

THE STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

Public Service Company of New Hampshire

Petition for Approval of PPA with Laidlaw Berlin BioPower, LLC

Docket No. DE 10-195

Objection
of
Public Service Company of New Hampshire
to
Concord Steam Corporation's Motion to Compel

November 5, 2010

Pursuant to N.H. Code Admin. Rules Puc § 203.07(e), Public Service Company of New Hampshire ("PSNH" or the "Company") hereby objects to Concord Steam Corporation's ("CSC") Motion to Compel dated October 29, 2006.¹ Concord Steam has identified as questions in contention its data request numbers 1, 2, 3, 5, 6, 9 and 28 propounded on PSNH in its first set of questions on October 14, 2010.

CSC, a competitor to PSNH and Laidlaw in the energy, REC, and biomass markets, primarily asks the Commission to provide it with confidential, commercial, financial information that neither PSNH, Laidlaw, nor any other participant in the competitive free market, would provide to such a competitor. Moreover, in another docket, CSC has noted that it seeks to have PSNH voluntarily or involuntarily purchase energy, RECs, and perhaps other products from its own biomass-fired facility.² Providing CSC with confidential information from PSNH when CSC has expressed its own desire to sell to PSNH would distort the full and fair competition principle of the restructuring law³ by giving unregulated competitive market participants access to PSNH's fuel, energy, capacity, REC, planning, analytical, and forecasting documents, while PSNH would

¹ It is apparent that Concord Steam's Motion should have been dated 2010, not 2006.

² *Complaint of Clean Power Development, LLC*, Docket No. DE 09-067

³ RSA 374-F:3,VII

have no access to identical information from them. PSNH must deal with these same entities as both potential suppliers of energy, capacity, and RECs, and potentially compete with them for fuel in the open marketplace. Such a situation would ultimately cause harm that would be borne by retail consumers in the form of higher costs.⁴

In support of this Objection, PSNH states as follows:

1. CSC owns and operates an existing wood-fired plant that generates steam and electricity.⁵ CSC has been developing a new wood-fired combined heat and power plant in Concord since 2007 that would greatly expand its generating capacity to 17 MW.⁶ CSC has expressed its desire to sell its “in-state generated renewable power and RECs” to PSNH⁷ and to potentially invoke the requirements of the Public Utility Regulatory Policies Act of 1978⁸ to obtain a rate order mandating PSNH’s purchase of its plant’s output with rates based upon PSNH’s avoided costs.⁹
2. On October 14, 2010, CSC issued its first set of data requests on PSNH. That set included 28 questions.
3. Pursuant to the expedited procedural schedule adopted for this proceeding by the Commission in Order No. 25,158, PSNH provided responses to 7 of CSC’s 28 questions on October 22¹⁰, and to the remaining 21 questions on Monday, October 25.

⁴ *Re Public Service Company of New Hampshire*, Order No. 25,061, December 31, 2009 (PSNH’s internal power purchase guidance, including the 2008 memorandum regarding power purchases for 2010; revenue requirements for Newington Station; power supply and coal supply contracts, including the over-market calculation for the 2008 strips of energy purchased for 2010 and mark-to-market information on PSNH power purchases; specific information regarding planned maintenance outages for PSNH generating units; and price information regarding PSNH’s purchases and sales of RECs provided confidential treatment, “...**given that confidentiality helps produce lower rates.**” (Emphasis added).)

⁵ See Prefiled Direct Testimony of Peter Bloomfield, P.E., dated September 4, 2009, Docket No. DG 09-139.

⁶ *Re Concord Steam Corporation*, Docket No. DG 08-107, Order No. 24,969 dated May 22, 2009, *slip op.* at 2.

⁷ CSC Motion to Intervene dated July 23, 2009, Docket No. DE 09-067.

⁸ 16 U.S.C. § 824a-3(m).

⁹ CSC letter dated October 1, 2009, Docket No. DE 09-067.

¹⁰ PSNH responded to CSC question numbers 4, 5, 7, 9, 18, 21, and 27 on October 22.

4. Of the 28 responses made by PSNH to CSC's first set of questions, CSC disputes seven responses in its Motion to Compel. CSC appended to its Motion copies of PSNH's responses to these questions. Of the seven questions in dispute, CSC alleges that five of them – 1, 2, 3, 6, and 28 - - were not objected to by PSNH¹¹, and that as a result, PSNH has waived such right to object.¹²

5. Each of question numbers 1, 2, 3, 6 and 28 requested information substantially similar to information requested by Commission Staff in its first set of data requests. As a result, and consistent with past practice in proceedings before this Commission, PSNH referred CSC to the appropriate Staff data requests and PSNH's responses thereto.

6. Each of these five CSC questions requested information for which PSNH has a good faith basis to seek confidential treatment. The information sought by these five questions includes:

Q1: copies of the models or other analyses utilized or relied upon by PSNH in considering whether to enter into a long term power purchase agreement.

Q2: copies of the models or other analyses or studies utilized or relied upon by PSNH in considering whether to enter into the PPA, including but not limited to, models or analyses of the electric, capacity and fuel markets.

Q3: copies of the financial models or other analyses or studies considered or relied upon by PSNH that support the inclusion of the Purchase Option Agreement and Right of First Refusal.

Q6: copies of all analyses or studies performed by or on behalf of PSNH that relate to or consider the impact on the default service charge by the following:

- a. PPA in its entirety;
- b. Energy Base Price;
- c. Wood Price Adjustment;
- d. Purchase Option Agreement; and
- e. Right of First Refusal.

Q28: a copy of the financial model used to forecast profit and loss from the facility.

¹¹ Motion to Compel, paragraphs 3 and 4.

¹² *Id.* at paragraph 5.

7. In response to Q1, PSNH referred CSC to the responses made to Staff Q1-011 and 032; for Q2, to Staff Q1-003, 004, 005, 006, 007, 008, 011 and 015 -011; for Q3 to Staff Q1-011; for Q6 to Staff Q1-011; and, for Q28 to Q1-011 and 015.

8. As noted earlier, PSNH has a good faith basis to believe that the information requested by CSC in its question numbers 1, 2, 3, 6, and 28 that is in dispute is entitled to confidential treatment. That information was provided to Staff pursuant to the procedure set forth in Rule Puc 203.08 (d) and (e). In each case, PSNH noted its good faith basis to believe that the information is entitled to confidential treatment and its reliance upon the procedure set forth in Rule Puc 203.08 (d) and (e) whereby PSNH intends to submit a motion for confidential treatment regarding such documents at or before the commencement of the hearing in this proceeding.

9. CSC timely received copies of PSNH's responses to the identified Staff data requests excluding the confidential information. In each case where such confidential information was not supplied, the response included PSNH's noted reliance upon the procedure set forth in Rule Puc 203.08 (d).

10. By the process described above, CSC was indeed informed of the bases for PSNH not supplying the requested information. Hence, as required by Rule Puc 203.09, CSC was timely notified by PSNH of what information was not being supplied, why, and pursuant to which Commission Rule. Pursuant to Rule Puc 203.08 (h), if the Commission ultimately determines that the information in question is indeed subject to confidential treatment, PSNH will comply with the conditions the Commission determines are necessary to preserve such confidentiality. If, on the other hand, pursuant to Rule Puc 203.08 (i) the Commission determines that any of the information is not to be treated as confidential, PSNH shall then provide such information as necessary. Therefore, to the extent CSC seeks to compel the release of information protected by Rule Puc 203.08(e), its Motion is premature and should therefore be denied.

11. The instant fact situation has been recently addressed by the Commission's decision in *Re Kearsarge Telephone Company*, 92 NH PUC 441 (2007). In *Kearsarge*, the Commission was faced with a nearly identical situation as in this docket. segTEL, Inc., a competitor of petitioner

Kearsarge Telephone Co., was granted intervenor status in a Commission adjudicative proceeding. Kearsarge, in response to certain data requests, provided what it deemed to be confidential, competitively sensitive information to Commission Staff, but not to segTEL. segTEL filed a Motion to Compel, asking the Commission to order Kearsarge to provide it with the competitively sensitive data request responses. segTEL complained that it could not participate fully in the proceedings without the information in question. The Commission denied the Motion to Compel, stating:

In the North Atlantic Energy Corporation case relied upon by segTEL, the Commission agreed with a citizens' advocacy group, the Campaign for Ratepayers' Rights (CRR), that it was entitled to confidential information of the asset sales manager and auction advisor that assisted the Commission with overseeing the sale of a majority interest in the Seabrook nuclear power plant... .

The situation here differs from the CRR situation in several key respects. First, CRR was in no sense a commercial competitor of any Seabrook owner or anyone with a pecuniary interest in the outcome of the auction. Second, the purpose of CRR's participation was to vindicate the interests of New Hampshire electric consumers who, in the view of CRR, had been ill-served by Seabrook's owners since the facility was first proposed. Third, CRR was apparently content to limit access to its counsel, rather than insisting that others with technical expertise needed to be involved in the review. Finally, segTEL's role in the instant case is not analogous to that of CRR in the Seabrook sale; here, the Office of Consumer Advocate appears as the statutorily authorized advocate for residential customer interests.

92 NH PUC at 443.

12. As in the *Kearsarge* case, in the instant proceeding PSNH provided competitively sensitive information to Commission Staff, but withheld that competitively sensitive information from commercial competitor-intervenors. As in *Kearsarge*, the Motion to Compel was filed by a commercial competitor of both PSNH and Laidlaw. As in *Kearsarge*, the competitor-intervenor is not a "citizens' advocacy group" - - it is a Commission-regulated public utility. As in *Kearsarge*, the Office of Consumer Advocate is participating in this proceeding, and has been provided with the relevant information pursuant to a confidentiality agreement. The Commission should follow its result in *Kearsarge*, and deny CSC's attempts to access competitively sensitive information.

13. The two remaining CSC questions in dispute from set 1 are question numbers 5 and 9. In question 5, PSNH was asked to provide “copies of all analyses or studies performed by or on behalf of PSNH relating to the cost of biomass fuel at Schiller Station.” PSNH objected to this question as follows:

PSNH objects to this question as it is overly broad and unduly burdensome. PSNH further objects to this question as the documents requested would not provide or lead to relevant or admissible evidence. Moreover, most if not all of any responsive documents would be confidential and not provided to competitors under Rule Puc 203.08.

PSNH stands by its objection. Even if reasonable parties might differ on whether the question is overly broad, unduly burdensome, or would not lead to relevant or admissible evidence, there can be no dispute that Concord Steam Corporation does indeed compete with PSNH in the energy and wood-fuel markets, and that when CSC’s new Concord facility is developed, such competition would increase.¹³ The Commission has consistently held that information regarding fuel costs is indeed confidential commercial information that would be afforded confidential treatment and has withheld such information from competitors.¹⁴ The decision in the *Kearsarge* case should be followed, and the Motion to Compel should be denied.

14. CSC question number 9 requested PSNH to “Provide all documents on which PSNH intends to rely to satisfy the factors that must be found by the Commission pursuant to RSA 362-F:9 (II)(a),(b),(c),(d) and (e).” PSNH responded as follows:

PSNH objects to this question as it requires speculation, is vague, is overly broad. Until the record in this proceeding is finalized, PSNH cannot determine the universe of "all documents" which may be responsive.

Notwithstanding this objection, PSNH responds as follows:

¹³ Discussing CSC’s plans for a new 17 MW biomass-fired generating station, the Commission order noted: “Currently, Concord Steam is a steam utility with some incidental electric cogeneration capabilities. When this project is complete, the operation will transform into a merchant electric generating plant with steam operations in a subsidiary role.” *Re Concord Steam Corporation*, Docket No. DG 08-107, Order No. 24,969 dated May 22, 2009, *slip op.* at 4.

¹⁴ *See, e.g., Re Public Service Company of New Hampshire*, Docket No. DE 07-108, Order No. 24,945 dated February 27, 2009, *slip op.* at 18 (granting confidential treatment to coal pricing data); *Re EnergyNorth Natural Gas, Inc.*, 86 NH PUC 182 (2001) (discussing the grant of confidential treatment for gas supply information, amongst other things, the Commission noted it, “recognizes that the information contained in the filing is sensitive commercial information in a competitive market.”)

See the testimony of Mr. Large (pages 7 - 15), the testimony of Dr. Shapiro and the response to CSC-01, Q-CSC-008.

PSNH stands by its objection, which is succinct and unambiguous. It is unknown whether any, all, or none of the intervenors will file testimony. It is also unknown whether any, all, or none will seek to make their case solely via cross-examination of PSNH's witnesses. It is equally unknown what Commission Staff or the Office of Consumer Advocate might seek to include in the record of this proceeding. Thus, it is impossible for PSNH to know what documents are responsive to this request.

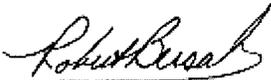
WHEREFORE, PSNH objects to Concord Steam Corporation's Motion to Compel. CSC is a competitor to both PSNH and Laidlaw, and under the *Re Kearsarge Telephone Company* rationale, should not receive confidential, commercial or financial information that would distort the competitive playing field. Its overly broad questions should not be allowed to impair the orderly and prompt conduct of this proceeding. As the Commission noted in *City of Nashua*, Order No. 24,654 (August 7, 2006), *reh'g denied*, Order No. 24,671 (Sept. 22, 2006), the standard for allowing discovery in Commission proceedings is a liberal one but is still subject to "principles of reasonableness and common sense." PSNH urges the Commission to follow its principle of reasonableness and common sense in this proceeding.

For the reasons expressed herein, PSNH respectfully requests that the Commission:

- A. deny the CSC Motion to Compel;
- B. consider necessary and appropriate conditions upon CSC's participation in the proceedings as permitted by RSA 541-A:32,III; and
- C. grant such other and further relief as justice may require

Respectfully submitted this 5th day of November, 2010.

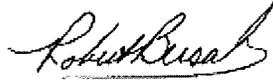
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

By:  _____

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CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2010, I served an electronic copy of this filing with each person identified on the Commission's service list for this docket pursuant to Rule Puc 203.02(a).



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