

STATE OF NEW HAMPSHIRE

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January 19, 2017

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

RE: Docket No. DE 16-576
Development of New Alternative Net Metering Tariffs, &c.

Dear Ms. Howland:

As you know, on January 12, 2017 the Office of the Consumer Advocate (OCA) filed a motion in the above-captioned proceeding to designate certain persons as Staff Advocates for purposes of this case pursuant to RSA 363:32, which would have the effect of imposing an *ex parte* wall between them and the Commissioners who will rule on the merits after hearing. The Commission issued a secretarial letter advancing the deadline for pleadings in opposition to the motion to January 18, 2017 and, accordingly, yesterday the Commission received such pleadings from its Staff, the New Hampshire Sustainable Energy Association (NHSEA), and the Energy Freedom Coalition of America (EFCA).

Having reviewed those pleadings, I now write in haste (requesting the Commission's indulgence for the informality of this communication) with an earnest request to the Commission. Staff, EFCA and, to some extent, the NHSEA all contend that RSA 363:32 is inapplicable because this is not an adjudicative proceeding within the meaning of the relevant provisions of the Administrative Procedure Act, RSA Chapter 541-A. *See* RSA 541-A:31, I ("An agency shall commence an adjudicative proceeding if a matter has reached a stage at which it is considered a contested case") and II(a) ("An agency may commence an adjudicative proceeding at any time with respect to a matter within the agency's jurisdiction"); *see also* RSA 363:32 (requiring or authorizing Staff designations in certain circumstances "[w]henver the commission conducts an adjudicative proceeding" pursuant to the Administrative Procedure Act).

The notion that Docket DE 16-576 is not an adjudicative proceeding is both startling and objectionable to a party such as the OCA, which initially appeared and has subsequently participated pursuant to the Order of Notice entered on May 19, 2016. The Order of Notice was ostensibly issued pursuant to RSA 541-A:31, III (“In a contested case, all parties shall be afforded an opportunity for an adjudicative proceeding after reasonable notice”) and included a series of directives (the scheduling of a prehearing conference, the publication of the Order of Notice, and the existence of and process for formal intervention) all citing relevant provisions of Part Puc 203 of the New Hampshire Code of Administrative Rules, which according to its title governs adjudicative proceedings before the Commission. Every aspect of this proceeding to date -- the prehearing conference, numerous technical sessions, several rounds of discovery, the submission of prefiled direct testimony and most recently the submission of prefiled rebuttal testimony – has been conducted in a manner consistent with N.H. Code Admin Rules Part Puc 203.

Moreover, although the legislation directing the Commission to open this docket does not explicitly specify that it should be an adjudicative proceeding – the instruction codified as RSA 362-A:9, XVI is simply to “initiate a proceeding to develop new alternative net metering tariffs” – to determine otherwise at this stage cannot be squared with any reasonable interpretation of the legislative directive issued by H.B. 1116 (2016 N.H. Laws Ch. 31). If the inquiry being conducted via this case were truly “legislative” rather than “adjudicative” as contended by Staff and EFCA, *see* Staff Opposition at 2-3 and EFCA Opposition at 3 n.9, the Legislature would not have consigned this matter to the Commission. A key purpose of doing so was to assure that new approaches to net metering would be based upon a defined record developed in an orderly manner and relying on sworn testimony – the essential attributes of adjudicative decisionmaking. A reasonable legislator, reading an order of the Commission concluding that Docket No. DE 16-576 is not an adjudicative proceeding, would have every reason to seek direct resolution of the issues in this case by the General Court forthwith.

Having been pushed to the edge of a cliff by EFCA, the NHSEA and its own Staff, the Commission need not leap. The OCA’s motion for staff designations invoked the Commission’s discretionary authority under RSA 363:32,II rather than the mandatory designation provisions set forth in RSA 363:32, I. This was by design; the purpose of our motion was to provide an opportunity for the Commission to bolster the confidence of the public, including the Legislature, in the objectivity of this highly visible and controversial proceeding in circumstances where the consultant hired by Staff has forgone a neutral posture. The OCA continues to believe this would be a prudent course of action for the reasons previously stated in our motion. If the Commission disagrees, we strongly urge the Commissioners to deny our motion on the merits and either avoid the question of whether this is an adjudicative proceeding or unambiguously declare that it is such a proceeding.

Should the Commission rule that this case is not adjudicative in nature, the OCA would interpose ongoing objections at suitable junctures and reserve its right to challenge the outcome of the docket on that basis for purposes of both rehearing and appeal. Although EFCA claims that the parties are “finding their way through this proceeding” with Staff as an “essential guide,” *see* EFCA Objection at 2, the real guide in this case – and the one on which the OCA and other

parties have relied to date – are the provisions in the Administrative Procedure Act and the Commission’s rules governing contested adjudicative proceedings. Discarding that legal guide at this stage would raise serious questions of due process and fundamental fairness.

Thank you for taking our concerns into account and for allowing the OCA to interpose what is effectively a reply to the pleadings in opposition to our motion.

Sincerely,



D. Maurice Kreis
Consumer Advocate

cc: Service list via electronic mail