

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

ELECTRIC AND GAS UTILITY CUSTOMERS

Investigation Into Purchase of Receivables, Customer Referral, and Electronic Interface

Docket No. DE 12-097

**GRANITE STATE ELECTRIC COMPANY'S MOTION TO COMPEL RETAIL
ENERGY SUPPLY ASSOCIATION'S RESPONSES TO DATA REQUESTS 1-7, 1-11, 1-
15, 1-17 AND 1-18**

Granite State Electric Company d/b/a Liberty Utilities ("Liberty" or the "Company") respectfully requests that the Commission compel the Retail Energy Supply Association ("RESA") to respond to Liberty's First Set of Data Requests. In support hereof, Liberty states as follows:

1. On April 12, 2012, RESA requested that the Commission open a generic docket to conduct an investigation into purchase of receivables, customer referral and electronic interface programs "and other retail electric market enhancements as soon as possible." April 12, 2012 RESA letter to Commission. The Commission subsequently opened the docket, and on May 24, 2012, RESA petitioned to intervene, asserting that:

RESA is a non-profit organization and trade association that represents the interests of its members in regulatory proceedings in the Mid-Atlantic, Great Lakes, New York and New England regions. RESA members are active participants in the retail competitive markets for electricity, including the New Hampshire retail electric market. Several RESA member companies are licensed by the Commission to serve residential, commercial and industrial customers in New Hampshire and are presently providing electricity service to customers in the State. As such, RESA and its members have a substantial and specific interest in ensuring that new retail electric market programs are established and designed in a reasonable manner that facilitates retail competition in New Hampshire. Accordingly, RESA's participation would be in the interests of justice.

RESA petition at page 3. RESA stated in its petition that its intervention would not impair the orderly conduct of the proceeding because its “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 companies seeking to protect their own interests. It will also protect in an efficient manner the interests of RESA’s members that do not otherwise seek party or limited participant status.” *Id.*

2. The Commission granted RESA’s intervention, and on July 13, 2012, Daniel W. Allegretti, Marc A. Hanks and Christopher H. Kallaher submitted direct testimony requesting that the Commission adopt a purchase of receivables, customer referral, and electronic interface programs in New Hampshire. That testimony states that RESA’s proposed retail market enhancements (e.g. the purchase of receivables, customer referral program and electronic interface) are necessary given the low levels of residential and customer migration statistics in each of the electric distribution utilities’ service territories. RESA Direct Testimony, p. 6, lines 12-19. Specifically, RESA testified that “Based on RESA member experience in numerous other jurisdictions, it is clear that market enhancements are needed in New Hampshire to facilitate robust and sustainable competition for residents and small businesses, as well as to overcome the inherent structural bias that exists with the local distribution utilities. For these reasons, RESA urges the Commission to consider and then adopt the retail market enhancements as they are proposed in this testimony so that an increasing number of customers can benefit from the competitive retail market in New Hampshire.” *Id.* at p. 7, lines 8-14.

3. On July 27, Liberty submitted data requests to RESA based on its prefiled testimony. The purpose of the data request were to evaluate RESA’s proposal in order to gain an understanding of what barriers to market entry exist, why the proposal is necessary, and what the

potential costs may be to Liberty and its customers should such a proposal be implemented. RESA objected to some of Liberty's data requests, claiming that the information sought is not relevant to the proceeding, that it is confidential and thus should not be disclosed, and that it would be "imprudent" to produce it. As a result, Liberty requests that the Commission compel RESA to respond to Liberty data requests 1-7, 1-11, 1-15, 1-17, and 1-18. A copy of RESA's objections and partial responses to these requests are included as Attachment A.

4. Consistent with Puc 203.09(i)(4), Liberty contacted RESA's counsel on August 10 in an effort to resolve the potential discovery dispute, seeking an explanation for the objections that had been asserted. Liberty has reviewed that response, and does not agree that RESA has a legally sustainable basis to withhold the information. As a result, Liberty now files this motion to compel. *See* Attachment B, RESA's response to Liberty's request for the basis for its objections.

Standard for Discovery

5. 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 (2001). The Commission will typically deny discovery requests only when it "can perceive of no circumstance in which the requested data will be relevant." *Lower Bartlett Water Precinct*, 85 NH PUC 371 (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 opponents and whether the evidence is in the possession of his opponent or someone else." *Scotsas v. Citizens Insurance Co.*, 109 N.H. 386, 388 (1969). In this case, Liberty seeks information that is in RESA or its members

possession that relate to the very need for, and the risks associated with, the adoption of a purchase of receivables program in New Hampshire.

Liberty Data Requests to RESA

Data Requests 1-7 and 1-11

6. In its request 1-7, Liberty asked RESA to “Please describe in detail the credit check process used by each member of RESA prior to enrolling residential customers, small commercial customers, and large commercial and industrial customers.” Similarly, in 1-11, Liberty asked as follows:

Please provide the following for each member of RESA by customer class in each state in which each RESA member does business: (a) the number of accounts with charge-offs; (b) the percentage of total accounts represented; (c) the number of total dollars charged-off; (d) the average balance per account; (e) the reason for the charge-off, and; (f) the average length of time the account was held by the RESA member.

7. In response to both 1-7 and 1-11, RESA objected claiming that the request seeks information that is irrelevant, protected from disclosure under RSA 91-A:5 and “would be 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.” *See* Attachment A.

8. The credit check process and bad debt experience of RESA members is very relevant to this proceeding. Under RESA’s proposal, Liberty would be purchasing the receivables of a competitive supplier, thereby assuming all of the risk associated with the customer’s potential non-payment of its bill. RESA proposes that a discount factor be applied to the amount of the receivable in recognition of that risk of non-payment. RESA testimony at p. 8. In order to develop an appropriate discount rate for that risk, Liberty must understand the credit check process that RESA’s members use prior to enrolling a customer, and what its members’ actual

bad debt experience is. Without knowing what level of bad debt RESA's members have encountered in other jurisdictions, Liberty cannot determine whether RESA's proposed purchase of receivable mechanism sufficiently protects Liberty and its customers against any financial harm associated with the proposal.

9. RESA's limited response to 1-7 states that "the actual practice of each RESA member is not known to the witnesses and is commercially sensitive information." RESA then provides only a very general response, indicating that some suppliers conduct credit checks while others manage credit on an overall portfolio basis, without providing any detail on the particular criteria used to screen customers. In the case of 1-11, RESA provided no response.

10. RESA's refusal to provide the information because it is "not known to the witnesses" is nothing more than an attempt to hide behind the shield of its status as a membership organization. Yet RESA used that very status as a membership organization as its basis to intervene, claiming that it would be more efficient for the Commission and parties than having individual members participate. The Commission should not allow RESA to rely on its status as a membership organization when it is to its benefit, and to hide behind it to avoid discovery. The Massachusetts Department of Public Utilities refused to allow RESA to do so, holding that "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." *Petition of NSTAR Electric Company*, DPU 07-64 (December 14, 2007) at page 7 (and attached hereto as Attachment D). This Commission should follow the same course of action, and require RESA to provide the requested information from its members.

11. RESA's refusal to provide the information because it is "commercially sensitive" is not a legal basis to withhold disclosure of information. As Liberty pointed out to RESA's counsel in its August 10 communication, the Commission has long-standing rules that provide a mechanism for protection of confidential information, *see e.g.* Puc 203.08, and Liberty would be willing to sign a non-disclosure agreement. When asked for legal support for its position on confidentiality, RESA responded that:

Assuming the information requested met the relevance test and that the other bases for objection could be overcome, the suggestion that a non-disclosure agreement and a protective order would resolve RESA's concerns is incorrect. A protective order and non-disclosure agreement is an imperfect solution, especially where the information would be shared with other commercial entities. In the event of a breach it will be both costly and difficult to establish with accuracy the extent of the damages suffered by each affected RESA member. Such mechanisms also do not prevent the transfer of information which may occur when personnel change jobs and find themselves working for a competitor. In short, these mechanisms should not be used unless there is a strong and compelling need for the information, something which is not the case here."

See Attachment B. Certainly these are the concerns of every party that holds confidential information that is sought in discovery. But those concerns do not provide a legal basis to withhold the information and RESA's counsel did not cite to a single case or Commission order to support its position. To the extent RESA is concerned that information cannot be shared among its members, there is no reason why the RESA member could not produce the information directly to Liberty. Liberty would certainly agree to protect the information from disclosure through an appropriate non-disclosure agreement.

12. Perhaps most ironically, in this very docket, RESA seeks direct access to the electric utilities' confidential customer information through its electronic interchange proposal. *See* RESA Response to PSNH 1-67, included as Attachment C. In that response, RESA indicates that password protection of customer information is sufficient to address confidentiality issues. Yet when asked for information it claims is confidential, RESA will not produce it even under

the protection of a confidentiality agreement. The Commission should order RESA to provide the information subject to these standard provisions.

13. Finally, RESA's claim that it would be "imprudent" to provide the information is a novel but unsustainable basis for a discovery objection. When questioned, RESA's counsel did not cite to one case or Commission order in support of this imprudence objection. That is because none exist. The Commission should hold RESA to the standard of any other petitioner, and order RESA to respond fully to Liberty's data requests 1-7 and 1-11.

Data Requests 1-15, 1-17 and 1-18

14. Liberty also asked a series of data requests about efforts undertaken by RESA's members to promote retail choice in New Hampshire. All of these questions go towards the need for RESA's proposed retail market enhancements. Specifically, Liberty asked the following:

1-15: Re: Testimony page 14, lines 21-22. Please provide the details of any and all marketing programs by RESA's members to improve customer awareness of retail choice options in New Hampshire and in other states in New England.

1-17: Re: Testimony page 6, lines 14-17. Please provide the details and results of any and all marketing programs RESA's members have made to New Hampshire's electric residential and small commercial customers since retail access began.

1-18: Re: Testimony page 7, lines 8-10. Please provide the details and results of any and all marketing programs RESA's members have made to electric residential and small commercial customers in other states in New England since retail access began in those states.

In the case of each question, RESA objected stating as follows:

Objection: RESA objects to the request on the basis that it is seeking information that 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 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.

Attachment A.

15. RESA's claim that the requested information is not relevant or likely to lead to the admissibility of relevant information is not convincing. RESA asked the Commission to open this docket to consider purchase of receivables, customer referral and electronic interface programs because it claims these programs are necessary in order to develop retail markets for residential and small commercial customers. *See* RESA Direct Testimony at page 6, lines 5 -19. Whether RESA's members have conducted any marketing activities in New Hampshire or other New England states to improve customer awareness of retail choice is information that goes to whether market barriers in fact exist, and whether other efforts to improve customer choice have been successful or have failed. This is important to know in order to assess whether there is any need to require distribution utilities to undertake the programs proposed by RESA, which will have significant costs to Liberty's customers to implement through billing system and other changes, will require granting access to third parties to confidential customer information, and will create a framework for ongoing regulatory proceedings to track and true-up the expense of RESA's proposal. Before even considering such a significant undertaking, it is important to know what efforts RESA's members have undertaken to attempt to penetrate the residential and small commercial customer markets. Yet RESA refuses to provide any of that information. RESA's stated reasons for its refusal – irrelevance, confidentiality and imprudence – should be rejected for all of the reasons stated regarding data requests 1-7 and 1-11.

Conclusion

16. RESA came to the Commission asking that it implement programs that are impose significant burdens and costs on the utilities and their customers, yet when asked to produce

information about its efforts to affect the markets for customer choice, RESA hides behind legal objections and claims of confidentiality. The Commission should look past these objections and require RESA to share information of its members so that the need for its proposals can be adequately assessed.

WHEREFORE, Liberty Utilities respectfully requests that the Commission:

- A. Compel RESA to respond to Liberty's Data Requests 1-7, 1-11, 1-15, 1-17 and 1-18; and
- B. Grant such other and further relief as the Commission deems necessary and just.

Respectfully submitted,

GRANITE STATE ELECTRIC COMPANY D/B/A
LIBERTY UTILITIES

By its Attorney,

Date: August 20, 2012

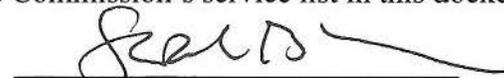
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Certificate of Service

I hereby certify that on August 20, 2012, a copy of this Motion to Retail Electric Supply Association's Response to Granite State Electric Company's First Set of Data Requests has been forwarded to the parties listed on the Commission's service list in this docket.



Sarah B. Knowlton