of what changes are deemed necessary by RESA to the backstop supply service for each of New Hampshire utility consistent with this testimony.
    b. Please quantify what is meant by the reference to "updated fairly regularly and frequently."

58. On page 13, lines 1-3, RESA's testimony states, "While other factors may have contributed to this trend, there is no question that the implementation of POR on a statewide basis in mid-2007 was one of the catalysts that drove the high migration rate seen now in Connecticut."
    a. Please list all "other factors [that] may have contributed to this trend"?
    b. Has RESA conducted any economic analyses or studies to support its contention that "there is no question that the implementation of POR… drove the high

migration rate seen now in Connecticut."? If so, please provide copies of all such analyses or studies. If not, what is the basis for RESA's certification that POR was such a catalyst leading to high migration in Connecticut?

59. On page 14, lines 2-5, regarding its proposed customer referral program, RESA's testimony states, "the EDCs would be also be required to offer residential and small commercial customers the option to learn about their electricity supply options when they contact the company for certain other purposes, namely (a) to make an inquiry regarding their rates or the amount of their bill; or (b) to seek information regarding energy efficiency or other value-added services."
    a. Would the proposed marketing services provided by a utility's customer service representatives increase the duration of calls?
    b. Would the proposed marketing services require an increase in the number of customer service representatives employed by a utility in order to keep the average wait-time to answer at the same levels provided prior to implementation of those marketing services?
    c. How do RESA-member competitive suppliers inform customers about their electricity supply options today?
    d. Do RESA-member competitive suppliers pay for marketing and/or advertising services today?
    e. If any such marketing and/or advertising costs are incurred by RESA members today, do those costs include a profit margin to the entities supplying those services?
    f. Does RESA propose that the state's EDCs can charge competitive suppliers for providing the proposed marketing services?
    g. Does RESA propose that any charges imposed by the state's EDCs for such marketing services may include a profit margin?
    h. In what states, if any, do such customer referral programs exist?
    i. In any states identified in response to subpart h, do the utilities charge competitive suppliers for this service, and, if so, do such charges include a profit margin?

60. Is there anything stopping competitive suppliers today from establishing a "webpage, which contains the EDCs' existing Default Service rates, information on electric offers available from competitive suppliers and contact information for each competitive supplier" as discussed on page14, lines 7-9 of RESA's testimony?
    a. If so, please list all the reasons why competitive suppliers cannot establish such a webpage today.

61. Doesn't RESA have a website which could be used to host a webpage, which contains the EDCs' existing Default Service rates, information on electric offers available from competitive suppliers and contact information for each competitive supplier"?
    a. Is it true that the RESA website includes a page that provides "Electricity Shopping Information"?
    b. How many states are included on the listing of "Electricity Shopping Information" in the RESA webpage "Consumer Corner"?

c. Is New Hampshire included in the listing on the RESA webpage?

62. Part of the marketing efforts proposed by RESA on page 14, lines 13-15, includes that "the EDCs would be required to disseminate bill inserts to customers that also provide information about participating competitive suppliers and their offerings."
    a. What rights would the EDC have to review and approve the content that would be included in the proposed bill inserts?
    b. Does RESA propose that competitive suppliers would pay for this service? If not, who under RESA's proposal, who would bear the costs of this service?

63. On page 14, lines 17-21, RESA states three reasons why "Many residential and small commercial customers are still receiving their generation service from the EDCs…."
    a. Please quantify what is meant by "many" and provide the basis for such quantification.
    b. Are the three reasons cited by RESA why customers still receive generation service from the EDCs the only reasons why a customer may still be on an EDCs generation service? If not, what other reasons are there why a customer may receive generation service from an EDC?

64. On page 15, lines 1-2, RESA's testimony discusses how customer referral programs would allow "customers to make demand response and energy efficiency modifications to better manage their electricity consumption and costs."
    a. How would a customer referral program allow "customers to make demand response and energy efficiency modifications to better manage their electricity consumption and costs?"
    b. Please provide details concerning the "demand response and energy efficiency modifications" referred to in this statement.
    c. Are customers unable to "make demand response and energy efficiency modifications" today? If so, please discuss the reasons why.

65. On page 14, lines 6-7, RESA's testimony states that a robust customer referral program "could be implemented quickly and provide immediate benefits to customers in the residential and small commercial market segments." Would competitive suppliers also receive immediate benefits from the implementation of such a program?

66. If the Commission decided not to implement a POR program, would RESA agree that implementation of a customer referral program would be ineffective?

67. On page 15, lines 16-18, RESA proposes that "EDCs should develop and maintain dedicated and secure web-based interface sites that allow suppliers direct access to key customer usage and account data, presented in a format that can be automatically pulled and scraped."
    a. The Commission has consistently held that customer-specific data is entitled to confidential treatment. How does RESA's electronic interface proposal comport with these Commission determinations?

b. What limitations, if any, would RESA's electronic interface proposal place on what customer data may be obtained?
c. What limitations, if any, would RESA's electronic interface proposal place on which competitive suppliers would be able to access the customer data?
d. What limitations, if any, would RESA's electronic interface proposal place on what competitive suppliers could do with the customer data made available to them?
e. What penalties, if any, would RESA propose in the event that a competitive supplier misused customer data made available to them under an electronic interface program?
f. What agency of the state does RESA claim has jurisdiction to impose any such penalties discussed in response to subpart e?
g. Does "customer-specific data such as account number, meter number, service address, next scheduled meter read date, rate code, ICAP tag, historic usage data, payment history, service status (EDC or supplier), and other relevant information" as set forth on page 15, lines 18-21 have potential commercial value to other entities outside of the electric energy supply business?
h. Is RESA aware of any "Red Flag Rule" restrictions imposed by the Federal Trade Commission that would be compromised by its customer information access proposal?

68. On page 15, beginning on line 22, RESA's testimony states, "the EDCs should provide each supplier on a confidential basis a quarterly updated sync-list showing the accounts that are enrolled with the ESG."
    a. What is an ESG?
    b. What is a sync-list?
    c. Why does RESA propose that this information be provided on a confidential basis?

69. On page 16, lines 2-3, RESA states that "suppliers should be permitted to use language in their contracts with their customers as authorization to secure historical monthly usage data."
    a. Does RESA propose that the EDCs will have access to each of their contracts in order to verify that customers have indeed authorized access to that customer's information?
    b. Does RESA propose that EDCs will be compensated for reviewing contracts on an individual basis to ensure that customer authorization has indeed been provided?
    c. If the answer to part a. is negative, what entity does RESA propose should have access to those contracts?
    d. If RESA is proposing that the Commission or its Staff have access, will such added responsibility increase the Commission's administrative costs? If so, who should pay for such cost increase?

70. On page 16, lines 3-5, RESA's testimony states, "Suppliers, not the EDCs, should be responsible for maintaining Letters of Authorization and these forms should be subject to audit by the Commission."
    a. How many different competitive suppliers does RESA believe the New Hampshire marketplace could have if all of the proposals contained in its testimony were implemented?
    b. Does RESA propose that competitive suppliers should be subject to Commission charges or assessments to pay for the proposed Commission audits?

71. On page 16, beginning on line 12, RESA's testimony discusses "What benefit(s) will result from enhancing access to customer information."
    a. Is RESA aware of any competitive suppliers that have been accused of violating applicable rules in place that are intended to protect consumers or the competitive marketplace? If so, please provide a listing of all such alleged violations known to RESA.
    b. Have any RESA members been accused of any such violations? If so, please provide all documents, correspondence, orders, and the like detailing the allegations, the competitive suppliers' responses thereto, and the action (if any) taken by the respective state or federal agency.

72. Is it RESA's opinion that competitive market forces are more effective than economic regulation in arriving at efficient prices?

73. If implementation of a POR program by and EDC requires expenditures for programming and other administrative items, is RESA proposing that competitive suppliers pay for such costs? If so, via what mechanism? If not, then who bears those costs?

Attachment 2

Hearing Officer Ruling, December 14, 2007,

Massachusetts DPU Docket No. 07-64

The Commonwealth of Massachusetts

DEPARTMENT OF PUBLIC UTILITIES

D.P.U. 07-64 December 14, 2007

Petition of NSTAR Electric Company for approval by the Department of Public Utilities of: (1) a proposed renewable energy power supply program; and (2) two long-term contracts to purchase wind power and renewable energy certificates, pursuant to G.L. c. 164, § 94A.

HEARING OFFICER RULING ON: (1) NSTAR ELECTRIC MOTION TO COMPEL DISCOVERY; (2) NSTAR ELECTRIC MOTION TO STRIKE DIRECT TESTIMONY; AND (3) PROCEDURAL SCHEDULE

I. INTRODUCTION

On July 24, 2007, NSTAR Electric Company ("NSTAR Electric" or "Company") filed a petition ("Petition") with the Department of Public Utilities ("Department") seeking approval of: (1) two long-term contracts to purchase wind power and associated renewable energy certificates ("RECs"), pursuant to G.L. c. 164, § 94A; and (2) a renewable energy power supply program for its basic/default ("basic") service customers. NSTAR Electric also sought review of its petition on an accelerated schedule. The Department docketed this matter as D.P.U. 07-64.

On August 28, 2007, pursuant to timely notice or petitions, and with no objection from NSTAR Electric, the Department granted full party status to eight intervenors, which included the Retail Energy Supply Association ("RESA") and Direct Energy Services, LLC ("Direct Energy"). On November 5, 2007, RESA filed the direct testimony of two witnesses, both of whom are employees of Direct Energy.[1] NSTAR Electric issued one set of information requests on November 9, 2007, and RESA filed responses on November 19, 2007, objecting to

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[1] RESA is an incorporated, non-profit, umbrella organization of competitive suppliers, of which Direct Energy is a member company. RESA's other members are: Commerce Energy, Inc.; Consolidated Edison Solutions, Inc; Gexa Energy; Hess Corporation; Integrys Energy Services, Inc.; Liberty Power Corporation; Reliant Energy Retail Services, LLC; Sempra Energy Solutions, LLC; Strategic Energy, LLC; SUEZ Energy Resources NA, Inc.; and US Energy Savings Corporation.

a number of the information requests for a variety of reasons. RESA's witnesses appeared and testified at an evidentiary hearing on November 27, 2007.[2]

On November 27, 2007, NSTAR Electric filed a written motion to compel RESA to supplement its responses to certain information requests ("NSTAR Motion to Compel"), over RESA's objections. Specifically, NSTAR Electric seeks to compel responses to information requests NSTAR-1-23 and NSTAR-1-24. On December 3, 2007, RESA filed a timely answer to NSTAR's Motion ("RESA's Answer Opposing Motion to Compel").

On November 29, 2007, NSTAR Electric filed a written motion to strike the testimony of both of RESA witnesses ("NSTAR Motion to Strike") from the record of this proceeding on the basis that: (1) one of the witnesses may be in violation of Rule 3.7(a) of the Massachusetts Rules of Professional Conduct; and (2) because employees of Direct Energy are testifying on behalf of RESA, NSTAR Electric cannot assess the distinction between the parties, which results in bias and prejudice towards its petition in this proceeding. On December 7, 2007, RESA filed a timely answer to NSTAR's Motion ("RESA's Answer Opposing Motion to Strike").

In this Ruling, I address: (1) NSTAR Electric's request to compel responses to certain information requests; (2) NSTAR Electric's request to strike the testimony of RESA's witnesses; and (3) to the extent possible, the procedural schedule.

II. REQUEST TO COMPEL RESPONSES

A. Positions of the Parties

1. NSTAR Electric

NSTAR Electric seeks to compel responses to information requests regarding: (1) the number of residential customers and small, medium, and large commercial and industrial ("C&I") customers within Massachusetts receiving renewable generation from a RESA member company, and the amount of renewable energy supplied by each member company; and (2) the number of residential customers and small, medium, and large C&I customers within NSTAR Electric's service territory receiving renewable generation from a RESA member company, and the amount of renewable energy supplied by each member company

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[2] For additional procedural history, see NSTAR Electric, D.P.U. 07-64 (Interlocutory Order on Procedural Schedule) (August 31, 2007) and NSTAR Electric, D.P.U. 07-64 (Interlocutory Order on Procedural Schedule) (September 27, 2007).

(NSTAR Motion to Compel at 4). Specifically, NSTAR Electric seeks to compel responses to information requests NSTAR-1-23 and NSTAR-1-24, over RESA's objections (id.).

In response to RESA's objections that the information sought is not relevant, nor is it likely to lead to admissible evidence, NSTAR Electric alleges that RESA's withholding of this information effectively denies its due process rights to cross-examine witnesses, pursuant to G.L. c. 30A, § 11(3) (id.). NSTAR Electric argues that, without this information, it cannot determine RESA's purpose for participating in this proceeding, and that the information may be relevant to RESA's standing, interest and integrity in the proceedings (id. at 5, 8). NSTAR Electric states that RESA cannot object on the grounds that the information sought will be inadmissible, so long as it appears to be reasonably calculated to lead to the discovery of admissible evidence (id. at 5-6). In support of its argument, NSTAR Electric refers to Department precedent which allows each party to put forward its own evidence and demonstrate the unsoundness of that of its opponents, and the Department's wide latitude with respect to the admission of evidence (id. at 6, citing NSTAR Electric Company, Hearing Officer Ruling of November 20, 2007). NSTAR Electric claims that the information is relevant to determining: (1) the extent of the business connection between any RESA member companies and NSTAR Electric's service territory; and (2) to what extent RESA member companies will be adversely affected by NSTAR Electric's proposal (id. at 5). NSTAR Electric asserts that, in RESA's petition to intervene, filed on August 16, 2007, RESA stated that it has a substantial and specific interest in ensuring that NSTAR Electric's proposed renewable energy contracts and program are legally supported, reasonable, and do not adversely affect RESA members, their customers, or retail competition in Massachusetts electricity markets (id. at 6). As a result, NSTAR Electric argues that questions pertaining to RESA member companies' presence in Massachusetts and NSTAR Electric's service territory are relevant and may lead to admissible evidence in this proceeding (id.).

NSTAR Electric addresses RESA's objections that the information sought is proprietary in nature, and would be unduly burdensome to produce (id. at 7-9). NSTAR Electric argues that the proprietary nature of information is a matter for the Department to determine, and RESA has failed to abide by Department practice which would require them to: (1) file a motion requesting that the Department afford confidential treatment to these materials; (2) pursue a confidentiality agreement or non-disclosure agreement with the parties; and (3) provide confidential responses to the Department and the parties (id. at 7-8). NSTAR Electric also disputes RESA's objection that producing the information would be unduly burdensome and an unreasonable annoyance on RESA's member companies, arguing that the information should be readily available (id. at 9).

NSTAR Electric disputes RESA's contention that, in order to respond to the information requests, RESA's individual member companies who are not parties to this proceeding would be forced to make unreasonable investigations (id. at 9-11). NSTAR

Electric claims that RESA must be required to respond to the information requests about the actions, practices, or involvement of its members on the grounds that: (1) representation of its membership was the basis of its petition for intervenor status as a trade association; and (2) the information requests are questions of fact, and do not require policy or opinion responses (id. at 10-11). Accordingly, for all of the reasons stated above, NSTAR Electric contends that the Department should grant NSTAR's Motion to Compel (id. at 5, 11-12).

2. RESA

RESA opposes NSTAR Electric's Motion to Compel (RESA Answer Opposing Motion to Compel at 2). RESA states that the Department should reject NSTAR's Motion to Compel because: (1) NSTAR Electric is not entitled to the information; (2) it constitutes an untimely effort to object to RESA's status as an intervenor; and (3) it is designed to harass RESA and its witnesses and discourage them from pursuing their arguments (id.).

RESA claims that the data sought in NSTAR Electric's information requests, including the production of the number of customers and electricity load information related to the provision of renewable resources, supplied by each of the twelve RESA member companies, distinguished into four customer classes, within both Massachusetts and NSTAR Electric's service territory, is grossly burdensome to produce (id. at 2). RESA points to other means by which NSTAR Electric can reliably obtain the information it seeks, including: (1) NSTAR Electric's own data on the extent of business connections between RESA members and Massachusetts, because NSTAR Electric manages the distribution service of all RESA member companies within its service territory; and (2) publicly available data, such as government websites in order to determine which RESA members are operating locally, and the overall extent of market penetration for retail competitors in Massachusetts and NSTAR Electric's service territory (id. at 3).

RESA argues that NSTAR Electric offers only specious and unpersuasive grounds to justify its information requests (id. at 2-3). RESA claims that NSTAR Electric's stated purposes for seeking this information relate to issues that have no bearing on the proceeding (id. at 2-3). RESA states that NSTAR Electric seeks to belatedly revisit RESA's intervenor status in the proceeding, which cannot be allowed, especially where NSTAR Electric did not oppose RESA's request for party status (id. at 3). RESA asserts that NSTAR Electric correctly notes that the information need not be admissible in order to be discoverable, and must be reasonably calculated to lead to the discovery of admissible evidence (id. at 4). RESA argues, however, that NSTAR Electric has not demonstrated how the customer information it seeks will lead to the discovery of admissible evidence, given that RESA's standing to participate and sufficiency of interests in the proceeding are not at issue (id.). RESA claims that requiring it to provide more specific data is unnecessary and inappropriate, especially when RESA's testimony asserts that regulatory changes are needed to foster greater

competition in the marketplace (id. at 3-4). RESA contends that, because its testimony states that there are impediments to retail competition in Massachusetts, a relative lack of business connections or use of renewable resources in Massachusetts would provide no probative information regarding motives of RESA or its member companies for participating in the proceeding (id. at 4).

RESA asserts that the information NSTAR Electric seeks to compel is proprietary in nature, and if the Department deems it discoverable, then RESA will file a motion for confidential treatment (id.). RESA claims that NSTAR's Motion to Compel is the result of a strategy to harass RESA, its members and its witnesses, rather than engaging RESA on the substance of its arguments (id. at 5). Accordingly, for all of the reasons stated above, RESA contends that NSTAR's Motion to Compel is without merit and should be denied (id.).

B. Standard of Review

With respect to discovery (i.e., information requests), the Department's regulations provide that

> [t]he purpose of discovery is to facilitate the hearing process by permitting the parties and the Department to gain access to all relevant information in an efficient and timely manner. Discovery is intended to reduce hearing time, narrow the scope of the issues, protect the rights of the parties, and ensure that a complete and accurate record is compiled.

220 C.M.R. § 1.06(6)(C)1. Hearing Officers have discretion in establishing discovery procedures. 220 C.M.R. § 1.06(6)(c)(2) provides that

> [b]ecause the Department's investigations involve matters with a wide range of issues, levels of complexity and statutory deadlines, the presiding officer shall establish discovery procedures in each case which take into account the legitimate rights of the parties in the context of the case at issue . . . . In exercising this discretion, the presiding officer shall be guided by the principles and procedures underlying the Massachusetts Rules of Civil Procedure, Rule 26 et seq.

Rule 26(b)(1) provides in pertinent part:

> Parties may obtain discovery regarding any matter, not privileged, relevant to the subject matter involved in the pending action . . . . It is not ground for objection that the information sought will be inadmissible at the trial if the

information appears reasonably calculated to lead to the discovery of admissible evidence.

Finally, G.L. c. 30A, § 12(1) provides agencies with the power to require the testimony of witnesses and the production of evidence. G.L. c. 30A, § 12(3) states, in part, that any party to an adjudicatory proceeding shall be entitled as of right to the issue of subpoenas in the name of the agency conducting the proceeding. The Department's rule, 220 C.M.R. § 1.10(9), embodies the statutory authority to compel the appearance of witnesses and production of documents by subpoena.

C. Analysis and Findings

As an initial matter, I note that, pursuant to 220 C.M.R. § 1.02(4) and 220 C.M.R. § 1.06(6)(c), NSTAR's Motion to Compel Discovery should have been filed on November 26, 2007, which was seven days after November 19, 2007, the deadline for RESA to respond to NSTAR Electric's information requests. NSTAR Electric sent electronic copies to the members of the service list on November 27, 2007, but the Department did not receive an electronic copy or a hard copy until November 28, 2007. NSTAR Electric did not request an extension, as provided for in 220 C.M.R. § 1.02(5). However, RESA did not address this issue in its answer. Notwithstanding the issue that NSTAR's Motion to Compel is arguably late, I will consider the merits.

Pursuant to G.L. c. 30A, § 10, the Department must afford all parties to an adjudicatory proceeding an opportunity for full and fair hearing. NSTAR Electric argues that it should receive responses to information requests NSTAR-1-23 and NSTAR-1-24 because: (1) the information sought is relevant and likely to lead to the discovery of admissible evidence; and (2) withholding of this information effectively denies NSTAR Electric its due process rights to cross-examine witnesses, pursuant to G.L. c. 30A, § 11(3). Because both of NSTAR Electric's arguments depend upon whether the information is both relevant and likely to lead to admissible evidence, I will address this question first.

RESA objects to responding to the information requests on multiple grounds. RESA is correct in arguing that it is too late for NSTAR Electric to challenge RESA's standing in the proceeding. The time for NSTAR Electric to dispute RESA's status as a full party intervenor was clearly prior to August 28, 2007, when the Department granted their petition, but NSTAR Electric did not oppose any of the petitions for intervenor or limited participant status.

In making its other objections, however, RESA overlooks the comprehensiveness of discovery and evidence permitted in Department proceedings. Rule 26(b)(1) of the Massachusetts Rules of Civil Procedure defines the scope of discovery as any information "relevant to the subject matter involved in the pending action . . . . [and] appears reasonably

calculated to lead to the discovery of admissible evidence." The Department has wide latitude with respect to the admission of evidence. Western Massachusetts Bus Lines, Inc. v. Department of Public Utilities, 292 N.E. 2d 707, 363 Mass. 61 (1973). Department precedent dictates that "[a]ccess to relevant material is needed by all parties in order to develop a complete record in a proceeding." D.T.E. 97-95, at 11 (July 2, 1998).

Information requests NSTAR-1-23 and NSTAR-1-24 pertain to the amount of renewable energy being supplied by RESA member companies to customers within Massachusetts and NSTAR Electric's service territory. The Department has previously stated that, while discovery is a useful tool for narrowing and defining issues for adjudication, we are careful to guard against the use of discovery as a fishing expedition for unnecessary information, and we recognize that the establishment of limitations and restrictions may be necessary to protect parties from the abuses of unreasonable discovery. New England Telephone and Telegraph Company, D.P.U. 91-63-A at 11 (Order on Motion to Compel Discovery or in the Alternative to Strike Testimony) (November 15, 1991). Some of the information requested appears to be "reasonably calculated to lead to the discovery of admissible evidence." The testimony offered by RESA's witnesses has not specifically addressed the business connection between any RESA member companies and NSTAR Electric's service territory nor any of the adverse effects of NSTAR Electric's proposal upon its individual member companies, but NSTAR Electric is nonetheless entitled to seek information on these issues through discovery, pursuant to G.L. c. 30A, § 10.

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 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. If RESA contends that the information sought warrants confidential treatment and can only be released subject to a non-disclosure agreement, it must file a redacted version of the responses in the public docket, along with a written motion for confidential treatment subsequent to this ruling; a possibility that RESA has already acknowledged in its response.

Accordingly, I find that RESA must supplement its responses to information requests NSTAR-1-23 and NSTAR-1-24, and that RESA must file, at a minimum, redacted supplemental responses and an accompanying motion for confidential treatment in the public docket within five (5) business days. RESA must also provide the Department with unredacted copies of the responses within five (5) business days. RESA may seek non-disclosure agreements with the Attorney General, the Division of Energy Resources, and NSTAR Electric prior to providing them access to the confidential information, and should pursue this issue with each party. Given that NSTAR Electric has filed an appeal of the Hearing Officer Ruling of November 19, 2007, which is currently pending before the Commission, and the Department has not yet ruled upon the parties' proposed non-disclosure agreements, I decline to set a specific deadline for RESA to provide confidential responses to these information requests.

III. REQUEST TO STRIKE TESTIMONY

A. Positions of the Parties

1. NSTAR Electric

NSTAR Electric seeks to strike the testimony of one of RESA's witnesses from the record of this proceeding on the basis that allowing a representative of one party to testify on behalf of another party has clouded the evidentiary record and undermined NSTAR Electric's due process rights (NSTAR Motion to Strike at 1). NSTAR Electric claims that it is not the kind of evidence on which reasonable persons are accustomed to rely on in the conduct of serious affairs, pursuant to G.L. c. 30A, § 11(2), because one of the witnesses has been acting as an attorney in the same proceeding in which he is a witness (id. at 3). NSTAR Electric claims that this constitutes a violation of Rule 3.7(a) of the Massachusetts Rules of Professional Conduct and Comments ("Rule 3.7(a)") for Mr. Kallaher to testify as a witness on behalf of RESA and provide legal representation to Direct Energy in this proceeding (id. at 2-3). NSTAR Electric states that this has unfairly prejudiced its petition, because Mr. Kallaher's testimony as a witness for RESA is inextricably intertwined with the legal arguments he is making as an attorney for Direct Energy in this proceeding (id. at 5).

NSTAR Electric also seeks to strike the testimony of both RESA witnesses from the record of this proceeding because employees of Direct Energy are testifying on behalf of RESA, and NSTAR Electric was prevented from adequately qualifying the witnesses to establish their credibility, exploring their potential prejudices and biases, as well as the correlation between their testimony and the views of other RESA member companies (id. at 10-12). NSTAR Electric claims that the Department cannot legally consider RESA's testimony because it has no standing other than its underlying membership, and it has already stated that the testimony offered does not necessarily reflect the views of the underlying

membership, which means that RESA has no jurisdictional nexus to this proceeding (id. at 12-14). NSTAR Electric argues that it:

> has been denied every opportunity to obtain, examine and challenge information relating to the type and scope of services provided to Massachusetts consumers, which is information going to the heart of the claims alleged in this proceeding by RESA and Direct Energy relating to the impact of the Company's proposals on their interests [citations omitted]. The omission of this information from the record severely and substantially impairs NSTAR Electric's due process rights in this proceeding because the Company is left with no opportunity to present or rebut information on the record about the impact of its proposals on the participants to the proceeding, who claim the Company's proposals will affect them (id. at 15-16).

NSTAR Electric asserts that it "did not initially object" to RESA and Direct Energy's status as intervenors in the case because it recognized that the Department would "want to consider legal and policy considerations involving the impact on the competitive market before approving the Company's proposal" (id. at 16). NSTAR Electric contends that RESA's objections to discovery have further complicated matters and impaired its rights in this proceeding, and therefore the Department should strike the testimony of RESA's witnesses (id. at 16-17). NSTAR Electric states that, at the evidentiary hearing, it tried to pursue a line of questioning on potential prejudice and bias of the witnesses to explore whether the witnesses for RESA are actually offering the opinions of Direct Energy, but was stymied by the objections of opposing counsel and a ruling by the Hearing Officer (id. at 17). NSTAR Electric asserts that, even if the witnesses are offering the consensus views of member companies, they are doing so without the opportunity for cross-examination and discovery (id. at 18). NSTAR Electric argues that the testimony of both witnesses should be stricken (id.). NSTAR Electric acknowledges that, because striking all testimony on the competitive impact, at this juncture in the case, may affect the Department's ability to approve NSTAR Electric's proposals, NSTAR Electric would not lodge further objection if the Department accepted Mr. Cerniglia's testimony and excluded only the testimony of Mr. Kallaher (id.).

2. RESA

RESA opposes NSTAR's Motion to Strike, and states that it should be denied on the grounds that: (1) NSTAR's Motion to Strike is untimely; (2) Rule 3.7(a) does not apply to these facts, and the remedy sought by NSTAR Electric is inappropriate; (3) the testimony was clearly submitted on behalf of RESA; and (4) NSTAR Electric has not availed itself of the proper procedures for challenging evidentiary rulings (RESA's Answer Opposing Motion to Strike at 1, 6, 7, 9). RESA states that the purpose of Rule 3.7(a) is to protect a client's right to the attorney's testimony at trial, which may be discounted by the jury if the attorney also

appears in the role of advocate at trial (id. at 3). RESA distinguishes the conduct of its witness from the conduct addressed in Rule 3.7(a) (id. at 2-5). Alternatively, RESA claims that, even if Rule 3.7(a) did apply, the proper remedy would be to disqualify the attorney rather than strike the testimony (id. at 6, citations omitted). RESA claims that, because intervenor testimony was filed on November 5, 2007, NSTAR Electric had ample opportunity to raise this issue prior to evidentiary hearings on November 27, 2007, instead of waiting until November 29, 2007 to file its Motion to Strike (id. at 6-7). In support of its claim, RESA points out that NSTAR Electric had previously filed a motion to strike, on different grounds, on November 9, 2007 (id.). See NSTAR Electric Company, D.P.U. 07-64 (Hearing Officer Ruling) (November 19, 2007).

RESA disputes NSTAR Electric's contention that there is any confusion in the record of this proceeding (id. at 7). RESA asserts that the witnesses have stated, both in their written testimony and at the evidentiary hearing, that they are employees of Direct Energy and their testimony is being offered by RESA (id. at 7-8). RESA also notes that there have been many instances of "umbrella" organizations offering the testimony of members to present consensus viewpoints in a proceeding before the Department, some of which have included NSTAR Electric and RESA, and the testimony has not been challenged (id. at 8-9).[1] RESA argues that a party cannot move to strike evidence on the basis that it was not allowed to explore the line of questioning that was the subject of a ruling by the Hearing Officer (id. at 9-10). RESA claims that NSTAR Electric must instead avail itself of the proper procedures for challenging evidentiary rulings: (1) file an appeal of a Hearing Officer ruling; or (2) file an appeal with the Supreme Judicial Court after the Department has issued a final decision (id. at 10). Accordingly, for all of these reasons, RESA contends that NSTAR's Motion to Strike is without merit, and should be denied (id.).

B. Analysis and Findings

As an initial matter, I find that NSTAR's Motion to Strike is late-filed or, at a minimum, untimely. After the intervenor testimony was filed on November 5, 2007, NSTAR Electric knew or should have known about this issue, and should have addressed it in its initial

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[1] RESA cites to Investigation Into Distributed Generation, D.T.E. 02-38; Boston Edison Company, Cambridge Electric Light Company, and Commonwealth Electric Company, D.T.E. 05-84; Boston Edison Company, Cambridge Electric Light Company, and Commonwealth Electric Company, D.T.E. 06-40; Fitchburg Gas and Electric Company, D.T.E. 06-74; Investigation Into Dynamic Pricing, D.T.E./D.P.U. 06-101; Boston Edison Company, Cambridge Electric Light Company, and Commonwealth Electric Company, D.T.E./D.P.U. 06-107; and Investigation Into Rate Structures to Promote Efficient Deployment of Demand Resources, D.P.U. 07-50.

motion to strike, filed on November 9, 2007. Although NSTAR Electric has neither alleged nor demonstrated good cause for late-filing NSTAR's Motion to Strike, I will nonetheless consider the merits of the request.

NSTAR's Motion to Strike requests that the Department exclude the testimony of a witness because it was provided in violation of Rule 3.7(a). Rule 3.7(a) states that, "[a] lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness" and articulates three exceptions, none of which apply here. Comments 1 and 2 for Rule 3.7(a) state that combining the roles of advocate and witness can prejudice the opposing party, and the opposing party's proper objection is that the combination of roles may prejudice its rights in the litigation. Thus, I will interpret Rule 3.7(a) only to the extent necessary to consider NSTAR Electric's objection.

Mr. Kallaher is an attorney, licensed in Massachusetts, and an employee of Direct Energy. He did not file a formal notice of appearance in this proceeding for Direct Energy, but arguably, he represented it at the public hearing and initial procedural conference.[1] Initial filings for Direct Energy were signed by its outside counsel and included Mr. Kallaher's signature, as initialed by outside counsel. Subsequent appearances for Direct Energy were made by outside counsel, and subsequent filings for Direct Energy were signed only by outside counsel. On November 5, 2007, Mr. Kallaher's direct testimony was filed by RESA, a separate party to this proceeding and the trade association for Direct Energy and eleven other entities. On these facts, I am not able to conclude that Mr. Kallaher is "[c]ombining the roles of advocate and witness" in this proceeding, and has prejudiced the rights of NSTAR Electric.

Even if Mr. Kallaher's actions could be said to have combined the roles of advocate and witness, and prejudiced the rights of NSTAR Electric, Rule 3.7(a) describes a balancing test to perform between the interests of the client and those of the opposing party. Comment 4 states that, if there is a risk of prejudice, "in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client." Therefore, Rule 3.7(a) implies that, if the prejudice towards the opposing party outweighs the client's interest in representation by the lawyer, the lawyer is disqualified as an advocate, but remains a necessary witness in the matter. There is no indication in Rule 3.7(a) or the Comments that the proper solution is to strike the lawyer's testimony. If applied to this situation, Rule 3.7(a)

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[1] RESA states that Mr. Kallaher believes it is common practice for employees to represent their employers before the Department, regardless of whether they are attorneys (id. at 4-5). If so, that belief is erroneous. The Department only allows non-lawyers to act as advocates in certain limited circumstances. Western Massachusetts Electric Company, D.T.E. 01-36/02-20, at 7-10 (Interlocutory Order on Appeal of Hearing Officer Ruling Denying Petition to Intervene) (January 21, 2003).

might disqualify Mr. Kallaher from advocating for Direct Energy, but would not appear to constitute a basis for excluding his testimony as a witness for RESA. Mr. Kallaher might have avoided this issue altogether by filing a withdrawal as counsel for Direct Energy, but it is not clear that he was obligated to do so. Based on Rule 3.7(a), even if Mr. Kallaher could be said to have combined the roles of advocate and witness, it would not: (1) prejudice NSTAR Electric's rights in this proceeding; or (2) necessitate the exclusion of Mr. Kallaher's testimony as RESA's witness.

With regard to NSTAR Electric's argument about the confusion of interests between RESA and Direct Energy, I find that there has been no confusion or resulting prejudice to NSTAR Electric. RESA's counsel and witnesses were properly identified in the filings, and the witnesses have openly acknowledged that they are employees of Direct Energy, but are offering their testimony in this proceeding on behalf of RESA, which represents a consensus viewpoint among all the member companies of the trade association. Two separate parties, whose intervenor status in this proceeding was unopposed by NSTAR Electric, have pooled their resources of counsel and witnesses in order to develop the position of one party. This alone should not disqualify the evidence RESA presents, nor the arguments that it makes.

Pursuant to G.L. c. 30A, § 11(2), agencies may admit evidence and give testimony probative effect if it is the kind of evidence on which reasonable persons are accustomed to rely on in the conduct of serious affairs. Berkshire Gas Company, D.T.E. 01-56, at 6-7 (2002). See also 220 C.M.R. §1.10(1). As a rule, the Department admits all testimony of experts and evaluates a witness's qualifications as we weigh the evidence of the proceeding. Bay State Gas Company, D.T.E. 06-77, at 3 (2006), citing D.T.E. 01-56, at 6-7. The Department weighs the credibility of a particular witness' testimony when it considers the case in whole. D.T.E. 01-56, at 6. Until that time, the Department is capable of giving the RESA testimony the appropriate weight. Additionally, each party will have an opportunity to argue on brief whether its opponent failed to present substantial evidence in support of its case. Id., at 6-7. Consistent with longstanding precedent, I find that the Department is capable of giving evidence the appropriate weight while the evidentiary record is being compiled, and making determinations about the credibility of witness testimony based upon the record as a whole.

To the extent that Rule 3.7(a) applies to this situation, it does not require the Department to exclude RESA's testimony. The Department is capable of giving the testimony of RESA's witnesses the weight it deserves. Therefore, NSTAR's Motion to Strike is denied and the testimony will remain part of the record in this proceeding.

In deference to the important policy goals of Rule 3.7(a), and in order to avoid any confusion of the record or any appearance of impropriety, I direct Mr. Kallaher to file a formal withdrawal and clarify that he will not be acting as counsel to Direct Energy in the context of this proceeding.

IV. RULING

In sum, NSTAR's Motion to Compel responses to information requests is granted. In accordance with the ruling above, RESA is required to file unredacted supplemental responses to information requests NSTAR-1-23 and NSTAR-1-24, and may also file a motion for confidential treatment to the extent it deems it necessary. If so, RESA must also follow Department procedures, and file a redacted copy of the responses for the public docket. Until such time as confidential treatment has been ruled upon, the information will be treated as such. Therefore, until the parties execute a non-disclosure agreement, or unless one is imposed by the Department, RESA is not required to provide the Attorney General, the Division of Energy Resources, or NSTAR Electric with confidential responses to these information requests.

NSTAR's Motion to Strike is denied.

V. PROCEDURAL SCHEDULE

Based on this Ruling, a number of parties may wish to address additional record evidence that is potentially confidential in their written briefs for this proceeding. At this time, parties are directed to file initial briefs on the evidence currently available to them no later than Monday, December 24, 2007. Parties will be provided an opportunity to file supplemental briefs, as appropriate, after the Department addresses the appeal of the November 19, 2007 Hearing Officer Ruling, non-disclosure agreements, and any other pending matters.

VI. APPEAL

Under the provisions of 220 C.M.R. § 1.06(d)(3), any aggrieved party may appeal this Ruling to the Commission by filing a written appeal with supporting documentation within two (2) days of this Ruling. A written response to any appeal must be filed within two (2) days of the appeal. Under the provisions of 220 C.M.R. § 1.06(d)(2), rulings and decisions of the hearing officer shall remain in full force and effect unless and until set aside or modified by the Commission.

/s/

Laura C. Bickel
Hearing Officer

Attachment 3

Director's Decision, February 27, 2012

Surface Transportation Board Docket No. FD 35557

2012 WL 628774 (S.T.B.)

Surface Transportation Board (S.T.B.)

REASONABLENESS OF BNSF RAILWAY COMPANY COAL DUST MITIGATION TARIFF PROVISIONS

Decided: February 27, 2012
Service Date: February 27, 2012

SURFACE TRANSPORTATION BOARD DECISION

Docket No. FD 35557

***1** By the Board, Rachel D. Campbell, Director, Office of Proceedings

This decision finds that individual members (Member Organizations) of the Western Coal Traffic League (WCTL) are subject to discovery in this proceeding under the Board's subpoena power and that Union Electric Company D/B/A Ameren Missouri (Ameren Missouri) likewise is subject to discovery as a party-intervenor. This decision also establishes that the Board will hold a March 13, 2012 technical conference, if necessary, with counsel for Member Organizations, Ameren Missouri, and BNSF Railway Company (BNSF) to resolve any outstanding discovery issues.

In Docket No. FD 35305, the Board found a BNSF tariff intended to mitigate dispersion of coal dust from rail cars, when considered as a whole, to be an unreasonable practice. Following BNSF's issuance of a new tariff to mitigate coal dust, which includes a safe harbor coal dust suppression provision, the Board initiated this proceeding to consider the reasonableness of the new tariff's safe harbor provision, but denied WCTL's request to reopen Docket No. FD 35305. Ark. Elec. Coop. Corp.-Petition for Declaratory Order, FD 35305, et al. (STB served Nov. 22, 2011).

On December 16, 2011, the Board granted a motion to adopt a procedural schedule, which included a discovery period. On January 27, 2012, BNSF filed a motion to compel discovery from WCTL on behalf of the Member Organizations.1 WCTL replied to the motion to compel on February 6, 2012.
On January 27, 2012, BNSF also filed a petition for subpoenas, in which it argues that, if the Board denies BNSF's motion to compel, the Board should instead issue subpoenas to the Member Organizations under 49 C.F.R. § 1113.2. The Member Organizations filed a joint reply to the petition for subpoenas on February 16, 2012. AFS filed a supplemental reply on February 16, 2012.2

In addition, on February 6, 2012, BNSF filed a motion to compel discovery from Ameren Missouri, which is a party to the proceeding.3 Ameren Missouri filed a reply on February 16, 2012.

On February 16, 2012, the Board issued a decision stating that, in order to manage this docket efficiently, it would issue a single decision addressing BNSF's three related filings.

The Member Organizations argue that subpoenas are an extraordinary remedy that the Board rarely grants. They also claim that BNSF does not need the documents it seeks, the requests are overbroad and unduly burdensome, and that non-party discovery is not permissible under the accelerated procedural schedule agreed upon by the parties in this proceeding.

In determining whether to issue a subpoena, the Board will examine whether the subpoenas could cause undue

burden on third parties, especially those with a limited connection to the matter before the Board. While it is true that the Board has only occasionally issued subpoenas in proceedings before this agency, the Member Organizations do not cite to an analogous situation where the Board has declined to exercise its subpoena powers. 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.

***2** The Member Organizations cite to Asphalt Supply & Service, Inc. v. Union Pacific Railroad, NOR 40121 (ICC served Mar. 27, 1987), for the proposition that the Board will grant a petition for subpoenas only if the moving party has established a "very strong foundation" for doing so. The "strong foundation" in Asphalt Supply & Service, Inc. was described as a requirement that must be met before subpoena power will be used "to compel from a stranger to the litigation ... actions which may be expensive, oppressive or burdensome." Id. at 1 (emphasis added). The Member Organizations clearly are not strangers to the instant litigation — WCTL, acting on behalf of the Member Organizations, is a party to the proceeding. Therefore, the standard cited in Asphalt Supply & Service, Inc. is inapplicable here. The Member Organizations cannot avoid legitimate discovery, and subpoenas are an appropriate means for that discovery.

The Board will also not allow the constraints of the accelerated procedural schedule to preclude legitimate third-party discovery in this proceeding. The Member Organizations argue that discovery should be denied if it is inconsistent with expedited case procedures by citing to Canexus Chemicals Canada, L.P. v. BNSF Railway, NOR 42132 (STB served Feb. 2, 2012). That proceeding is a simplified Three-Benchmark rate case where the expedited discovery schedule is by rule, whereas here the schedule is by agreement between the parties. Furthermore, a Three-Benchmark case has different decision points and concerns driving the procedural schedule, and is distinct from the declaratory order proceeding here in which, while the Board has accommodated the parties' request seeking prompt resolution, there is not a prescribed deadline for decision. Thus, rather than unduly limit the discovery process, the Board instead will hold the procedural schedule in abeyance for a brief period while discovery issues are resolved. The Member Organizations will be subject to reasonable discovery.

Similarly, the Board will order Ameren Missouri to respond to legitimate, appropriately tailored discovery requests. Regardless of other possible disputes between it and BNSF, Ameren Missouri is a party to this proceeding with relevant information that it must produce.

In Board proceedings, parties are entitled to discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding." 49 C.F.R. § 1114.21(a)(1). Further, it "is not grounds for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." 49 C.F.R. § 1114.21(a)(2). "The requirement of relevance means that the information might be able to affect the outcome of a proceeding." Waterloo Ry.—Adverse Aband.-Lines of Bangor and Aroostook R.R. and Van Buren Bridge Co. In Aroostook Cnty., Me., AB 124 (Sub-No. 2), et al. (STB served Nov. 14, 2003). BNSF's discovery requests are related to the subject matter of the proceeding and may lead to admissible evidence. Although the Member Organizations and Ameren raise issues about the scope of discovery, neither argues that the requested discovery could not reasonably lead to admissible evidence.

***3** In the hope of narrowing the scope and burden of the current discovery requests, the Board will defer issuing any subpoenas to the Member Organizations or compelling discovery from Ameren Missouri to permit the resolution of these issues by agreement. The Board is also scheduling a technical conference to be held on March 13, 2012.4 Both the Member Organizations and Ameren raise concerns about the breadth of the discovery requests and burden they create. BNSF has raised similar concerns about the breadth and burden of the discovery

requested of it in this proceeding.5 For example, both the Member Organizations and BNSF object to requests for "all documents"6 and the definitions of the parties to which the discovery requests are directed.7 The Board notes these parallel objections and the general validity of concerns about the breadth of discovery, and recognizes that the Member Organizations and the parties could privately negotiate to more narrowly tailor the bounds of discovery. The Board will not limit potential negotiations between the Member Organizations and the parties by addressing the merits of any individual discovery request at this time. Instead, the Board will provide the Member Organizations and the parties the opportunity to negotiate these issues, given the finding that the Member Organizations and Ameren are subject to discovery and that the Board will issue appropriate subpoenas and an order to compel Ameren following the technical conference, if necessary. The technical conference will address the scope of the subpoenas as needed. If BNSF and the parties agree to revised discovery requests before the technical conference, they may file a motion to request that the technical conference be cancelled (or that a particular entity's participation is not necessary). After the technical conference (or after a request that the technical conference be cancelled), the parties may file a proposed revised procedural schedule.

Finally, the Board notes the concerns raised by AFS in its supplemental reply to the petition for subpoenas. AFS states that it is an inactive entity and is not capable of responding to discovery. That statement is more properly made in response to the issuance of a subpoena rather than in a petition to deny the issuance. Consistent with its ruling as to the other members of WCTL, the Board will issue the subpoena, but before doing so expects the parties to address its scope and burden during their informal discussions and, if necessary, at the technical conference.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. BNSF's motion to compel discovery from WCTL is denied as moot.

2. The Board will hold a technical conference with counsel for Member Organizations, Ameren Missouri, and BNSF on discovery from the Member Organizations and/or from Ameren Missouri on March 13, 2012, at 10:00 a.m., at the Board's headquarters at 395 E Street, S.W., Washington, DC. Following the technical conference, the Board will issue subpoenas for discovery from the Member Organizations as appropriate and will rule on BNSF's motion to compel discovery from Ameren Missouri.

***4** 3. The procedural schedule is held in abeyance. After the technical conference (or after a request that the technical conference be cancelled), the parties may file a proposed revised procedural schedule.

4. This decision is effective on its service date.

Footnotes

1 The members of WCTL are Ameren Energy Fuels & Services Company (AFS), Arizona Electric Power Cooperative, Inc., Austin Energy, CLECO Corporation, CPS Energy, Entergy Services, Inc., Kansas City Power & Light Company, Lower Colorado River Authority, MidAmerican Energy Company, Minnesota Power, Nebraska Public Power District, Omaha Public Power District, Texas Municipal Power Agency, Western Farmers Electric Cooperative, Western Fuels Association, Inc., and Wisconsin Public Service Corporation.

2 AFS also joins the Member Organizations' reply.

3 On February 13, 2012, Arkansas Electric Cooperative Corporation (AECC) filed a motion to compel discovery from BNSF. AECC's motion will be addressed in a future decision.

4 Because the Board will grant the alternative form of relief sought by BNSF for subpoenas for discovery from the Member Organizations as appropriate, the motion to compel WCTL is moot.

5 Arkansas Electric Cooperative Corporation's (AECC) Motion to Compel Discovery from BNSF, Exhibit B, BNSF's Responses and Objections to AECC's First Requests for Production of Documents.

6 Reply of Member Organizations at 13; Reply of Member Organizations, Exh. 2, BNSF's Reponses and Objections to Coal Shippers' First Set of Interrogatories and Document Requests at 2.

7 Reply of Member Organizations at 14; Reply of Member Organizations, Exh. 2, BNSF's Reponses and Objections to Coal Shippers' First Set of Interrogatories and Document Requests at 3.

2012 WL 628774 (S.T.B.)

Attachment 4

Board Decision, June 21, 2012

Surface Transportation Board Docket No. FD 35557

2012 WL 2378133 (S.T.B.)

Surface Transportation Board (S.T.B.)

REASONABLENESS OF BNSF RAILWAY COMPANY COAL DUST MITIGATION TARIFF PROVISIONS

Decided: June 21, 2012
Service Date: June 25, 2012

SURFACE TRANSPORTATION BOARD DECISION

Docket No. FD 35557

***1** By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman

Digest:1 This decision affirms the February 27, 2012 decision in this proceeding, which was a decision of a Board employee related to the issuance of subpoenas and issued under authority delegated by the Board. The decision reschedules the previously postponed technical conference for July 11, 2012.

On February 27, 2012, the Director of the Office of Proceedings issued a decision in this proceeding finding that certain nonparties are subject to discovery by subpoena. Reasonableness of BNSF Ry. Coal Dust Mitigation Tariff Provisions (February 27 Order), FD 35557 (STB served Feb. 27, 2012). We affirm that decision here. We also address and affirm here the Director's statements regarding privilege logs in Reasonableness of BNSF Railway Coal Dust Mitigation Tariff Provisions (March 5 Order), FD 3555, slip op. at 4 (STB served Mar. 5, 2012) and Reasonableness of BNSF Railway Coal Dust Mitigation Tariff Provisions (March 19 Order), FD 35557, slip op. at 3 (STB served Mar. 19, 2012).

BACKGROUND

In Docket No. FD 35305, the Board found that a BNSF Railway Company (BNSF) tariff intended to limit the amount of coal dust that blows off of rail cars during transit to be an unreasonable practice when considered as a whole. Ark. Elec. Coop. Corp.—Petition for Declaratory Order, FD 35305 (STB served Mar. 3, 2011). The Board further observed that a cost-effective safe harbor provision (i.e., specific coal dust suppression measures that would constitute compliance with the tariff) would significantly alleviate its concerns. Following BNSF's issuance of a new tariff, which includes a "safe harbor" coal dust suppression provision, the Board initiated this proceeding to consider the reasonableness of the new tariff's safe harbor provision, but denied the request of the Western Coal Traffic League (WCTL) to reopen Docket No. FD 35305. Ark. Elec. Coop. Corp.—Petition for Declaratory Order, FD 35305, et al. (STB served Nov. 22, 2011).

This proceeding is in the discovery phase, and various motions to compel discovery have been filed. On January 27, 2012, BNSF filed a motion to compel discovery from the Member Organizations of WCTL.2 As an alternative, BNSF also filed a petition for the issuance of subpoenas to the Member Organizations under 49 C.F.R. § 1113.2. The Member Organizations objected to both of these requests.

Subsequently, the Director of the Office of Proceedings issued the February 27 Order finding that the Member Organizations are subject to discovery. The decision provided that, after BNSF and the Member Organizations had an opportunity to negotiate discovery issues, Board staff would, if necessary, hold a technical conference on March 13, 2012, with counsel for the Member Organizations and BNSF, and issue subpoenas to the Member Organizations.

***2** On March 1, 2012, the Member Organizations filed a joint appeal of the February 27 Order under 49 C.F.R. § 1115.9, which governs appeals of employee decisions to the Board. On March 6, 2012, the following pleadings were filed in response to the Member Organizations' appeal: a reply in support by Arkansas Electric Cooperative Corporation (AECC); separate replies in opposition by BNSF and Union Pacific Railroad Company (UP); and a comment on the appeal by the Association of American Railroads. On March 9, 2012, two statements supporting the Member Organizations were filed by two groups of trade associations.3

On March 2, 2012, the Member Organizations jointly petitioned the Board to postpone the technical conference pending resolution of their appeal. On March 8, 2012, BNSF filed a reply in opposition to the joint petition to postpone the technical conference. The motion to postpone the technical conference (including the portion of the conference involving Ameren Missouri) was granted. Reasonableness of BNSF Ry. Coal Dust Mitigation Tariff Provisions, FD 35557 (STB served Mar. 9, 2012). The decision stated that, if necessary, the technical conference would be rescheduled in the Board's decision addressing the appeal. Id. at 2.

DISCUSSION AND CONCLUSIONS

Interlocutory appeals, including an appeal of a decision of the Director of the Office of Proceedings, are governed by 49 C.F.R. § 1115.9. The Board applies a highly deferential standard of review to such appeals. Wisc. Power & Light Co. v. Union Pac. R.R., NOR 42051, slip op. at 2 (STB served June 21, 2000). Under § 1115.9(a), the bases for appeal includes instances where "[t]he ruling grants a request for the inspection of documents not ordinarily available for public inspection" or "[t]he ruling may result in ... substantial detriment to the public interest, or undue prejudice to a party."

The Member Organizations appeal the February 27 Order on the above bases. The Member Organizations argue that the Director misapplied the legal standard. Alternatively, they argue that the Director's application of the law will be substantially detrimental to the public interest, claiming BNSF's request for discovery is retaliation against WCTL members for participating in this proceeding. A number of other trade associations filed statements in support of the Member Organizations, because they are concerned that permissive nonparty discovery directed at members will have a chilling effect on the participation of shipper trade associations in Board proceedings.

For the reasons discussed below, we will deny this appeal. We first discuss our conclusion that the Director applied the correct legal standard. We then address the concerns raised by the shipper trade associations that this decision could deter shipper trade associations from participating in Board proceedings, as their participation has long been important to ensure that the views expressed in agency proceedings reflect the interests of all stakeholders. We then conclude with a short clarification on the production of privileged logs and reschedule the technical conference so this proceeding can move forward.

***3** The Director Applied the Correct Legal Standard.

The February 27 Order described correctly the applicable legal standard to govern this request for nonparty discovery. In Board proceedings, "parties are entitled to discovery 'regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding."' February 27 Order, slip op. at 3 (quoting 49 C.F.R. § 1114.21(a)(1)). Further, it "is not grounds for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Id. (quoting 49 C.F.R. § 1114.21(a)(2)). The February 27 Order explained that the requirement of relevance means "that the information might be able to affect the outcome of a proceeding." Id. (citing Waterloo Ry.—Adverse Aband.—Lines of Bangor and Aroostook R.R. and Van Buren Bridge Co. In Aroostook Cnty., Me., AB 124 (Sub-No. 2), et al. (STB served Nov. 14, 2003)).

The February 27 Order balanced the relevance of the information sought against the burden. The order stated that: "In determining whether to issue a subpoena, the Board will examine whether the subpoenas could cause undue

burden on third parties, especially those with a limited connection to the matter before the Board." February 27 Order, slip op. at 2. The February 27 Order then noted that the weight given to the burden on the nonparty will be influenced by that party's relationship to the proceeding. If a party seeks a subpoena "to compel from a stranger to the litigation ... actions which may be expensive, oppressive or burdensome," then a strong foundation regarding the relevance of the information sought would be required. Id. (citing Asphalt Supply & Serv., Inc. v. Union Pac. R.R. (Asphalt Supply 1987), NOR 40121 (ICC served Mar. 27, 1987)). Where, however, a party seeks a subpoena from a nonparty that has a clear interest in the proceeding and will be directly affected by its outcome, the Director concluded that a very strong foundation is not a prerequisite to the issuance of a nonparty subpoena. Id.

The Member Organizations claim the Director applied the wrong legal standard. The Member Organizations cite Asphalt Supply 1987, arguing under that decision the February 27 Order wrongly treated the request for subpoenas as equivalent to party-based discovery.4 That case involved a dispute over undercharges assessed by the railroad defendants after movement of goods. Asphalt Supply & Serv., Inc. v. Union Pac. R.R., NOR 40121, slip op. at 1-2 (ICC served Mar. 1, 1988). The complaint was filed by Asphalt Supply, the receiver of the goods, which had negotiated the rate. Id. at 1. The railroads assessed the undercharges on Asphalt Supply, and sought a subpoena to be served on the consignor of the goods—a nonparty. Id. There, an administrative law judge denied the request for a subpoena, stating that the agency requires a party to present a strong foundation if it seeks a subpoena "to compel from a stranger to the litigation ... actions which may be expensive, oppressive or burdensome." Asphalt Supply 1987 slip op. at 2. The Member Organizations argue that Asphalt Supply 1987 requires a uniformly strong showing of relevance to issue a subpoena to a nonparty, regardless of that nonparty's relationship to the proceeding. The Member Organizations also argue that under the Federal Rules of Civil Procedure (FRCP), trade associations are "jural entities" and their members are not subject to party-based discovery.

***4** We find no error in the balancing test applied by the Director. All discovery requests entail the balancing of the relevance of the information sought against the burden of producing that information. Moreover, the Director properly determined that where the information is sought from a nonparty, greater weight should be given to the burden and thus a stronger showing of relevance is required. The more tangential the nonparty is to the proceeding, the greater the weight given to the burden being imposed in the balancing test. Indeed, if a party seeks a subpoena to compel from a nonparty unrelated to the litigation discovery that may be expensive, oppressive or burdensome, then we require a strong foundation regarding the relevance of the information sought to overcome the burden on that nonparty.5 But even in the case of a nonparty with no interest in the proceeding, we still balance the relevance against the burden.
A strong foundation is not required in all cases before we will permit nonparty discovery. Rather, a request for a subpoena is considered based on the specific facts of the case where we consider the relevance of the material sought, and the burden on the nonparty.6 And the "jural entities" precedent is not the proper inquiry, as the February 27 Order addressed whether the Member Organizations were subject to subpoenas as *nonparties*, and not as parties to the proceeding.7

The Director's Decision Will Not Result in Manifest Injustice.

Applying the proper balancing test, the Director concluded that the Member Organizations could be subjected to reasonably tailored subpoenas for information relevant to this proceeding. The Director noted that, 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 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." February 27 Order, slip op. at 2. The Director examined the information sought and concluded that "BNSF's discovery requests are related to the subject matter of the

proceeding and may lead to admissible evidence." Id. However, "in the hope of narrowing the scope and burden of the current discovery requests, the Board will defer issuing any subpoenas to the Member Organizations or compelling discovery from Ameren Missouri to permit the resolution of these issues by agreement." Id.

***5** The Member Organizations believe that the February 27 Order will produce a manifestly prejudicial result that is substantially detrimental to the public interest. They observe that shippers participate in many STB proceedings through their trade associations. They are concerned that trade associations 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 issued at the whim of their rail carriers, which is exactly what will happen in this case if the Director's Decision is allowed to stand."8 These concerns are echoed by shipper trade associations that filed comments in this appeal.

The Board greatly values the role trade associations play in its proceedings. Trade associations (both shipper and railroad) permit the voices of numerous Board stakeholders to be heard on matters of industry-wide significance. Those voices help the Board carry out its mission in the balanced manner contemplated by Congress. It is often more efficient for these stakeholders to share their views through a common trade association than to file hundreds of individualized pleadings.

But the valuable role of trade associations cannot shield their members from reasonably tailored discovery of relevant information in appropriate cases. We are aware of the considerable expense of participating in Board proceedings and strive to ensure that participation is accessible to all interested parties. In this instance, however, given the nature of the inquiry, issuance of subpoenas is necessary to develop the record for this proceeding.

This decision will not cause the use of nonparty subpoenas to increase, as this case presents unusual circumstances that are unlikely to arise in the vast majority of cases where trade associations appear before the agency. Here, the parties to the proceeding do not possess the complete range of information that may be necessary for the development of a full record. A full record requires information related to the impacts and effectiveness of the safe harbor at issue. AECC, however, argues that the information sought by BNSF is not relevant to this proceeding, which is focused solely on the safe harbor provision of the tariff. But the question of a "cost effective" safe harbor provision includes, among others, "issues raised by WCTL that are related to the reasonableness of the safe harbor provision [including] the absence of penalties for noncompliance, the lack of cost sharing, and shipper liability associated with the use of the BNSF-approved topper agents." Ark. Elec. Coop. Corp.—Petition for Declaratory Order, FD 35305, et al., slip op. at 4 n.5 (STB served Nov. 22, 2011). Some of the information sought by BNSF is relevant to these issues. While the Board recognizes that the Member Organizations are entities separate and apart from WCTL, the Member Organizations possess relevant information regarding the reasonableness of the safe harbor provision.

***6** The Member Organizations also argue that the discovery BNSF seeks is retaliatory. They maintain that "BNSF initiated this unprecedented maneuver in this case for one reason and one reason only: retaliation."9 They assert that BNSF views WCTL as a rogue trade association whose members should be punished for the association's litigious ways.10 As support, they cite a BNSF motion to compel, where the railroad stated that "WCTL is not a typical trade association .... WCTL is little more than a vehicle for WCTL's members to engage in litigation ...."11

We will not tolerate retaliatory conduct by any party in this or any agency proceeding. Here, however, we do not believe the discovery request can be interpreted as retaliatory. WCTL is the primary petitioner in this proceeding, but WCTL does not itself ship coal under the tariff. Although WCTL plans to argue that the safe harbor provision is unreasonable, WCTL was unable or unwilling to provide any discovery responses to BNSF about issues such as coal shippers' plans to comply with the tariff. Often, shipper trade associations work collaboratively with the railroad to narrow the scope of discovery on its members and reach a mutually agreeable solution. For instance, as NGFA and NAFCA note in their comments, NAFCA and UP, in another proceeding, privately reached an agreement on the dissemination of information in a similar situation without the need for Board intervention.12

We encourage parties to follow the model of collaboration used by NAFCA and UP. But when WCTL declined to provide any relevant information, it was proper for BNSF to seek a nonparty subpoena. While BNSF's initial request was overly broad and burdensome—which justified the Director's decision to order the parties to meet and negotiate— we do not view the decision to seek a subpoena as improper retaliation against the members of WCTL.

Privilege Logs.

On February 13, 2012, AECC filed a motion to compel discovery from BNSF. On February 27, 2012, AECC filed a motion to compel discovery from UP. In these motions, AECC requested that the Board compel BNSF and UP to produce privilege logs. In the March 5 Order, slip op. at 4, and the March 19 Order, slip op. at 3, the Director of the Office of Proceedings held, among other things, that BNSF and UP respectively should produce privilege logs to AECC.

Although the current appeal did not raise the issue of privilege logs, we will address the Director's orders regarding privilege logs to be produced by BNSF and UP to AECC in order to clarify our view on the issue. We recognize the burden of producing privilege logs, but we agree with the decision that they are appropriate here. In this proceeding, unique circumstances make knowledge of the existence of privileged material important. This is the second proceeding regarding the efforts of BNSF to establish a tariff to control coal dust emission. As such, this second round of discovery is likely to capture far more privileged material created during the prior proceeding than in an ordinary Board proceeding, and the risk of inadvertent labeling of relevant non-privileged material as privileged is thus far higher. Accordingly, we believe it is appropriate in these circumstances to require the parties to bear the burden of producing privilege logs.

***7** In sum, the Board will deny this appeal and reschedule the technical conference for July 11, 2012. The technical conference will address the discovery requests directed at the Member Organizations (with the exception of the requests directed to AFS, as BNSF has withdrawn its petition for subpoena of AFS).13 If BNSF and the Member Organizations agree to revised discovery requests before the technical conference, they may file a motion to request that the technical conference be cancelled (or that a particular entity's participation be excused). After the technical conference (or after a request that the technical conference be cancelled or certain parties be excused), the parties may file a proposed revised procedural schedule.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The Member Organizations' appeal of the February 27 Order is denied.

2. The Board will hold a technical conference with counsel for the Member Organizations (except AFS) and BNSF on discovery from the Member Organizations on July 11 2012, at 10:00 a.m., at the Board's headquarters at 395 E Street, S.W., Washington, DC. Ameren Missouri is excused from the technical conference. Following the technical conference, the Board will issue subpoenas for discovery from the Member Organizations, as appropriate.

3. This decision is effective on its service date.

Footnotes

1 The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

2 The 16 members of WCTL are Ameren Energy Fuels & Services Company (AFS); Arizona Electric Power Cooperative, Inc.; Austin Energy; CLECO Corporation; CPS Energy; Entergy Services, Inc.; Kansas City Power & Light Company; Lower Colorado River Authority; MidAmerican Energy Company; Minnesota Power; Nebraska Public Power District; Omaha Public Power District; Texas Municipal Power Agency; Western Farmers Electric Cooperative; Western Fuels Association, Inc.; and Wisconsin Public Service Corporation (collectively, the Member Organizations).

3 One statement was filed by National Grain and Feed Association (NGFA) and North America Freight Car Association (NAFCA). The second statement was filed by Alliance for Rail Competition, American Chemistry Council, American Public Power Association, The Chlorine Institute, Consumers United for Rail Equity, Edison Electric Institute, The Fertilizer Institute, The National Industrial Transportation League, National Rural Electric Cooperative Association, and WCTL. Although these statements were filed late under 49 C.F.R. § 1115.9(b), we will accept them in the interest of a complete record and because they will not prejudice any party.

4 The Member Organizations also cite Rice v. Cincinnati, Washington & Baltimore Railroad, 3 I.C.C. 186 (1889), but that decision predates our modern discovery regulations. In Rice, the Interstate Commerce Commission reasoned that the burden on the nonparties from which discovery was sought would be significant, and that the evidence they could provide would likely be inadmissible. Id. at 212. However, our discovery regulations provide that "[it is not grounds for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." 49 C.F.R. § 1114.21(a)(2).

5 The Member Organizations argue that the February 27 Order misconstrues the meaning of the phrase "stranger to the litigation" from Asphalt Supply 1987, and that the phrase is simply a synonym for nonparty. However, the outcome of Asphalt Supply 1987 is consistent with our findings here and the February 27 Order, because the subpoena at issue in the Asphalt Supply proceeding was directed at a nonparty without any apparent interest in the outcome of the proceeding or a relationship to the proceeding. The instant situation—discovery requests of nonparties with both a clear relationship to and impact from the proceeding—was not considered in the Asphalt Supply proceeding, making that case inapplicable here.

6 See, e,g., Ariz. Pub. Serv. Co. v. Burlington N. & Santa Fe Ry., NOR 41185, slip op. at 1-2 (STB served Dec. 23, 2003) (subpoena issued to nonparty whose coal shipments were grouped with the complainant's in prior rates decisions); Pub. Serv. Co. of Colo. d/b/a/ Xcel Energy v. Burlington N. & Santa Fe Ry., NOR 42057, slip op. at 3 (STB served Feb. 1, 2002) (subpoena issued to manufacturer of electronic fuel gauges used by defendant); Wisc. Power & Light Co., slip op. at 2-4 (subpoena seeking traffic forecasts issued to complainant's nonparty consultant).

7 We further see no error in the Director's decision not to allow the constraints of the accelerated procedural schedule to preclude legitimate nonparty discovery in this proceeding. February 27 Order, slip op. at 3.

8 Joint Appeal 6-7.

9 Joint Appeal 7.

10 Id.

11 Id.

12 NGFA Comments 4-5.

13 Ameren Missouri, which is a party to the proceeding, is also excused from the technical conference.

2012 WL 2378133 (S.T.B.)

APENDIX B

RESA's OBJECTIONS TO PSNH's QUESTIONS

THE STATE OF NEW HAMPSHIRE
BEFORE THE
NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

Docket No. DE 12-097

ELECTRIC AND GAS UTILITIES
Investigation into Purchase of Receivables, Customer Referral and Electronic Interface for Electric and Gas Distribution Utilities

Retail Energy Supply Association's Objections to PSNH's First Round of Data Requests

Date of Request: July 27, 2012 **Date of Response:** August 6, 2012

Q-PSNH 1-3. Could pro-ration of customer payments between a utility and a supplier potentially lead to increased service terminations?

Witness: No witness.

Response:
Objection: RESA objects to the request on the basis 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 because RESA is not seeking pro-ration of customer payments.

Date of Request: July 27, 2012 **Date of Response:** August 10, 2012

Q-PSNH 1-4. Is pro-ration of customer payments in the public interest?

Witness: No witness.

Response:
Objection: RESA objects to the request on the basis 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 because RESA is not seeking pro-ration of customer payments.

Date of Request: July 27, 2012 **Date of Response:** August 10, 2012

Q-PSNH 1-18. Are any of RESA's members regulated utilities, owned by 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.

Witness: No witness.

Response:
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.

PUC Docket No. DE 12-097
RESA Objections to
First Round of PSNH Data Requests

Date of Request: July 27, 2012 **Date of Response:** August 6, 2012

Q-PSNH 1-19. Have 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.

Witness: No witness.

Response:
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.

Date of Request: July 27, 2012 **Date of Response:** August 6, 2012

Q-PSNH 1-21. Which of RESA's members sell electricity to retail electric customers in New Hampshire?

Witness: No witness.

Response:
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.

Date of Request: July 27, 2012 **Date of Response:** August 6, 2012

Q-PSNH 1-22. For 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.

Witness: No witness.

Response:
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.

Date of Request: July 27, 2012 **Date of Response:** August 6, 2012

Q-PSNH 1-25. Page 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."

a. Please list the electric distribution companies referred to in this statement.
b. Please provide the customer migration statistics referred to in this statement by customer class for each of the electric distribution utilities' service territories.
c. Please list each RESA member that is actively soliciting residential and small commercial customers in each of the electric distribution utilities' service territories.
d. For those RESA members listed in response to subquestion c, please provide details of each such member's active solicitation program.

Witness: No witness.

Response:
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, 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.

Date of Request: July 27, 2012 **Date of Response:** August 6, 2012

Q-PSNH 1-27. Page 7, lines 6-8 of RESA's testimony states, "While medium and large commercial and industrial customer 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.

Witness: No witness.

Response:
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.

Date of Request: July 27, 2012 **Date of Response:** August 6, 2012

Q-PSNH 1-32. 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.

Witness: No witness.

Response:
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.

Date of Request: July 27, 2012 **Date of Response:** August 6, 2012

Q-PSNH 1-33. 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?

Witness: No witness.

Response:
Objection: RESA objects to the request on the basis that it asking for speculation, that it is argumentative, and that it is based on a faulty premise.

Date of Request: July 27, 2012 **Date of Response:** August 6, 2012

Q-PSNH 1-35. On page 8, lines11-13 of RESA's testimony, the following example of how a POR program works was provided: "assuming a 1% discount rate and a $100 receivable, an EDC would pay the Supplier $99 and retain $1 as compensation for bad debt risk and approved program implementation costs."

a. Suppose that the $100 receivable was the result of a competitive supply contract with a medical emergency customer insulated from termination for non-payment. What recourse would the utility have to collect that $100 receivable?
b. Suppose that instead of charging that medical emergency customer $100 for energy supply, the competitive supply contract with that customer resulted in a cost of energy of $100,000.
    i. Under the example used by RESA, under a POR program with an assumed discount rate of 1%, how much of that $100,000 receivable would the utility have to pay the supplier?
    ii. What is the likelihood that the utility would be able to recover that $100,000 receivable created by the agreement between a third-party competitive supplier and that medical emergency customer?
    iii. If that $100,000 receivable is ultimately uncollectible, who takes the loss?

Witness: No witness.

Response:
Objection: RESA objects to the request on the basis that it asking for speculation, that it is argumentative, and that it is based on a faulty premise.

Date of Request: July 27, 2012 **Date of Response:** August 6, 2012

Q-PSNH 1-37. On page 8, lines 18-20, RESA's testimony states "POR programs are usually designed for the mass market customers, the residential and small commercial market segments, which otherwise can be difficult and expensive for a supplier to individually conduct a credit check and bill."

a. Is the cited difficulty and expense of conducting credit checks and issuing bills unique to competitive energy suppliers?
b. Would RESA agree that the cost of credit checks and billing customers is a normal cost of business?
c. Are cable, telecommunications, or broadband providers also faced with the difficulty and expense of conducting credit checks and issuing bills?
d. Is it RESA's position that utilities should be forced to offer billing and POR programs for other industries, such as cable, telecommunications, or broadband providers?

Witness: No witness.

Response:
Objection: RESA objects to the request 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.

Date of Request: July 27, 2012 **Date of Response:** August 6, 2012

Q-PSNH 1-39. 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?

Witness: No witness.

Response:
Objection: RESA objects to the request 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.

Date of Request: July 27, 2012 **Date of Response:** August 6, 2012

Q-PSNH 1-40. Are the state's utilities always able to disconnect a customer for non-payment?

Witness: No witness.

Response:
Objection: RESA objects to the request 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.

Date of Request: July 27, 2012 **Date of Response:** August 6, 2012

Q-PSNH 1-41. Are there moratorium periods when the state's utilities are not allowed to disconnect customers for non-payment?

a. If so, please identify those periods.
b. During any such periods identified in response to subpart a, are competitive suppliers able to terminate their arrangements with customers during those time periods?
c. Are there any times of year when a competitive supplier is not able to terminate their arrangements with a customer for non-payment?
d. Are there certain classes of customers who are never subject to disconnection for non-payment by the state's utilities? If so, identify those types of customers.
e. For the customer types listed in response to subpart d, are competitive suppliers able to terminate their arrangements with those customers for non-payment?

Witness: No witness.

Response:
Objection: RESA objects to the request 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.

Date of Request: July 27, 2012 **Date of Response:** August 6, 2012

Q-PSNH 1-42. Does implementation of a POR program provide opportunities for "gaming" by competitive suppliers? If the answer is yes, please detail all such opportunities.

Witness: No witness.

Response:
Objection: RESA objects to the request on the basis that the question is vague and overbroad and it uses an undefined term, "gaming".

PUC Docket No. DE 12-097
RESA Objections to
First Round of PSNH Data Requests

Date of Request: July 27, 2012 **Date of Response:** August 6, 2012

Q-PSNH 1-44. Is there any legal impediment restricting competitive supplier from mitigating the possibility of unpaid or delinquent bills by requiring customers to post a deposit?

a. Wouldn't the requirement for a deposit equivalent to two months of energy costs be sufficient to eliminate "the credit risk associated with payment loss" discussed on page 9, line 19?

b. Do any of RESA's members serving residential or small commercial customers in New Hampshire require deposits of any customers?

Witness: No witness.

Response:
Objection: RESA objects to the request 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.

Date of Request: July 27, 2012 **Date of Response:** August 6, 2012

Q-PSNH 1-45. 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?|

Witness: No witness.

Response:
Objection: 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 of all bills by all customers" means.

PUC Docket No. DE 12-097
RESA Objections to
First Round of PSNH Data Requests

Date of Request: July 27, 2012 **Date of Response:** August 6, 2012

Q-PSNH 1-50. On page 10, lines 6-7, RESA's testimony states that by implementation of a POR program "Customers take advantage of existing rate-base resources, thereby avoiding duplicative costs... ." Similarly, on page 10, line 23, RESA testifies of the benefits of "maximiz[ing]the utilization of the existing rate-based utility resources." And, on page 12, line 12, RESA discusses the benefits of "greatly reducing duplicative administrative and cash management functions."

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?

Witness: No witness.

Response:
Objection: RESA objects to the request on the basis that it 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.

PUC Docket No. DE 12-097
RESA Objections to
First Round of PSNH Data Requests

Date of Request: July 27, 2012 **Date of Response:** August 6, 2012

Q-PSNH 1-51. On page 10, line 14, RESA's testimony refers to "lower prices currently offered by retail suppliers." 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? If the answer to this is in the affirmative, please explain in detail the basis of RESA's answer.

Witness: No witness.

Response:
Objection: RESA objects to the request on the basis that it calls for speculation and predictions about future prices.

Date of Request: July 27, 2012 **Date of Response:** August 6, 2012

Q-PSNH 1-54. On page 10, lines 19-22, RESA's testimony 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."

a. Is RESA guaranteeing that implementation of a well-designed POR program will reduce costs for all consumers?

b. In the states where RESA alleges "well-designed, non-recourse POR programs have been established, e.g., Connecticut, New York, Illinois, Maryland, and Pennsylvania" (p. 10, lines 11-13), are there retail electric customers that continue to receive their electric supply from standard offer, default service, provider-of-last-resort service, or some similar offering provided by an EDC in such state?

c. If the answer to subpart b is in the affirmative, please provide a listing of the number of retail customers that continue to receive electric supply from the EDC, by state, utility, and customer class.

Witness: No witness.

Response:
Objection: RESA objects to the request on the basis 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.

PUC Docket No. DE 12-097
RESA Objections to
First Round of PSNH Data Requests

Date of Request: July 27, 2012 **Date of Response:** August 6, 2012

Q-PSNH 1-55. 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 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.

Witness: No witness.

Response:
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 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 it is seeking commercial or financial information that is protected under RSA 91-A:5.

Date of Request: July 27, 2012 **Date of Response:** August 6, 2012

Q-PSNH 1-59. On page 14, lines 2-5, regarding its proposed customer referral program, RESA's testimony states, "the EDCs would be also be required to offer residential and small commercial customers the option to learn about their electricity supply options when they contact the company for certain other purposes, namely (a) to make an inquiry regarding their rates or the amount of their bill; or (b) to seek information regarding energy efficiency or other value-added services."

a. Would the proposed marketing services provided by a utility's customer service representatives increase the duration of calls?
b. Would the proposed marketing services require an increase in the number of customer service representatives employed by a utility in order to keep the average wait-time to answer at the same levels provided prior to implementation of those marketing services?
c. How do RESA-member competitive suppliers inform customers about their electricity supply options today?
d. Do RESA-member competitive suppliers pay for marketing and/or advertising services today?
e. If any such marketing and/or advertising costs are incurred by RESA members today, do those costs include a profit margin to the entities supplying those services?
f. Does RESA propose that the state's EDCs can charge competitive suppliers for providing the proposed marketing services?
g. Does RESA propose that any charges imposed by the state's EDCs for such marketing services may include a profit margin?
h. In what states, if any, do such customer referral programs exist?
i. In any states identified in response to subpart h, do the utilities charge competitive suppliers for this service, and, if so, do such charges include a profit margin?

Witness: No witness.

Response:
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.

PUC Docket No. DE 12-097
RESA Objections to
First Round of PSNH Data Requests

Date of Request: July 27, 2012 **Date of Response:** August 6, 2012

Q-PSNH 1-71. On page 16, beginning on line 12, RESA's testimony discusses "What benefit(s) will result from enhancing access to customer information."

a. Is RESA aware of any competitive suppliers that have been accused of violating applicable rules in place that are intended to protect consumers or the competitive marketplace? If so, please provide a listing of all such alleged violations known to RESA.

b. Have any RESA members been accused of any such violations? If so, please provide all documents, correspondence, orders, and the like detailing the allegations, the competitive suppliers' responses thereto, and the action (if any) taken by the respective state or federal agency.

Witness: No witness.

Response:
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.

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APPENDIX C

RESA's RESPONSES TO PSNH's QUESTIONS

Date of Request: July 27, 2012 **Date of Response:** August 10, 2012

Q-PSNH 1-18. Are any of RESA's members regulated utilities, owned by 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.

Witness: **No witness.**

Response: **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 anti-trust 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 calculated to lead to the discovery of information that would be admissible in this proceeding.**

Date of Request: July 27, 2012 **Date of Response:** August 10, 2012

Q-PSNH 1-19. Have 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.

Witness: **No witness.**

Response: **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 calculated to lead to the discovery of information that would be admissible in this proceeding.**

Date of Request: July 27, 2012 **Date of Response:** August 10, 2012

Q-PSNH 1-21. Which of RESA's members sell electricity to retail electric customers in New Hampshire?

Witness: **RESA witnesses Allegretti, Kallaher, and Hanks**

Response: **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 anti-trust principles.**

Notwithstanding and without waiving RESA's objections, RESA responds as follows: RESA cannot answer this question in that it seeks information which is not in the possession, custody or control of RESA, which does not keep or record individual RESA member offers to retail customers.

Date of Request: July 27, 2012 **Date of Response:** August 10, 2012

Q-PSNH 1-22. For 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.

Witness: **RESA witnesses Allegretti, Kallaher, and Hanks**

Response: **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 anti-trust 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 calculated to lead to the discovery of information that would be admissible in this proceeding..**

Notwithstanding and without waiving RESA's objections, RESA responds as follows: please see response to Q-PSNH 1-21.

Date of Request: July 27, 2012 **Date of Response:** August 10, 2012

Q-PSNH 1-25. Page 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."

a. Please list the electric distribution companies referred to in this statement.
b. Please provide the customer migration statistics referred to in this statement by customer class for each of the electric distribution utilities' service territories.
c. Please list each RESA member that is actively soliciting residential and small commercial customers in each of the electric distribution utilities' service territories.
d. For those RESA members listed in response to subquestion c, please provide details of each such member's active solicitation program.

Witness: **RESA witnesses Allegretti, Kallaher, and Hanks**

Response: **Objection. RESA objects to paragraphs c. and d. of 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 it is irrelevant to this proceeding and not reasonably calculated to lead to the discovery of information that is admissible in this proceeding, 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.**

Notwithstanding and without waiving RESA's objections, RESA responds as follows:
(a)The EDCs referred to in this statement include the three investor-owned utilities, Public Service of New Hampshire, Granite State Electric Company d/b/a Liberty Utilities, and Unitil.
(b) Please see the attached customer migration statistics.
(c) Notwithstanding and without waiving RESA's objections, RESA responds as follows: RESA cannot answer this question in that it seeks information which is not in the possession, custody or control of RESA, which does not keep or record individual RESA member offers to retail customers.
(d) Please see response to Q-PSNH 1-25(c)

Unitil's migration info is included with its default service filing and can be found here: http://www.puc.nh.gov/Regulatory/CASEFILE/2012/12-003/INITIAL%20FILING%20-%20PETITION/12-003%202012-06-07%20UES%20ATT-DIRECT%20TESTIMONY%20T%20BOHAN.PDF

At the linked file, see pages 61-62 of the pdf file. (Schedule TMB-3).

It is our understanding that as of December 2011, migration by rate class for thee NH Electric Cooperative was as follows:

Class	Total # of Customers	# Customers w/Comp. Supply
Residential – Rev Class 1	68,413	148
General – Rev Class 2 & 3	10,217	471
PG <= 1000 – Rev Class 4	22	10
PG > 1000 – Rev Class 5	4	2
Ski Areas – Rev Class 8 & Less Ski Lights	5	0
Municipal Lights – Rev Class 6	94	9
Totals	78,755	640

Copies of PSNH and GSEC recent migration reports are attached.

Public Service Company of New Hampshire
Migration of Customers To and From the Competitive Energy Supply Market
2012 Report
to the New Hampshire Public Utilities Commission

	Customers Receiving Energy Service From the Competitive Market			Retail Sales			
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
	Number of Customers Not Billed for PSNH's Energy Service	Total Kilowatt-hours Delivered (KWH)	Estimated Demand at the Time of PSNH's System Peak Reported to the ISO-NE (KW)	Total Customers Taking Delivery Service	% of Customers Not Billed for PSNH's Energy Service as a % of Total Customers* Col (1) / Col (4)	Total KWH Delivered To All Customers (KWH)	%of Kilowatt-hours Not Billed for PSNH's Energy Service as a % of Total KWH Col (2) / Col (6)
April							
Residential	3,198	1,731,991		422,030	0.76%	230,283,920	0.75%
Small C&I Rate G	11,615	43,952,849		73,603	15.78%	131,568,716	33.41%
Medium C&I Rate GV	932	97,984,635		1,428	65.27%	136,196,850	71.94%
Large C&I Rate LG	99	94,014,093		115	86.09%	97,711,064	96.22%
Lighting	278	1,361,705		1,002	27.74%	2,988,546	45.56%
Total	**16,122**	**239,045,273**	**384,881**	**498,178**	**3.24%**	**598,749,096**	**39.92%**
May							
Residential	4,332	2,303,704		424,351	1.02%	209,965,156	1.10%
Small C&I Rate G	12,189	43,974,149		74,004	16.47%	125,006,440	35.18%
Medium C&I Rate GV	942	95,679,559		1,428	65.97%	130,549,088	73.29%
Large C&I Rate LG	97	87,987,345		113	85.84%	91,336,553	96.33%
Lighting	277	1,164,094		1,004	27.59%	2,548,931	45.67%
Total	**17,837**	**231,108,851**	**521,850**	**500,900**	**3.56%**	**559,406,168**	**41.31%**
June							
Residential	5,746	3,555,002		424,359	1.35%	228,984,083	1.55%
Small C&I Rate G	12,846	50,762,764		74,094	17.34%	138,217,464	36.73%
Medium C&I Rate GV	964	106,682,132		1,426	67.60%	144,638,389	73.76%
Large C&I Rate LG	96	94,217,174		111	86.49%	99,020,821	95.15%
Lighting	276	1,150,040		1,000	27.60%	2,449,259	46.95%
Total	**19,928**	**256,367,112**	**661,497**	**500,990**	**3.98%**	**613,310,016**	**41.80%**

*"Total Customers" refers to all customers taking Delivery Service.

Granite State Electric Co.
1713 Electric Customer Migration Report
Docket DE 06-115
For Quarter Ending June 30, 2012

	Energy Service						Competitive Service					
Customer Rate Class	Apr-2012	May-2012	Jun-2012	Apr-2012	May-2012	Jun-2012	Apr-2012	May-2012	Jun-2012	Apr-2012	May-2012	Jun-2012
	Number of Energy Service Customers			kWh Used by Energy Service Customers			Number of Competitive Service Customers			kWh Used by Competitive Service Customers		
D	34,072	34,097	34,127	20,639,408	18,604,718	20,040,953	43	43	42	53,578	45,822	45,698
D-10	438	435	438	453,847	349,937	341,680	0	0	0	0	0	0
T	1,197	1,192	1,185	1,520,704	1,202,615	1,072,889	2	2	3	24,556	21,365	18,771
G-1	58	57	56	7,163,065	6,961,419	7,730,964	61	67	68	17,418,037	21,858,827	24,665,523
G-2	646	618	627	8,048,079	7,460,786	8,488,891	187	198	203	4,137,289	4,388,433	4,712,982
G-3	4,650	4,647	4,630	6,327,493	5,928,668	6,331,795	886	908	930	982,591	1,031,477	1,133,960
V	18	18	17	19,356	16,462	20,811	1	1	1	2,246	718	155
Streetlights	117	119	117	179,743	164,647	160,374	22	23	27	231,025	213,791	212,500
TOTAL	41,196	41,183	41,197	44,351,695	40,689,252	44,188,357	1,202	1,242	1,274	22,849,322	27,560,433	30,789,589
Customer Rate Class	Number of Energy Service Customers as % of Total			kWh Used by Energy Service Customers as % of Total			Number of Competitive Service Customers as % of Total			kWh Used by Competitive Service Customers as % of Total		
D	100%	100%	100%	100%	100%	100%	0%	0%	0%	0%	0%	0%
D-10	100%	100%	100%	100%	100%	100%	0%	0%	0%	0%	0%	0%
T	100%	100%	100%	98%	98%	98%	0%	0%	0%	2%	2%	2%
G-1	49%	46%	45%	29%	24%	24%	51%	54%	55%	71%	76%	76%
G-2	78%	76%	76%	66%	63%	64%	22%	24%	24%	34%	37%	36%
G-3	84%	84%	83%	87%	85%	85%	16%	16%	17%	13%	15%	15%
V	95%	95%	94%	90%	96%	99%	5%	5%	6%	10%	4%	1%
Streetlights	84%	84%	81%	44%	44%	43%	16%	16%	19%	56%	56%	57%
TOTAL	97%	97%	97%	66%	60%	59%	3%	3%	3%	34%	40%	41%

Prepared By: J. Jerz
Reviewed By: C. DaFonte

Date: July 10, 2012

Date of Request: July 27, 2012 **Date of Response:** August 10, 2012

Q-PSNH 1-27. Page 7, lines 6-8 of RESA's testimony states, "While medium and large commercial and industrial customer 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.

Witness: **RESA witnesses Allegretti, Kallaher, and Hanks**

Response: **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 anti-trust principles.**

Notwithstanding and without waiving RESA's objections, RESA responds as follows: RESA cannot answer this question in that it seeks information which is not in the possession, custody or control of RESA, which does not keep or record individual RESA member offers to retail customers.

Date of Request: July 27, 2012 **Date of Response:** August 10, 2012

Q-PSNH 1-32. 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.

Witness: **RESA witnesses Allegretti, Kallaher, and Hanks**

Response: **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 anti-trust principles, that is argumentative, that it would be unduly burdensome to compile the information requested, that it is irrelevant to this proceeding and not 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.**

Notwithstanding and without waiving RESA's objections, RESA responds as follows: RESA cannot answer this question in that it seeks information which is not in the possession, custody or control of RESA, which does not keep or record individual RESA member offers to retail customers.

Date of Request: July 27, 2012 **Date of Response:** August 10, 2012

Q-PSNH 1-33. 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?

Witness: **RESA witnesses Allegretti, Kallaher, and Hanks**

Response: **Objection. RESA objects to the request on the basis that is asking for speculation, that is argumentative, and that it is based on a faulty premise.**

Notwithstanding and without waiving RESA's objections, RESA responds as follows: Adopting the RESA proposals will benefit those customers who "choose" to purchase energy service from PSNH because its proposals will create a better marketplace for those customers should they eventually decide to purchase energy service from a supplier.

Date of Request: July 27, 2012 **Date of Response:** August 10, 2012

Q-PSNH 1-35. On page 8, lines11-13 of RESA's testimony, the following example of how a POR program works was provided: "assuming a 1% discount rate and a $100 receivable, an EDC would pay the Supplier $99 and retain $1 as compensation for bad debt risk and approved program implementation costs."

a. Suppose that the $100 receivable was the result of a competitive supply contract with a medical emergency customer insulated from termination for non-payment. What recourse would the utility have to collect that $100 receivable?
b. Suppose that instead of charging that medical emergency customer $100 for energy supply, the competitive supply contract with that customer resulted in a cost of energy of $100,000.
    i. Under the example used by RESA, under a POR program with an assumed discount rate of 1%, how much of that $100,000 receivable would the utility have to pay the supplier?
    ii. What is the likelihood that the utility would be able to recover that $100,000 receivable created by the agreement between a third-party competitive supplier and that medical emergency customer?
    iii. If that $100,000 receivable is ultimately uncollectible, who takes the loss?

Witness: **RESA witnesses Allegretti, Kallaher, and Hanks**

Response: **Objection. RESA objects to the request on the basis that is asking for speculation, that is argumentative, and that it is based on a faulty premise.**

Notwithstanding and without waiving RESA's objections, RESA responds as follows:
(a) Please see Admin Rules Part PUC 1205.
(b) The POR program would only be applicable to residential and small commercial accounts and therefore the large customer example listed above is inapplicable in the current situation.

Date of Request: July 27, 2012 **Date of Response:** August 10, 2012

Q-PSNH 1-37. On page 8, lines 18-20, RESA's testimony states "POR programs are usually designed for the mass market customers, the residential and small commercial market segments, which otherwise can be difficult and expensive for a supplier to individually conduct a credit check and bill."

a. Is the cited difficulty and expense of conducting credit checks and issuing bills unique to competitive energy suppliers?
b. Would RESA agree that the cost of credit checks and billing customers is a normal cost of business?
c. Are cable, telecommunications, or broadband providers also faced with the difficulty and expense of conducting credit checks and issuing bills?
d. Is it RESA's position that utilities should be forced to offer billing and POR programs for other industries, such as cable, telecommunications, or broadband providers?

Witness: **RESA witnesses Allegretti, Kallaher, and Hanks**

Response: **Objection. RESA objects 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.**

Notwithstanding and without waiving RESA's objections, RESA answers as follows:

(a) RESA believes that conducting credit checks and issuing bills does occur in retail markets for other goods and services.
(b) See response to subsection (a).
(c) See response to subsection (a).
(d) **No.**

Date of Request: July 27, 2012 **Date of Response:** August 10, 2012

Q-PSNH 1-39. 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?

Witness: **RESA witnesses Allegretti, Kallaher, and Hanks**

Response: **Objection. RESA objects to the request 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 is asking RESA to do legal research and state a legal conclusion.**

Notwithstanding and without waiving RESA's objections, RESA responds as follows: not explicitly.

Date of Request: July 27, 2012 **Date of Response:** August 10, 2012

Q-PSNH 1-40. Are the state's utilities always able to disconnect a customer for non-payment?

Witness: **RESA witnesses Allegretti, Kallaher, and Hanks**

Response: **Objection. RESA objects to the request 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 is asking RESA to do legal research and state a legal conclusion.**

Notwithstanding and without waiving RESA's objections, RESA responds as follows: Please see RSA 363-B:1 and Admin. Rules Puc 1203.11 and 1203.12, which are duly enacted laws and regulations that speak for themselves.

Date of Request: July 27, 2012 **Date of Response:** August 10, 2012

Q-PSNH 1-41. Are there moratorium periods when the state's utilities are not allowed to disconnect customers for non-payment?

a. If so, please identify those periods.
b. During any such periods identified in response to subpart a, are competitive suppliers able to terminate their arrangements with customers during those time periods?
c. Are there any times of year when a competitive supplier is not able to terminate their arrangements with a customer for non-payment?
d. Are there certain classes of customers who are never subject to disconnection for non-payment by the state's utilities? If so, identify those types of customers.
e. For the customer types listed in response to subpart d, are competitive suppliers able to terminate their arrangements with those customers for non-payment?

Witness: **RESA witnesses Allegretti, Kallaher, and Hanks**

Response: **Objection. RESA objects to the request 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 is asking RESA to do legal research and state a legal conclusion.**

Notwithstanding and without waiving RESA's objections, RESA responds as follows: Please see RSA 363-B:1 and Admin. Rules Puc 1203.11 and 1203.12, which are duly enacted laws and regulations that speak for themselves.

Date of Request: July 27, 2012 **Date of Response:** August 10, 2012

Q-PSNH 1-42. Does implementation of a POR program provide opportunities for "gaming" by competitive suppliers? If the answer is yes, please detail all such opportunities.

Witness: **RESA witnesses Allegretti, Kallaher, and Hanks**

Response: **Objection. RESA objects to the request on the basis that the question is vague and overbroad and it uses an undefined term, "gaming".**

Notwithstanding and without waiving RESA's objections, RESA responds as follows: RESA is not certain what "gaming" means.

Date of Request: July 27, 2012 **Date of Response:** August 10, 2012

Q-PSNH 1-44. Is there any legal impediment restricting competitive supplier from mitigating the possibility of unpaid or delinquent bills by requiring customers to post a deposit?

a. Wouldn't the requirement for a deposit equivalent to two months of energy costs be sufficient to eliminate "the credit risk associated with payment loss" discussed on page 9, line 19?

b. Do any of RESA's members serving residential or small commercial customers in New Hampshire require deposits of any customers?

Witness: **RESA witnesses Allegretti, Kallaher, and Hanks**

Response: **Objection. RESA objects to the request 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 is asking RESA to do legal research and state a legal conclusion.**

Notwithstanding and without waiving RESA's objections, RESA responds as follows:
(a) No.
(b) RESA cannot answer this question in that it seeks information which is not in the possession, custody or control of RESA, which does not keep or record individual member companies policies regarding deposits as an organization. Moreover, it would be imprudent for RESA to gather the requested information from its member companies because it is highly confidential, proprietary and protected from disclosure among members by law and/or agreement respecting antitrust principles, confidentiality and/or non-disclosure.

Date of Request: July 27, 2012 **Date of Response:** August 10, 2012

Q-PSNH 1-45. 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?|

Witness: **RESA witnesses Allegretti, Kallaher, and Hanks**

Response: **Objection. 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 of all bills by all customers" means.**

Notwithstanding and without waiving RESA's objections, RESA answers as follows:

(a) Yes, uncollectible bills would continue to be a cost of doing business for both suppliers and utilities, as they are today.

(b) The cost of such uncollectibles is a cost of doing business for both suppliers and utilities.

(c) RESA agrees that a POR program syndicates the risk of loss across of all customers of an EDC, except those who have opted for dual billing and are, therefore, outside the program.

Date of Request: July 27, 2012 **Date of Response:** August 10, 2012

Q-PSNH 1-50. On page 10, lines 6-7, RESA's testimony states that by implementation of a POR program "Customers take advantage of existing rate-base resources, thereby avoiding duplicative costs… ." Similarly, on page 10, line 23, RESA testifies of the benefits of "maximiz[ing]the utilization of the existing rate-based utility resources." And, on page 12, line 12, RESA discusses the benefits of "greatly reducing duplicative administrative and cash management functions."

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?

Witness: **RESA witnesses Allegretti, Kallaher, and Hanks**

Response: **Objection. RESA objects to the request on the basis that it is argumentative and that it is seeking information that is irrelevant to this proceeding and not reasonably calculated to leave to the discovery of information that would be admissible in this proceeding.**

Notwithstanding and without waiving RESA's objections, RESA answers as follows:

(a) Yes.
(b) Yes. However, RESA's proposal seeks to better utilize functions that customers already pay for and that, if eliminated from a supplier's costs, can be passed onto customers *via* better rates than what might otherwise be offered.
(c) Please see response to subsection (b).
(d) No.

Date of Request: July 27, 2012 **Date of Response:** August 10, 2012

Q-PSNH 1-51. On page 10, line 14, RESA's testimony refers to "lower prices currently offered by retail suppliers." 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? If the answer to this is in the affirmative, please explain in detail the basis of RESA's answer.

Witness: **RESA witnesses Allegretti, Kallaher, and Hanks**

Response: **Objection. RESA objects to the request on the basis that it calls for speculation and predictions about future prices.**

Notwithstanding and without waiving RESA's objections, RESA answers that it does not know. RESA suppliers offer multiple products with varying characteristics based on market pricing at the time the retail offers are made.

Date of Request: July 27, 2012 **Date of Response:** August 10, 2012

Q-PSNH 1-54. On page 10, lines 19-22, RESA's testimony 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."

a. Is RESA guaranteeing that implementation of a well-designed POR program will reduce costs for all consumers?

b. In the states where RESA alleges "well-designed, non-recourse POR programs have been established, e.g., Connecticut, New York, Illinois, Maryland, and Pennsylvania" (p. 10, lines 11-13), are there retail electric customers that continue to receive their electric supply from standard offer, default service, provider-of-last-resort service, or some similar offering provided by an EDC in such state?

c. If the answer to subpart b is in the affirmative, please provide a listing of the number of retail customers that continue to receive electric supply from the EDC, by state, utility, and customer class.

Witness: **RESA witnesses Allegretti, Kallaher, and Hanks**

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

Notwithstanding and without waiving RESA's objections, RESA answers as follows:

(a) RESA believes that current retail market prices are lower than New Hampshire EDC's default service commodity prices.

(b) Yes.

(c) Please see objection.

Date of Request: July 27, 2012 **Date of Response:** August 10, 2012

Q-PSNH 1-55. 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 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.

Witness: **RESA witnesses Allegretti, Kallaher, and Hanks**

Response: **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 anti-trust principles, 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 it is seeking commercial or financial information that is protected under RSA 91-A:5.**

Notwithstanding and without waiving RESA's objections, RESA answers as follows: RESA cannot answer this question in that it seeks information which is not in the possession, custody or control of RESA, which does not keep or record the information requested for its individual member companies. Moreover, it would be imprudent for RESA to gather the requested information from its member companies because it is highly confidential, proprietary and protected from disclosure among members by law and/or agreement respecting antitrust principles, confidentiality and/or non-disclosure.

Date of Request: July 27, 2012 **Date of Response:** August 10, 2012

Q-PSNH 1-59. On page 14, lines 2-5, regarding its proposed customer referral program, RESA's testimony states, "the EDCs would be also be required to offer residential and small commercial customers the option to learn about their electricity supply options when they contact the company for certain other purposes, namely (a) to make an inquiry regarding their rates or the amount of their bill; or (b) to seek information regarding energy efficiency or other value-added services."

a. Would the proposed marketing services provided by a utility's customer service representatives increase the duration of calls?
b. Would the proposed marketing services require an increase in the number of customer service representatives employed by a utility in order to keep the average wait-time to answer at the same levels provided prior to implementation of those marketing services?
c. How do RESA-member competitive suppliers inform customers about their electricity supply options today?
d. Do RESA-member competitive suppliers pay for marketing and/or advertising services today?
e. If any such marketing and/or advertising costs are incurred by RESA members today, do those costs include a profit margin to the entities supplying those services?
f. Does RESA propose that the state's EDCs can charge competitive suppliers for providing the proposed marketing services?
g. Does RESA propose that any charges imposed by the state's EDCs for such marketing services may include a profit margin?
h. In what states, if any, do such customer referral programs exist?
i. In any states identified in response to subpart h, do the utilities charge competitive suppliers for this service, and, if so, do such charges include a profit margin?

Witness: **RESA witnesses Allegretti, Kallaher, and Hanks**

Response: **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 anti-trust principles, that calls for speculation, and that the information can be obtained from a publicly available source.**

Notwithstanding and without waiving RESA's objections, RESA answers as follows:
(a) Possibly.
(b) Possibly.

(c) RESA cannot answer this question in that it seeks information which is not in the possession, custody or control of RESA, which does not keep or record the information requested for its individual member companies. Moreover, it would be imprudent for RESA to gather the requested information from its member companies because it is highly confidential, proprietary and protected from disclosure among members by law and/or agreement respecting antitrust principles, confidentiality and/or non-disclosure.
(d) Please see response to subsection (c)
(e) Please see response to subsection (c)
(f) No.
(g) Please see response to subsection (f).
(h) Please see response to Staff 1-10.
(i) Please see response to Staff 1-10.

Date of Request: July 27, 2012 **Date of Response:** August 10, 2012

Q-PSNH 1-71. On page 16, beginning on line 12, RESA's testimony discusses "What benefit(s) will result from enhancing access to customer information."

a. Is RESA aware of any competitive suppliers that have been accused of violating applicable rules in place that are intended to protect consumers or the competitive marketplace? If so, please provide a listing of all such alleged violations known to RESA.

b. Have any RESA members been accused of any such violations? If so, please provide all documents, correspondence, orders, and the like detailing the allegations, the competitive suppliers' responses thereto, and the action (if any) taken by the respective state or federal agency.

Witness: **RESA witnesses Allegretti, Kallaher, and Hanks**

Response: **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 anti-trust principles, that calls for speculation, and that the information can be obtained from a publicly available source.**

Notwithstanding and without waiving RESA's objections, RESA answers as follows:

(a) RESA cannot answer this question in that it seeks information which is not in the possession, custody or control of RESA, which does not keep or record the information requested for its individual member companies. Moreover, it would be imprudent for RESA to gather the requested information from its member companies because it is highly confidential, proprietary and protected from disclosure among members by law and/or agreement respecting antitrust principles, confidentiality and/or non-disclosure.

(b) Please see response to subsection (a).