

STATE OF NEW HAMPSHIRE  
BEFORE THE  
PUBLIC UTILITIES COMMISSION

Re: Public Service Company of New Hampshire

DE 08-77

**CONSTELLATION'S MOTION TO COMPEL PUBLIC SERVICE COMPANY  
OF NEW HAMPSHIRE TO RESPOND TO CONSTELLATIONS DATA REQUESTS**

Pursuant to N.H. Admin. Rules Puc 203.07 and 203.09, Constellation NewEnergy, Inc. and Constellation Energy Commodities Group, Inc. (together "Constellation"), hereby file this motion to compel Public Service Company of New Hampshire ("PSNH") to provide full and complete responses to certain data requests propounded by Constellation on July 8, 2008 and July 15, 2008, respectively.

1. On July 18, 2008 PSNH objected to Constellation's data requests 1-1, 5, 13, 15, 24 and 29 on the grounds that "[t]his proceeding is limited to consideration of approving the Power Purchase Agreement and Renewable Energy Certificate Option Agreement between Lempster Wind, LLC and PSNH. This proceeding is not a general investigation into PSNH's compliance plans for acquiring RECs pursuant to RSA 362-F. Constellations requests... are not relevant to this proceeding. They are beyond the public interest determination set forth in RSA 362-F:9." PSNH further objected to "any questions which seek competitively sensitive information (Requests [Constellation Set 1] 1, 5, 24 and 29)." Letter from Gerald M. Eaton to Steven V. Camerino, dated July 18, 2008.

2. On July 15, 2008, PSNH objected to Constellation's data requests 2-7 and 8, again on relevance grounds.

3. The data requests to which PSNH has objected are set forth on Appendix A to this motion.

4. In addition, to date PSNH has provided limited or non-responsive answers to Constellation data requests 1-2, 8, 11, 14, 16, 17, 23 and 25 and 2-1, 11 and 13, but has not objected to these requests. In order to avoid seeking Commission involvement to compel PSNH to respond to these eleven requests, on July 31, 2008 Constellation propounded follow up questions in a third set of data requests to focus on the inadequacy of PSNH's prior responses. A copy of Constellation's third set of data requests is attached as Appendix B (see data requests 1 through 9, 11 and 12).

#### **I. STANDARD OF REVIEW**

5. Discovery in proceedings before the New Hampshire Public Utilities Commission (the "Commission") is guided by the principles and procedures set forth in New Hampshire Superior Court Rule 35(b)(1), which states, in part, that

[p]arties may obtain discovery regarding *any* matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought *appears reasonably calculated to lead to the discovery of admissible evidence.*

NH Sup. Ct. R. 35(b) (emphasis added); *see also Re Investigation into Whether Certain Calls Are Local*, Docket DT 00-223, Order No. 23,658, 86 NH PUC 167, 168 (Mar. 22, 2001).

Additionally, the New Hampshire Supreme Court has held that 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 of someone else." *Scotsas v. Citizens Insur. Co.*, 109 N. H. 386, 253 A. 2d 831, 833 (1969); *see also Yancey v.*

*Yancey*, 119 NH 197, 198 (1979) (holding that New Hampshire takes a “liberal view of discovery”); *Barry v. Horne*, 117 N.H. 693, 694 (1977) (stating intent of Superior Court Rule 35(b)(1) is to allow “very broad discovery”).

6. The Commission has reaffirmed its adherence to the standards established by Rule 35(b) and the New Hampshire Supreme Court. In a recent decision, the Commission stated that its policies are "consistent with Superior Court Rule 35(b) regarding the scope of discovery," and that the Commission requires 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." *City of Nashua*, Order No. 24,681, Docket No. DW 04-048 (Oct. 23, 2006). Even when it has denied motions to compel discovery, the Commission has commented that it did so when it could "perceive of *no circumstances* in which the requested data will be relevant." *Lower Bartlett Water Precinct*, Docket DW 99-166, Order No. 23,471, at 4-5 (May 9, 2000) (emphasis added).

## II. DISCUSSION

7. The purpose of this docket is to consider whether the Power Purchase Agreement and Renewable Energy Certificate Option Agreement between Lempster Wind, LLC and PSNH are in the public interest pursuant to RSA 362-F, which provides in relevant part:

I. Upon the request of one or more electric distribution companies and after notice and hearing, the commission may authorize such company or companies to enter into multi-year purchase agreements with renewable energy sources for certificates, in conjunction with or independent of purchased power agreements from such sources, *to meet reasonably projected renewable portfolio requirements and default service needs to the extent of such requirements*, if it finds such agreements or such an approach, as may be conditioned by the commission, to be in the public interest.

II. In determining the public interest, the commission shall find that the proposal is, on balance, substantially consistent with the following factors:

(a) The efficient and cost-effective realization of the purposes and goals of this chapter;

(b) The restructuring policy principles of RSA 374-F:3;

(c) The extent to which such multi-year procurements are likely to create a reasonable mix of resources, in combination with the company's overall energy and capacity portfolio, in light of the energy policy set forth in RSA 378:37 and either the distribution company's integrated least cost resource plan pursuant to RSA 378:37-41, if applicable, or a portfolio management strategy for default service procurement that balances potential benefits and risks to default service customers;

(d) The extent to which such procurement is conducted in a manner that is administratively efficient and promotes market-driven competitive innovations and solutions; and

(e) Economic development and environmental benefits for New Hampshire.

(Emphasis added.)

8. Contrary to PSNH's position, the Commission is charged with undertaking a broad, multifaceted analysis of PSNH's proposed contracts in this case to determine whether the proposed contracts are in the public interest and, in particular, are necessary "*to meet reasonably projected renewable portfolio requirements and default service needs to the extent of such requirements.*"

9. All of the data requests to which PSNH has objected seek to obtain information regarding PSNH's reasonably projected renewable portfolio requirements, the number of renewable energy certificates ("RECs") that PSNH either has procured or will need to procure during the period that the Lempster agreements are in effect, the specific steps that PSNH has taken to meet those requirements and/or information in PSNH's possession or control that would enable the Commission to compare the cost of the RECs to their projected market cost/value.

10. PSNH's objections misstate the standard for review regarding discovery disputes. The standard, as noted above is whether the information sought "appears reasonably calculated to lead to the discovery of admissible evidence." *Re Investigation into Whether Certain Calls Are Local, supra*. Despite this broad standard, the information sought by the foregoing data requests is plainly directly relevant to the issues in this proceeding, and in fact relates to the central issue that the Commission is charged with determining. It is hard to imagine how the Commission could fulfill its statutory obligation without such information.

11. PSNH has further objected to several of Constellation's data requests on the basis that they would require PSNH to provide confidential or competitively sensitive information. Confidentiality is not a valid basis for objection to a data request, unless the information at issue is privileged. If the answer to a data request would require the disclosure of confidential information, PSNH may seek protective treatment in accordance with Commission rules and provide a redacted copy of its response to Constellation. Such a process would (1) allow the Commission staff and the Consumer Advocate an opportunity to review the information requested, (2) provide Constellation at least a partial response to its questions and (3) provide Constellation a more specific understanding of PSNH's basis for claiming confidentiality and thereby enable it to determine if PSNH's claim of confidentiality is appropriate. In fact, in its pending integrated resource planning docket, DE 07-108, PSNH responded to a data request by Constellation and other competitive suppliers by providing a copy of the response to the Commission staff and the Consumer Advocate, but not to the suppliers. Neither Constellation nor any other supplier challenged this approach.

12. As noted above, PSNH has also provided non-responsive or partial answers to eleven additional data requests from Constellation but did not object to any portion of the requests. In an attempt to avoid involving the Commission in resolving this aspect of the discovery dispute between PSNH and Constellation, Constellation has propounded follow up data requests seeking the missing information. To preserve its right to seek to compel responses to these eleven data requests and not be prejudiced by the end of the discovery period provided for in the procedural schedule in this case, Constellation is including these additional data requests in this motion. Constellation believes that the Commission can delay ruling on these requests until PSNH has responded to Constellation's third set of data requests and it has become clear whether PSNH will respond to them voluntarily and whether the responses create a need for follow-up questions. (If it becomes necessary for the Commission to rule on this part of Constellation's request, Constellation is prepared to provide the Commission with a copy of PSNH's responses to each of the requests referred to above, but in light of the fact that discovery is not normally filed with the Commission and the large number of requests involved, Constellation is not including that information with this motion at this time.)

### **III. CERTIFICATION AND CONCLUSION**

13. In accordance with N.H. Code of Admin. Rule Puc 203.09(i), counsel for Constellation has contacted counsel for PSNH to attempt in good faith to resolve the discovery dispute that is the subject of this motion.

14. To the extent that PSNH posits new or expanded arguments for objecting to Constellation's data requests, Constellation reserves the right to respond to such arguments in writing or at oral argument.

15. In addition, to the extent that the responses to any data requests to which PSNH is compelled to respond create the need for follow up data requests, Constellation requests that the Commission amend the procedural schedule to provide Constellation with an opportunity for such additional discovery as it would have been afforded had PSNH provided timely and complete responses in the first place.

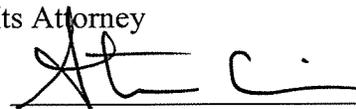
WHEREFORE, Constellation respectfully requests that the Commission grant this Motion to Compel and order PSNH to respond to Constellation' data requests as set forth above.

Respectfully submitted,

CONSTELLATION NEWENERGY, INC. AND  
CONSTELLATION ENERGY  
COMMODITIESGROUP, INC.

By Its Attorney

By:



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August 5, 2008

CERTIFICATE OF SERVICE

I hereby certify that I have served this Motion to Compel on all persons on the service list this 5<sup>th</sup> day of August, 2008.



Steven V. Camerino