

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
Wood-Fired IPPs'
Motion to Compel
Dated November 12, 2010

November 18, 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 the Wood-Fired IPPs'¹ Motion to Compel dated November 12, 2010 ("M3").² In M3, the Wood-Fired IPPs have identified as questions in contention its data request numbers 5-1, 5-2, 5-3, 5-4, 5-5, 5-6, 5-7, 5-8, 5-9, 5-14, 5-16, and 5-28.³ M3 also seeks to compel access to confidential information provided to Staff in response to Staff data request numbers 3-11 and 5-4.

In support of this Objection, PSNH states as follows:

¹ The "Wood-Fired IPPs" include Bridgewater Power Company, L.P., Pinetree Power, Inc., Pinetree Power-Tamworth, Inc., Springfield Power LLC, Whitefield Power & Light Company, and Indeck Energy -- Alexandria, LLC.

² The Wood-Fired IPPs filed two earlier Motions to Compel dated October 29, 2010 ("M1") and November 3, 2010 ("M2").

³ The first digit refers to which set of data requests the question is in (i.e., set 1, set 2, set 3, set 4 or set 5) of the five sets propounded on PSNH by the Wood-Fired IPPs to date.

1. On November 5, 2010, PSNH filed a comprehensive Objection (“O1”) to both M1 and M2. Rather than repeat the contents of that Objection herein, PSNH seeks leave to incorporate by reference the applicable substantive discussion contained in that previous filing herein.

2. The Wood-Fired IPPs’ data request numbers 5-1, 5-2, 5-3, 5-4, 5-5, 5-6, 5-7, 5-8, and 5-9 are substantially identical to their earlier questions 3-1, 3-2, 3-3, 3-4, 3-5, 3-6, 3-7, 3-8, and 3-13, respectively. The Wood-Fired IPPs indicated this fact in M2 at paragraph 35, “In order to further clarify their intent, the Wood-Fired IPPs have recently rephrased and re-issued many of the data requests contained in its third set in a new fifth set of data requests sent to PSNH on November 1, 2010.”

3. The resurrected versions of these questions contained in the Wood-Fired IPPs’ fifth set of data requests do not eliminate the original objections that PSNH had to their earlier incarnation. PSNH stands by its original objections to questions 5-1, 5-2, 5-3, 5-4, 5-5, 5-6, 5-7, 5-8, and 5-9, and incorporates its objection to questions 3-1, 3-2, 3-3, 3-4, 3-5, 3-6, 3-7, 3-8, and 3-13 contained in paragraphs 24 and 25 of the Company’s earlier O1.

4. In M3 the Wood-Fired IPPs argue that the questions from the third set of data requests which were resubmitted to PSNH in the fifth set of data requests had been “re-phrased to clarify that they seek PSNH’s *understanding* and do not request a legal opinion from witnesses unqualified to provide such an opinion.”⁴ The questions themselves show that this is not the case. In the very next paragraph of M3, the Wood-Fired IPPs use their question 5-3 as an example:

For example, data request 5-3 asks PSNH whether it is PSNH’s understanding that the renewable energy certificate (“REC”) prices in the PPA, once approved by Commission order, cannot be subsequently modified by the Commission, and, if so, to identify with specificity the New Hampshire law that provides the Commission with the authority to issue such an order and, if it is PSNH’s understanding that a Commission order approving the PPA long-term REC pricing can subsequently be modified by the Commission, to state and explain the New Hampshire law standard applicable to such modification, and identify the New Hampshire authority that PSNH understands would allow such an order.⁵

⁴ M3, paragraph 10.

⁵ M3, paragraph 11.

According to the Wood-Fired IPPs, this question, which expressly demands that PSNH “identify with specificity the New Hampshire law that provides the Commission with the authority to issue such an order,” “state and explain the New Hampshire law standard applicable to such modification,” and “identify the New Hampshire authority that PSNH understands would allow such an order,” does “not request a legal opinion from witnesses unqualified to provide such an opinion.” The Wood-Fired IPPs own example clearly demonstrates that these questions do indeed request legal responses, as opposed to factual data in the possession of the Company.⁶ As the Commission has previously held, “The Commission's discovery process is primarily an opportunity to develop factual issues rather than to query opposing counsel on the legal support for a position.”⁷ Therefore, the Wood-Fired IPPs’ Motion to Compel should be denied.

5. In M3, the Wood-Fired IPPs next complain that in response to Staff questions 3-11 and 5-4, PSNH provided confidential responses to Staff, but withheld that information from other intervenors, pursuant to the procedure set forth in Rule Puc 203.08. Following the Commission’s recent Order on Rehearing number 25,168 dated November 12, 2010, on November 16 PSNH provided copies of its full response to Staff question 3-11 to all parties in this proceeding. Hence, the issue surrounding Staff question 3-11 is now moot.⁸ With respect to Staff question 5-4, PSNH fully briefed the confidentiality issue in its earlier O1 in paragraphs 8 through 14, and incorporates that previous discussion herein.

6. The next question in contention in M3 is 5-14:

Please provide any and all documents in the possession or under the control of PSNH regarding Laidlaw's announcement on September 29, 2008 that it had reached agreement on the material terms of a contemplated 20-year power purchase agreement with PSNH, including the material terms agreed-to by such

⁶ Similarly, as part of Question 5-1 the Wood-Fired IPPs ask the Commission to compel a response to the request for, “the citation or reference to any authority noted in Q. 3-1 (a);” in 5-2 to “provide the citation or reference to any such standard in New Hampshire law;” and in 5-5 to “provide the specific citation or reference to such authority, and explain PSNH's understanding of the scope of FERC's authority over the REC pricing terms and conditions of the PPA.”

⁷ *Re Consumers New Hampshire Water Co.*, 82 NH PUC 365 (2007).

⁸ PSNH also provided copies of its full responses to Staff questions 1-11, 1-15, and 1-32, and Wood-Fired IPPs questions 4-1, 4-2, 4-3, 4-4, 4-5, and 4-6 to all parties on November 16, thus mooting the need for Commission consideration of the Wood-Fired IPPs’ Motion to Compel their release contained in M2.

date and, if such terms are different than those contained in the PPA presented to the Commission for approval in this docket, please state how the terms differ, and describe the process pursuant to which the terms changed.

PSNH responded by objecting as follows:

PSNH objects to this question as the documents requested would not provide or lead to relevant or admissible evidence, because the matter before the Commission relates to the actual agreement reached between PSNH and Laidlaw as opposed to the negotiations that preceded it.

This question asks for negotiation documents. The Commission has had several recent opportunities to rule upon similar requests for negotiation documents. On each occasion, the Commission has rejected such requests.

In *Public Service Co. of New Hampshire*, 89 NH PUC 226 (2004), the Commission refused to compel the production of documents related to negotiations between an electric utility and the contractor it selected to build a wood yard (in connection with plans to convert a coal-fired boiler to one capable of burning wood). The Commission ruled that, as to such confidential and competitively sensitive negotiations, and "[i]n contrast to the results of any such negotiations, we can conceive of no circumstances in which we would deem the information [to be] admissible."

Similarly, in *City of Nashua*, Order No. 24,654 (August 7, 2006), *reh'g denied*, Order No. 24,671 (Sept. 22, 2006), the Commission refused to compel the City of Nashua to produce information concerning negotiations leading up to an agreement with an outside contractor for the operation of the water utility system the City is seeking to municipalize pursuant to RSA 38. In that decision, the Commission noted that the standard for allowing discovery in Commission proceedings is a liberal one but is still subject to "principles of reasonableness and common sense." Order No. 24,654, slip op. at 3. The Commission observed that, "the facts that drive the Commission's ultimate decision relate to the costs themselves, as fixed by the contracts in question, regardless of how the contracting parties may have regarded them during contract negotiations and regardless of whether the assumptions that drove such negotiations are at variance with public statements." *Id.* at 4.

In *Verizon New England Inc.*, Order on Motions to Compel Discovery Submitted by the Office of Consumer Advocate, Order No. 74,767, June 22, 2007, the Commission noted it is an established principle that the Commission will not compel the discovery of information simply to shed light on the thinking of parties that enter into contracts subject to our review. The rule applied in these situations is that parties are entitled to obtain information in discovery if the information is "relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence." Order No. 24,654 at 3. But, because the matter before the Commission relates to the actual agreement of the joint

petitioners as opposed to the negotiations that preceded it, "[w]e do not perceive circumstances in which information about the negotiations ... would become part of the record in this proceeding." *Id.*

7. PSNH fully briefed this issue in its earlier O1 in paragraphs 15 through 17, and incorporates that previous discussion herein.

8. The Wood-Fired IPPs argue that this question is relevant and should be answered because it only seeks "the process of development of the final terms of the PPA following such statement."⁹ It seems apparent to PSNH that, "the process of development of the final terms of the PPA" is the very negotiation process that the Commission found to be outside the scope of discovery in the *Public Service Co. of New Hampshire, City of Nashua, and Verizon New England Inc.* decisions cited above. Therefore, the Wood-Fired IPPs' Motion to Compel should be denied.

9. Next, the Wood-Fired IPPs complain that PSNH has objected to the provision of interconnection study details. Question 5-14 asked:

Please provide any and all documents in the possession or under the control of PSNH regarding the final interconnection study or system impact study for the Facility performed by or in conjunction with ISO New England, including drafts of any such study and the interconnection application referenced in Mr. Large's testimony at page 3, line 3, and the total dollar cost to interconnect the Facility and to construct all required system upgrades. Please identify whether such total costs are included in the Facility total cost of \$125 million referenced in Dr. Shapiro's testimony at page 3, line 16.

PSNH responded:

PSNH objects to this question as it relates to matters that are not within the scope of this proceeding. Matters relating to the Facility's interconnection were dealt with by the N.H. Site Evaluation Committee ("NHSEC"). The NHSEC issued an Order granting confidential treatment for the System Impact Study. (*See* "Order on Pending Motions," NHSEC Docket No. 2009-02 dated August 19, 2010.)

In addition, the interconnection study process and eventual interconnection agreement falls within FERC jurisdiction, including applicable confidentiality provisions. FERC, via the ISO-NE tariff, prohibits the release of such matters. *See* ISO New England, Inc. Transmission, Markets and Services Tariff, Section II,

⁹ M3, paragraph 23.

Schedule 22, Large Generator Interconnection Procedures, Section 13.1, Confidentiality.

10. The materials requested have no relevance to the determination that the Commission is required to make under RSA 362-F:9. PSNH fully briefed this issue in its earlier O1 in paragraphs 18 and 19, and incorporates that previous discussion herein.

11. Moreover, just two months ago, PSNH was admonished by ISO-NE when Clean Power Development (another competitor-intervenor in this proceeding) complained that certain interconnection information was apparently released and made public on the internet.¹⁰ In an e-mail dated August 11, 2010, to PSNH, ISO-NE's regulatory counsel wrote:

As you may know by now, information related to the Clean Power Development project, in particular, information related to the project's deficiency about their Facility Study Agreement deposit appears to have been released and made public in an investor hub site. The project's counsel believes that information may have been leaked by PSNH (though I am not aware of any evidence supporting this).

This email simply is intended as a reminder that you are responsible for adhering to the ISO's confidential information policies when dealing with information and/or communications associated with Interconnection Customers and their projects. The ISO's confidential information policies include, but are not limited to, the ISO Info Policy, the LGIP/SGIP, and any respective confidential information provisions contained in participation agreements and study agreements. Folks at NU and/or PSHN (*sic*) handling information/documentation associated with Interconnection Customers and their projects should be reminded that they need to adhere to the confidential information policies.

12. As the interconnection study information that is sought by the Wood-Fired IPPs has no relevance to the RSA 362-F:9 public interest determination which is the purpose of this proceeding; and since the NHSEC has dealt with the interconnection issue as part of its review of the Laidlaw project; and since other competitor-intervenors have complained about the release of similar information; and since ISO-NE, pursuant to its FERC regulated tariff, requires confidential treatment of the information sought and has specifically warned PSNH about such

¹⁰ PSNH is fully aware of the confidentiality requirements of ISO-NE, as demonstrated by this Objection. PSNH denies breaching that confidentiality obligation and was not responsible for the apparent release of Clean Power Development's confidential information.

confidentiality obligation¹¹ – the Commission should deny the Wood-Fired IPPs’ Motion to Compel.

13. Finally (at least for M3), the Wood-Fired IPPs asked its “scour the globe” question 5-28:

If any question in this Set 5 to PSNH asks for any documents, studies, reports, workpapers, projections, analyses, reviews, evaluations, calculations, pro formas, spreadsheets, forecasts, estimates or the like in the possession or control of PSNH, and any of the foregoing exist but are not in the possession or control of PSNH, please identify which of the foregoing exist and the name and address(es) of the person or entity who or which has possession or control of it or them.

PSNH responded:

PSNH objects to this question as excessively broad and unreasonably burdensome. This would require PSNH to scour the globe looking for responsive information that is not in the possession or control of PSNH.

14. PSNH’s objection in response to question 5-28 is self-explanatory. If ever there was an overly broad discovery question – this is it. It does not ask PSNH to provide documents that are within PSNH’s control. Instead, the Wood-Fired IPPs are asking the Commission to force PSNH to become their private investigators to determine if any other entity on the face of the earth has responsive documents and if so, to identify both the documents and the entity possessing them.¹² There can be no dispute that this question is overly broad and unduly burdensome, and clearly intended to impair the orderly and prompt conduct of the proceedings.

15. In M3, the Wood-Fired IPPs spend considerable time arguing that they have a due process right to receive access to information that PSNH has deemed to be confidential.¹³ They complain that, “PSNH has not yet filed a motion for confidential treatment or otherwise justified its claim that the materials referred to in these data request responses must be kept confidential... .”¹⁴ In each data response for which PSNH has a good-faith basis to invoke the confidentiality process set forth in Rule Puc 203.08, PSNH has noted that it “intends to submit a

¹¹ The inclusion of confidentiality restrictions in the FERC-regulated ISO New England, Inc. Transmission, Markets and Services Tariff also raises federal preemption issues. As a transmission provider under the auspices of ISO-NE, PSNH is bound to comply with that Tariff.

¹² And, PSNH would be required to perform this miracle within the 10-day response time dictated by Order No. 25,158.

¹³ See M3, paragraphs 14-19.

¹⁴ M3, paragraph 15.

motion for confidential treatment regarding such documents at or before the commencement of the hearing in this proceeding” per the Commission’s procedural rule 203.08 (d) and (e). PSNH has its own due process right to rely upon the procedures set forth in the Commission’s rules.¹⁵ The Commission should not rule upon such confidentiality issues until PSNH has had the opportunity to file the requisite motions for confidential treatment per Rule Puc 203.08.

16. As demonstrated throughout this Objection, and as PSNH previously noted in O1, the conduct of the competitor-intervenors evidenced by their abusive behavior in the discovery process is undoubtedly aimed toward impairing the interests of justice and the orderly and prompt conduct of the proceedings. The Commission should *sua sponte* determine whether continued intervenor status is warranted for the competitor-intervenors, including the Wood-Fired IPPs, or whether the imposition of conditions to such intervenor status are warranted pursuant to RSA 541-a:32,III.

WHEREFORE, PSNH objects to this most recent Motion to Compel filed by the Wood-Fired IPPs. Their 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 those principles of reasonableness and common sense in this proceeding.

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

- A. deny the Wood-Fired IPPs’ Motion to Compel;
- B. consider necessary and appropriate conditions upon the Wood-Fired IPPs’ participation in the proceedings as permitted by RSA 541-A:32,III; and

¹⁵ PSNH intends to file the necessary motions for confidential treatment soon, but has been otherwise occupied in this proceeding responding in a timely manner to the non-stop pleadings filed by the competitor-intervenors.

C. grant such other and further relief as justice may require.

Respectfully submitted this 18th day of November, 2010.

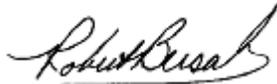
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CERTIFICATE OF SERVICE

I hereby certify that on November 18, 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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