

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

DE 14-238

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Determination Regarding PSNH's Generation Assets

**Response to Public Service Company of New Hampshire
Objection to TransCanada's Petition to Intervene**

NOW COMES TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast Inc. (together, "TransCanada" or "the Companies"), petitioner to intervene in this docket, and responds to the Response and Objections of Public Service Company of New Hampshire ("PSNH") to Petitions to Intervene dated October 2, 2014 ("Objection"). In support of this Response, TransCanada states as follows:

1. On September 16, 2014 the Commission issued an Order of Notice in the above-captioned docket. The Order of Notice cited HB 1602 which passed during the 2014 legislative session and was signed into law on August 1, 2014. This new law directed the Commission to open a docket to determine whether all or some of PSNH's generation assets should be divested.
2. On September 29, 2014 TransCanada submitted a petition to intervene in this docket. On October 2, 2014 PSNH filed the Objection noted above. In that Objection PSNH specifically objected to TransCanada's petition to intervene on the grounds that TransCanada's general interest in this proceeding does not create legal standing supporting its request for intervention (§ 11); the granting of its intervenor status would likely impair the orderly conduct of the proceeding (§§ 14 and 15); as a potential

purchaser of electric generation assets TransCanada's involvement in this docket, in the event that this docket leads to the initiation of a divestiture process, would provide it with an unfair advantage over other potential purchasers because of the access it would have to confidential materials (§ 15); TransCanada's interests are those of competitors in the energy marketplace which is not deemed to be a legal harm conferring standing on a party (§ 16); and because TransCanada has no interest at stake limiting its intervention or requiring it to consolidate with other parties or to demonstrate how its participation is both necessary and how it would not impair the orderly progress of the proceeding makes it impossible to do so (§ 22). In the Objection PSNH also argued that the Commission should make it clear that all parties must produce and provide relevant information as it may be needed and abide by the Commission's directives regarding the providing of information (§ 24).

3. During the prehearing conference on October 2, 2014 counsel for TransCanada orally requested separate intervention, as TransCanada had done in its petition to intervene, but further indicated that because TransCanada's interests would in all likelihood be aligned with NEPGA and RESA it would be willing to work with those parties to consolidate comments to the extent they are aligned. Staff stated orally at the prehearing conference that it did not object to the Commission exercising its discretionary authority under RSA 541-A:32 to grant TransCanada (and others) intervention citing the importance of this case. During the prehearing conference Commission indicated that parties seeking intervention could file responses to any PSNH objection to their intervention on or before October 9, 2014.

4. PSNH's Objection misconstrues the law with regard to interventions in Commission proceedings by confusing legal standing to participate in an appeal or a lawsuit in the New Hampshire courts with the authority given to the Commission under its rules, state law and Commission precedent to grant participation in its proceedings. The Commission's authority with regard to petitions to intervene in proceedings before it is governed by RSA 541-A:32, Commission rules and Commission precedent, not by New Hampshire Supreme Court cases addressing standing to bring appeals or to participate in actions taking place in the court system of the state. RSA 541-A:32 provides two routes to intervention, a mandatory one when a party has shown rights, privileges, duties, immunities or other substantial interests that that may be affected by the proceeding, and a discretionary one if such intervention would be in the interests of justice and would not impair the orderly and prompt conduct of the proceedings.

5. TransCanada submits that it is important to recall the state constitutional underpinnings to electric restructuring, which are cited in the purpose clause of the restructuring statute, RSA 374-F:1. Part 2, Article 83 of the New Hampshire Constitution provides: "Free and fair competition in the trades and industries is an inherent and essential right of the people and should be protected against all monopolies and conspiracies which tend to hinder or destroy it." This constitutional provision was central to the seminal case in this area of the law, *Appeal of Public Service Company of N.H.*, 141 N.H. 13, 19 (1996),¹ where the Court noted, citing *New England Household Moving & Storage, Inc. v. Public Utilities Commission*, 117 N.H. 1038, 1041 (1977), "free

¹ As the Court said in this case: "legislative grants of authority to the PUC should be interpreted in a manner consistent with the State's constitutional directive favoring free enterprise. Limitations on the right of the people to "[f]ree and fair competition," N.H. CONST. pt. II, art. 83, must be construed narrowly, with all doubt resolved against the establishment or perpetuation of monopolies." 141 N.H. 13, 19.

enterprise and the market economy are constitutional rights in this state.” Thus TransCanada affiliates doing business in this state have a constitutional right to free enterprise and a market economy, a right that may be affected by this proceeding to the extent that PSNH’s continued ownership of generation impacts its participation in the market for electricity. PSNH’s ownership of generation means that it is treated differently than TransCanada, other owners of generation and participants in the market for electricity, thus impacting free and fair competition in the electric industry in New Hampshire. This constitutional right in and of itself should qualify TransCanada to participate in this proceeding under the first part of RSA 541-A:32.

6. Beyond the argument noted above TransCanada submits that it would be in the interest of justice for the Commission to grant it intervention because it will be important for the Commission in making the determinations that it must make in this docket to hear from many interested parties that will be affected by the decision. The first section of HB 1602 states as one of the purposes of allowing the Commission to determine the issue in this docket is to “promote the settlement of outstanding issues involving stranded costs”. TransCanada submits that settlement with all stakeholders can not be promoted if parties that are seriously interested in and affected by the results of this docket are not allowed to intervene. This would contravene the legislative intent.

7. The Commission’s rules, Puc 203.17 Intervention, provide that the Commission “*shall grant* one or more petitions to intervene in accordance with the standards of RSA 541-A:32.” [Emphasis added.] The wording of the rule does not suggest a predilection to denying petitions to intervene, but rather just the opposite. Moreover, this approach is supported by the longstanding practice of the Commission.

The Commission has interpreted its authority and carried out its responsibilities in a consistent manner by allowing full and fair participation in its proceedings, particularly proceedings which, like this one, could have a significant impact on customers, businesses and the markets. In its comments to the Commission during the prehearing conference, Staff noted the significance of this proceeding. The Legislature's awareness of this consistent interpretation with regard to intervention has not interfered with the Commission's practice of allowing a broad range of interventions in important dockets. The Commission need only look to the long list of interventions which it granted in the DE 99-099 docket, the docket which lead to the Settlement Agreement which it cited in the Order of Notice, to see what that long standing practice has been when addressing issues similar in scope to those to be addressed in this docket. *Re Public Service Company of New Hampshire*, 84 NH PUC 464, 469-470 (1999).

8. Further, as a state agency, the Commission's powers are delegated to it by the Legislature, they are limited by statute, and its authority is both legislative and judicial. See *Appeal of Pennichuck Water Works*, 120 N.H. 562, 565 (1980); *Appeal of Granite State Elec. Co.*, 121 N.H. 787, 792 (1981); *McKay v. New Hampshire Compensation Appeals Bd.*, 143 N.H. 722, 728-729 (1999). If anything, the proceedings which it will conduct as directed by the Legislature in HB 1602 are in many respects more akin to legislative proceedings than to court or judicial proceedings. The New Hampshire Legislature could have chosen to decide the issues in this docket but it chose instead to delegate the authority to the Commission. By doing so TransCanada submits the Legislature intended the Commission to exercise its authority by hearing from all interested parties, in much the same way that the Legislature itself typically does.

9. As counsel for TransCanada said at the prehearing conference it will make reasonable efforts to combine its participation with NEPGA and RESA. Thus its participation will not impede the orderly conduct of the proceeding. In so far as PSNH's argument that parties to this docket must produce and provide relevant information as it may be needed and abide by the Commission's directives regarding the providing of information, TransCanada does not disagree.

10. With regard to access to confidential information, TransCanada submits that there are many ways to address concerns about access to confidential information about generation assets being provided to intervenors in this docket. Access to such information could be limited to certain parties or to counsel for parties. Presumably if such information should not be provided to generators it should not be available to the public and not provided to other intervenors, such as the cities of Berlin and Manchester (both of which may have an interest in purchasing generation assets and should be denied intervention to the docket based on the PSNH rationale), the International Brotherhood of Electrical Workers, Local #1837, and Pentti Aalto, to whose participation PSNH has not objected. In any event access to confidential information should not be used as a basis for denying intervention to a whole group of intervenors whose rights will be affected by this proceeding and whose input may be of significant benefit to the Commission in resolving the issues in this docket.

11. For the reasons noted above, TransCanada submits that granting PSNH's objection and denying TransCanada's petition to intervene would run contrary to RSA 541-A, the long standing practice of the Commission, and the legislative intent evident in

HB 1602, and it would result in unnecessarily limiting the input that the Commission should receive given the significance of the issues in this docket.

WHEREFORE, TransCanada respectfully requests that this honorable Commission:

- A. Grant TransCanada's petition to intervene in this docket; and
- B. Grant such further relief as it deems appropriate.

Respectfully submitted,

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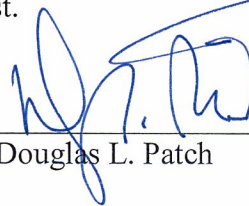


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October 9, 2014

Certificate of Service

I hereby certify that on this 9th day of October, 2014 a copy of the foregoing motion was sent by electronic mail to the Service List.



Douglas L. Patch