

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 09-180

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Proposed Default Energy Service Rate--2010

Order on Motions to Compel

ORDER NO. 25,048

November 30, 2009

I. BACKGROUND

On September 24, 2009, Public Service Company of New Hampshire (PSNH) filed a petition to establish its default energy service rate for effect with service rendered on and after January 1, 2010. The Commission issued an order of notice on October 5, 2009 and on October 16, 2009 the Commission received petitions to intervene from Freedom Logistics LLC, Halifax-American Energy Company, LLC (collectively, Freedom-Halifax) and TransCanada Power Marketing Ltd. (TransCanada). The New England Power Generators Association, Inc. (NEPGA) also filed a motion to intervene on October 19, 2009.¹

On November 4, 2009, the Commission granted the petitions to intervene subject to limitations on access to confidential information and approved a procedural schedule. On November 12, 2009, TransCanada filed a motion to compel PSNH to respond to TransCanada's data request number 13. PSNH responded with an objection on November 17, 2009 to TransCanada's motion to compel. On November 18, 2009, Freedom-Halifax filed a motion

¹ NEPGA has not participated in discovery in this proceeding.

(dated November 12, 2009) to compel PSNH to respond to its questions number 2 and 3.² On November 17, 2009, PSNH also filed an objection to Freedom-Halifax's motion to compel.

II. POSITIONS OF THE PARTIES

A. TransCanada

In its motion to compel, TransCanada said that it propounded, *inter alia*, the following data request upon PSNH on October 29, 2009:

13. Please provide copies of any guidelines, standard operating procedures or other forms of guidance relied upon by the individuals who make power purchases on behalf of PSNH.

TransCanada received the following response from PSNH on November 9, 2009:

“PSNH objects to this question pursuant to Rule Puc 203.09. The information sought by these questions is confidential business information which if revealed, would cause significant competitive harm to the company and its customers. Therefore, this information would not be supplied to potential suppliers, such as TransCanada. The benefits of disclosing this information to potential suppliers are outweighed by the harms that disclosure would likely cause. The information sought by this question is neither relevant nor material to this proceeding. The information sought by these questions is not reasonably calculated to lead to evidence admissible in this proceeding.” Motion to Compel at 1-2.

TransCanada stated that its counsel had offered to enter into a protective agreement to obtain the requested information but that PSNH declined such offer.

TransCanada argues that the requested information goes to the “very heart” of the issue that the Commission must determine in the instant proceeding, that is, whether the costs of the power that it purchases to meet default customer demand are reasonable and prudent consistent with RSA 369-B:3, IV(b)(1)(A). According to TransCanada, the practices PSNH uses and the

² Freedom-Halifax also filed a Motion to Compel PSNH to answer its question number 1. PSNH subsequently provided a response to question number 1 and, therefore, this Order pertains only to the Motion to Compel regarding questions 2 and 3.

guidelines it follows in purchasing such power are clearly relevant and/or likely to lead to information that is relevant in this proceeding.

TransCanada stated that it is seeking this information solely for the purpose of developing its position on the issue of whether 1) PSNH has met the referenced statutory burden and 2) any recommendation PSNH may have to transfer some portion of the costs of providing such power to customers who have migrated from default service is appropriate, reasonable and consistent with the restructuring principles. TransCanada recommends that the information responsive to its data request be made available to the Commission, its Staff, the OCA and intervenors such as TransCanada. *Id.* at 2

TransCanada stated that PSNH's objections are without merit, repeating the assertion that the information it requested was clearly relevant to the proceeding or likely to lead to admissible evidence. TransCanada said that if the Commission determines that the information is confidential, TransCanada would sign a non-disclosure agreement, although TransCanada maintains that the information is not confidential. In addition, TransCanada opined that the provision of the requested information is not overly burdensome. TransCanada asserted that PSNH, as a regulated utility should be forthcoming concerning how it procures power, the costs of which are borne by its ratepayers, and that the process that it uses and the guidelines it follows to purchase power should be open and transparent. *Id.* at 3

TransCanada stated that the Commission's evaluation of PSNH's proposed energy service rate for 2010 will be enhanced by TransCanada's participation in this docket and for that participation to be meaningful TransCanada and the Commission must have access to the information requested in its data request number 13. *Id.* at 3-4. According to TransCanada,

“[d]ue process requires no less.” *Id.* at 4. Due to the expedited schedule in this proceeding, TransCanada asked for a prompt ruling on its motion.

B. Freedom-Halifax

Freedom-Halifax’s motion to compel pertains to the following two data requests:

No. 2 Provide a copy of any study or analysis available to or in the possession of PSNH which forecasts or estimates market prices over the next five years.

No. 3. Provide a copy of any study or analysis available to PSNH which forecasts or estimates ES Default rate prices of the next five years.

According to Freedom-Halifax, this information is relevant even though the instant docket pertains to energy service rates for 2010 because PSNH’s prefiled testimony speculated about the unknown effects of future migration levels and related levels of alternative market prices. The testimony is as follows:

Q. Will the upward pressure on ES rates continue into the future?

A. Such a question can only be answered with knowledge of future migration levels and the related levels of alternative market prices. During the current unprecedented market price decline, suppliers have been successful in offering certain customers lower prices than the price calculated in the ES rate formula. How long this price differential will last is not known, nor is the pricing or terms of the current third party contracts. If market prices in the future increase once again over the ES rate level, PSNH expects that some or all of these customers on third party supply may migrate back to PSNH’s ES default rate.” Freedom Motion at 1.

Freedom-Halifax said that its data request relates to the future “price differential” which, according to PSNH, is needed to estimate future migration levels and any resulting impacts on smaller customers. Freedom-Halifax stated that PSNH asserts that knowledge of these levels is necessary to an adjudication of this issue, which was raised by PSNH, and therefore PSNH must respond to the data requests.

Freedom-Halifax said that the Commission’s applies a liberal discovery rule to its proceedings and will deny discovery requests only when it can perceive of no circumstance in

which the requested data is relevant (citations omitted). Freedom-Halifax also cited *Scotsas v Citizens Insurance Co. of New Jersey*, 106 NH 386 (1969), in support of its argument that all parties are entitled to be fully informed and have access to all evidence favorable to his side of an issue. (Citations omitted). *Id.* at 2.

C. Public Service Company of New Hampshire

In its objection to TransCanada's Motion to Compel, PSNH argued that the information requested by TransCanada was neither relevant to the proceeding nor reasonably calculated to lead to the discovery of admissible evidence. PSNH said that the purpose of the instant proceeding is to establish an energy service rate for 2010 based on estimated costs. According to PSNH, the Commission has explored and examined how PSNH procures the supplemental power in several reconciliation proceedings, after the fact, to investigate the reasonableness and prudence of PSNH's procurement of supplemental power. Because the Commission reviews these purchases after the fact, PSNH says that TransCanada's assertion that the subject of this proceeding is "whether the costs of the power that [PSNH] purchases to meet default service customer demand are reasonable and prudent" is just plain wrong. PSNH Objection at 2.

According to PSNH, the information TransCanada requested would serve no purpose in this proceeding but would only provide TransCanada the competitively sensitive details of how PSNH purchases supplemental power to meet the needs of its customers beyond the loads supplied by its generating assets. *Id.* at 2. Further, PSNH said that written procedures it uses will not prove that a competitively bid supply would have produced a better result or that substituting a projection of hourly ISO New England market prices are a better projection of the supplemental power prices that should be included in the estimate of the 2010 rates.

PSNH also argues that the information or guidelines as to how its personnel make purchases are highly sensitive confidential commercial information which has no material value in this proceeding, but its disclosure to competitive or alternative suppliers will have serious consequences for PSNH and its customers. PSNH says that competitive suppliers and those offering alternatives to PSNH energy service such as TransCanada, Freedom, Halifax and the members of NEPGA would benefit greatly from learning how PSNH procures its supplemental supply.

According to PSNH, TransCanada should never have made the request contained in its data request No. 13, and upon learning that the information sought is confidential, should not have filed its motion to compel. PSNH asserted that the Commission may limit the scope of an intervening party's participation in a docket pursuant to RSA 541-A:32, III. In the instant proceeding, PSNH stated that the Commission granted the intervention of TransCanada and others "subject to limitation on access to confidential information," quoting the Commission's secretarial letter dated November 4, 2009. PSNH states that by seeking confidential materials, TransCanada has sought information to which it is not entitled under the Commission's grant of limited intervention. *Id.* at 3.

Further, PSNH said that the suggestion by TransCanada that the execution of a non-disclosure agreement would resolve any confidentiality issues should be rejected because TransCanada itself is one of the participants in the competitive market to whom confidential information must not be disclosed. PSNH asserts that a non-disclosure agreement under which the confidential information would in fact be disclosed to TransCanada or other competitive market participants would be of no value.

PSNH also argues that TransCanada's motion to compel cites interests beyond the interests it stated for intervention. At the prehearing conference on October 19, 2009, when the hearings examiner sought clarification of TransCanada's interest for intervention, TransCanada responded that its request for intervention was based on the issues of customer migration and the restructuring principles of RSA 374-F. According to PSNH, the motion to compel goes beyond that and asserts an interest in the Commission's role in determining the estimated rate under RSA 369-B:3, IV(b)(1)(A). PSNH states that the OCA and Staff protect the interests of PSNH's customers, and that TransCanada represents no consumers that will ultimately take energy service from PSNH against whom it competes. *Id.* at 4

PSNH opined that every time the Commission grants intervention to a competitive or alternative supplier in a PSNH proceeding, there are issues related to discovery and the scope of that intervention. In the instant docket, PSNH said that intervenors have filed data requests that are beyond the scope of the proceeding and beyond the scope of their intervention as each had explained to the bench at the prehearing conference, and beyond the limitation that was properly imposed by the Commission pursuant to RSA 541-A:32, III(a).

PSNH said it had conceded at the prehearing conference that the issue of customer migration was a proper issue for discovery and inquiry as long as confidential information was not shared with the competitive and alternative suppliers. PSNH asserted that its reasonableness has been met with objectionable data requests and motions to compel. PSNH stated that the intervention of any competitive or alternative supplier in the future will only lead to disruption of the orderly conduct of these proceeding. PSNH concluded by requesting that the Commission deny TransCanada's motion to compel.

PSNH stated that no person has an absolute right to unrestricted participation as an intervenor in an administrative proceeding in New Hampshire. PSNH pointed out that RSA 541-A expressly provides agencies with the authority to impose conditions upon any intervenor's participation in an administrative proceeding. RSA 541-A:32, III. PSNH said that the limitations the Commission imposed on the participation of intervenors in the instant docket, that is, the restriction from access to confidential information, "are unquestionably permitted by RSA 541-A:32,III. *Id.* at 2.

Moreover, PSNH asserts that RSA 541-A:32, I(b) requires an entity seeking intervenor status to include in its request for intervenor status "facts demonstrating that the petitioner's rights, duties, privileges, immunities or other substantial interests may be affected by the proceeding or that the petitioner qualifies as an intervenor under any provision of law." Consistent with this statutory provision, PSNH states that Freedom-Halifax should be limited in its intervention to the issues raised in their petition for intervention and their statements at the prehearing conference where a representative stated that Freedom-Halifax were interested in the issues of customer migration and the restructuring principles of RSA 374-F. *Id.* at 2.

PSNH stated that it made clear at the prehearing conference that with respect to the requests for intervention by all four competitive suppliers – Freedom, Halifax, TransCanada and NEPGA – the Commission must impose a limitation so that such competitive supplier would not have access to PSNH's confidential, competitive information. PSNH said the record of the prehearing demonstrates that Freedom-Halifax did not raise any objection to that limitation at the prehearing conference. *Id.* at 3.

Regarding Freedom-Halifax's motion to compel PSNH to respond to its data requests numbers 2 and 3, PSNH stated that it had objected to responding to the question as follows:

“Nothing in the Commission’s Order of Notice or in PSNH’s filing addresses any period beyond December 31, 2010. The above Requests are not related to whether PSNH’s estimated rate for calendar year 2010 is just and reasonable as required by RSA 378:5 and 8, or whether the requested rate reflects a good faith estimate of PSNH’s actual, prudent and reasonable estimated costs of providing such service consistent with RSA 369-B:3, IV(b)(1)(A). Requests 2 and 3 will not lead to the discovery of information admissible in this Default Energy Service rate proceeding.” PSNH Objection at 1.

PSNH said that Freedom-Halifax cited one question and answer in Mr. Baumann’s prefiled testimony as proof that PSNH has raised the issue of future market and energy service prices. *Id.* at 1-2. In the response, Mr. Baumann averred that there is no answer to the question “[w]ill the upward pressure on ES rates continue in the future.” *Id.* at 2. PSNH stated that contrary to Freedom-Halifax’s motion to compel, the testimony does not say that the answer to the question of future price differentials is essential to the question of dealing with migration in 2010. Mr. Baumann testified that the question posed in the testimony cannot be answered because the future price differential is unknown. *Id.*

PSNH further asserted that Freedom and Halifax have access to the same fuel price projections as PSNH. According to PSNH, Freedom-Halifax can develop their own market price predictions and present them in direct testimony so that the projects will be subject to discovery and cross examination.

III. COMMISSION ANALYSIS

At the outset, we observe that TransCanada’s Motion to Compel was timely filed pursuant to N.H. Code Admin. R. Puc 203.09(i). Next we consider whether the discovery request was substantively appropriate. In a discovery dispute, the Commission applies by analogy the standard applicable to civil litigation in Superior Court which requires a party seeking to compel discovery “to show that the information being sought is relevant to the proceeding or is reasonably calculated 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.” *City of Nashua*, Order No. 24,681 (October 23, 2006) 91 NH PUC 452, 455 (citations omitted) (noting that generally New Hampshire law “favors liberal discovery.”)

In its motion to compel, TransCanada is asking that PSNH produce “copies of any guidelines, standard operating procedures or other forms of guidance relied upon by the individuals who make power purchases on behalf of PSNH.” TransCanada argues that the requested information goes to the issue that the Commission must determine in the instant proceeding, that is, whether the costs of the power that it purchases to meet default customer demand are reasonable and prudent consistent with RSA 369-B:3, IV(b)(1)(A). According to TransCanada, the practices PSNH uses and the guidelines it follows in purchasing such power are clearly relevant and/or likely to lead to information that is relevant in this proceeding.

We agree. In this docket, we must determine whether PSNH’s estimates of its 2010 energy service are just and reasonable and based on its actual, prudent and reasonable costs of providing such power consistent with RSA 369-B:3, IV (b)(1)(A). In our review of the estimated rates, we examine whether PSNH’s forecast of costs and revenues, projected kilowatt sales, and power purchases to supplement its owned generation, are reasonable as a basis to estimate costs. Certainly any guidelines, standard operating procedures or other forms of guidance used by PSNH to plan power purchases are relevant to this inquiry. Therefore, we grant TransCanada’s motion to compel.

We granted TransCanada’s intervention in this docket subject to limitations on its access to PSNH’s confidential information. To the extent that PSNH believes that a responsive answer to TransCanada’s question No. 13 is confidential, PSNH shall file a motion for confidential treatment with the Commission and provide copies of the requested information to Staff and the

OCA for their review, as well as provide redacted copies to other parties. This information shall be provided no later than close of business on Tuesday, December 1, 2009.

We next address the Freedom-Halifax motion to compel PSNH to provide a copy of any study or analysis available to or in the possession of PSNH that forecasts or estimates market prices over the next five years and a copy of any study or analysis available to PSNH which forecasts or estimates ES Default rate prices of the next five years. We agree with PSNH that this docket does not raise issues regarding long term forecasts of market prices and, therefore, this request will not lead to information relevant to this proceeding. We therefore deny the Freedom-Halifax motion to compel.

In light of the fact that we suspended the schedule for testimony by secretarial letter dated November 23, 2009, we modify the procedural schedule in this proceeding as follows, understanding that PSNH filed its testimony on November 23, 2009:

Discovery on PSNH Testimony	November 30, 2009
Intervenor/Staff Testimony	Close of Business December 2, 2009
Discovery Staff/Intervenor Testimony	Close of Business December 3, 2009
Responses Due	Noon on December 7, 2009
PSNH Rebuttal Testimony	December 8, 2009

We are allowing PSNH to file Rebuttal Testimony because the company filed its testimony on November 23, 2009 before it was aware of our letter suspending that aspect of the procedural schedule. The hearing will be held on December 10, 2009 as scheduled immediately following the hearing in Docket No. DE 09-179, PSNH's 2010 Stranded Cost Recovery Charge, which will begin at 10:00 a.m.

Finally, we note that there are pending issues concerning confidentiality, including a letter filed by Freedom-Halifax on November 12, 2009 asserting that limitations on access to confidential information are unlawful and a “partial objection” filed by TransCanada on November 25, 2009 to PSNH’s motion for confidential treatment of supplemental power supply contracts and coal supply contracts. Pending resolution of these motions, information for which PSNH seeks confidential treatment will be accorded such treatment consistent with Puc 203.08 and with the November 4, 2009 Secretarial Letter issued regarding intervention and procedural issues in this docket.

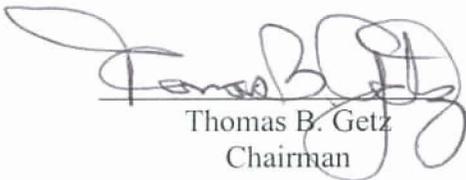
Based upon the foregoing, it is hereby

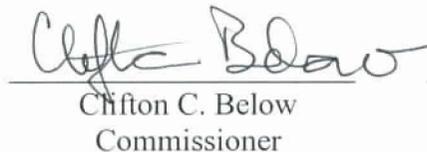
ORDERED, TransCanada’s motion to compel is hereby GRANTED subject to PSNH requesting confidential treatment of its response; and it is

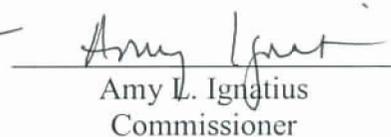
FURTHER ORDERED, that Freedom-Halifax’s motion to compel is hereby DENIED; and it is

FURTHER ORDERED, that the procedural schedule in the instant docket shall be modified as set forth in this Order.

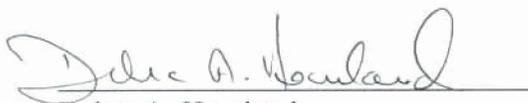
By order of the Public Utilities Commission of New Hampshire this thirtieth day of November, 2009.


Thomas B. Getz
Chairman


Clifton C. Below
Commissioner


Amy L. Ignatius
Commissioner

Attested by:


Debra A. Howland
Executive Director