

THE STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

DE 10-195

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Petition for Approval of Power Purchase Agreement with
Laidlaw Berlin BioPower, LLC

REPLY
OF
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
TO
CONCORD STEAM'S OBJECTION TO PSNH'S MOTION TO COMPEL

January 19, 2011

Public Service Company of New Hampshire ("PSNH") hereby replies to "Concord Steam's Objection to PSNH's Motion to Compel" dated January 18, 2011. Although replies to objections to motions are not expressly contemplated by the Commission's Rules of Practice and Procedure, good cause exists in this instance for the Commission to accept and consider this reply. Moreover, other parties in this proceeding have filed such replies, and the Commission has not taken action to reject those earlier replies. As a matter of due process, PSNH should be afforded the same opportunity to file a responsive pleading such as this that has tacitly been afforded other parties in this proceeding.

In reply to Concord Steam Corporation's ("CSC") Objection, PSNH responds as follows:

1. CSC's Objection begins in paragraph 1 by alleging, "PSNH submits an unprecedented motion to rescind Concord Steam's intervention in this proceeding." That allegation is incorrect. PSNH refers the Commission to its Order No. 23,840 issued on November 9, 2001, in Docket No. DE 01-089, where a similar such motion was filed, for reasons similar to those involved in this proceeding. (In that earlier docket, the motion to rescind intervenor status was rendered moot by a settlement.)

2. What is unprecedented is for one of this state's regulated utilities, CSC, not once, but twice to file Petitions for Intervention with this Commission that they now admit are not factually correct. The first such Petition was filed by CSC in Docket No. DE 09-067 on July 23, 2009; the second such Petition was filed in this docket on September 3, 2010.

3. Such Petitions for Intervention are significant pleadings under the state's Administrative Procedures Act, RSA Chapter 541-A. RSA 541-A:32 and this Commission's rules at Puc 203.17 set forth statutory and regulatory requirements for the grant of intervenor status in an agency adjudicative proceeding. RSA 541-A:32, I (a) requires a "petition...submitted in writing." That written petition must "state[s] 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." RSA 541-A:32, I (b).

4. CSC's two Petitions for Intervention did not state facts demonstrating 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. Instead, CSC now states that the matters set forth in two separate petitions for intervention, filed fourteen months apart, really relate to "a separate entity" whose information CSC "does not have legal authority to disclose." (CSC Objection to PSNH Questions 1, 9, 10, 18, 29, 30, 31, 32, 33, 35, 36, 37, 43, 52, 53, 54, 55, 56, 57, 58, 59, and 60).

5. In its Objection, CSC pooh-poohs its incorrect and misleading Petition for Intervention by admitting that the Petition was in fact in error (Objection, ¶11) and trying to explain that error away by saying, "Concord Steam's regular legal counsel serves as counsel for Laidlaw and was not available to represent Concord Steam in this proceeding. Concord Steam prepared its intervention without its legal counsel and inadvertently failed to distinguish between Concord Steam and Concord Power."

6. CSC's explanation not only lacks credibility, but it is woefully insufficient as it fails to address the statutory and regulatory mandates of RSA 541-A:32 and Rule Puc 203.17 that a petition for intervention deal with the petitioner's rights, duties, privileges, etc., not those of

some other “separate entity” over which the party filing the petition has limited, if any legal authority.

7. The CSC “my bad” explanation for its erroneous Petition for Intervention in this proceeding lacks credibility for several reasons. First, the mistaken allegations contained in the Petition were not made this one time – they were made twice, fourteen months apart. Second, during that fourteen month span, CSC did in fact engage new counsel. On October 29, 2009, an “Appearance” on behalf of CSC was filed by the law firm of Orr & Reno in Docket No. DE 09-067.

8. A further reason why the explanation lacks credibility is that the President of Concord Steam Corporation, Peter Bloomfield, is also listed as the sole Member of Concord Power and Steam, LLC in its May, 2010, annual report on file at the Secretary of State’s office. Clearly, Mr. Bloomfield should be aware of the differences, if any, between CSC and Concord Power and Steam, LLC. In their own Objection, the difference between CSC and Concord Power and Steam, LLC, was blurred as a result of a telling typo: “Neither Concord Power nor Concord Power have asked the Commission to approve an above-market PPA.” (Objection, ¶7). It should not be the duty of the Commission or the parties to an adjudicative proceeding to have to sort out the corporate relationships of putative party-intervenors that arise when discovery questions are objected to on that basis.

8. Another reason why the “my bad” explanation is not credible is that CSC has in fact been represented by counsel in this proceeding for many months. On October 18, 2010, an “Appearance” on behalf of CSC was docketed in this proceeding by the law firm of Upton & Hatfield. Two months subsequent to that “Appearance,” on December 17, 2010, counsel for CSC filed “Testimony on behalf of Concord Steam Corporation“ in this proceeding. In that testimony, presumably drafted with the assistance of their counsel, CSC witnesses testified:

- “I will discuss the PPA’s impact and harm to the wood-market in which Concord Steam competes for its wood supply” Saltsman, p. 2 (Which entity will compete with Laidlaw in the 2013/14 time frame that the Berlin plant would come on line – CSC or Concord Power?)

- “Concord Steam expects that the increase in fuel demand caused by Laidlaw will increase the cost of wood to Concord Steam” Saltsman, p. 6 (Who will be buying the wood – CSC or Concord Power?)
- “Concord Steam’s wood demand will represent something less than five percent (5%) of the NH wood market and therefore it will have little buying power in the market place.” Saltsman, p. 11. (Who will operate that plant that is referred to – CSC or Concord Power?)
- “Concord Steam has the ability to fuel switch to either #6/waste oil or natural gas if it is unable purchase wood fuel at a reasonable price or if wood is unavailable due to supply and demand imbalances.” Salstman, p. 12 (Who’s plant will be duel-fueled – CSC’s or Concord Power’s?)
- “I have prepared this testimony on behalf of the Concord Steam Corporation (Concord Steam), a wood-fired district-heating plant that serves the downtown area in Concord, New Hampshire.” Dalton, p. 1
- “Concord Steam has been developing a wood-fired combined heat and power plant in Concord since 2007 (Concord Power and Steam).” Dalton, p. 1 (The testimony prepared for and submitted by CSC says that CSC, not Concord Power, has been developing the new facility since 2007.)
- “Concord Steam indicates that this project has secured all the necessary environmental permits and secured financing commitments for the vast majority of the required investment capital.” Dalton, p. 1 (This testimony says CSC has secured financing – not Concord Power.)

9. These excerpts from testimony filed by CSC with the advice and assistance of counsel demonstrate that CSC’s “inadvertent” failure to distinguish between Concord Steam Corporation and Concord Power and Steam LLC were not merely due to the lack of legal counsel. The same “inadvertent failure” “to distinguish between Concord Steam and Concord Power” continued in CSC’s direct testimony, and therefore dispels CSC’s claim that “Despite an inadvertent error in Concord Steam’s intervention, Concord Power & Steam is not a party and is not subject to data requests.” (Objection, ¶14.)

10. When did CSC finally own-up to its supposed “inadvertenterror”? It did so only when PSNH submitted discovery requests to CSC based upon the rights, duties, privileges, immunities or other substantial interests it set forth in both its Petition for Intervention and in its direct testimony. Only then, in objections to myriad PSNH discovery questions, did CSC inform PSNH, the Commission, and the other parties to this proceeding that it was not the proper

“petitioner” under RSA 541-A:32 and Rule Puc 203.17, by stating in response to twenty-two of PSNH’s data requests:

This request seeks information from Concord Power and Steam, LLC. Concord Power and Steam, LLC is not a party to this proceeding under Puc 203.09 (b) and therefore not subject to discovery. Concord Steam Corporation is a separate entity and does not have legal authority to disclose Concord Power and Steam, LLC’s confidential financial information.

11. PSNH’s ability to prepare and present its case in this proceeding has been materially and irreparably harmed by CSC’s “corporate shell game.” Moreover, many of the public interests set forth in RSA 362-F:9 upon which this proceeding is based will similarly be irreparably harmed by allowing CSC to continue as an intervenor in this proceeding. Its recent revelation that certain rights, duties, substantial interests, and information relating thereto are not Concord Steam Corporation’s, but instead are those of Concord Power and Steam LLC, and CSC’s refusal or legal inability to provide information responsive to duly issued data requests, will not only impair the orderly and prompt conduct of the proceedings (RSA 541-A:32, I (c)). According to the City of Berlin, such a disruption to this proceeding could impair receipt of *millions of dollars* in tax credits and other community benefits. (See, “Concurrence of City of Berlin with PSNH’S Motion to Rescind the Grant of Intervenor Status to Concord Steam Corporation” dated January 12, 2011).

12. In its Objection, CSC alleges as one of its grounds that PSNH’s Motion to Compel should be denied that “Concord Steam has in fact answered the relevant requests with responsive information.” PSNH notes that CSC only asserted “relevance” as the basis for objecting to one or two of PSNH’s data requests. CSC did not raise “relevance” as the basis for the other questions to which it objected. The Commission’s rules at Puc 203.09 expressly state, “(h) Failure to object to a data request or requests for documents within 10 days of its receipt without good cause shall be deemed a waiver of the right to object.” Thus, “relevance,” not having been raised as an objection in a timely manner, has been waived by CSC. Similarly, CSC did not object on the basis of materiality, on a claim of the questions being burdensome, or on any bases other than: Concord Power and Steam, LLC is not a party to this proceeding under Puc 203.09 (b) and therefore not subject to discovery.; Concord Steam Corporation is a separate entity and

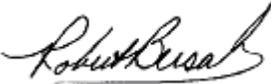
does not have legal authority to disclose Concord Power and Steam, LLC's confidential financial information; the request seeks confidential financial information that is not subject to disclosure.

WHEREFORE, the Commission has clear authority under RSA 541-A:32, V to rescind the intervenor status of Concord Steam Corporation. Their January 18 Objection only strengthens PSNH's arguments why such an action, although uncommon, is warranted in this situation. A party is responsible for the truth and accuracy of their pleadings. Whatever the cause of the so-called "inadvertent errors" contained in CSC's Petitions for Intervention, the continued errors in their testimony, and then their refusal to respond to various data requests by hiding behind their own error is creating serious due process issues that significantly impact PSNH's presentation of its case.

PSNH respectfully requests this Commission to grant its motion to rescind the intervenor status of Concord Steam Corporation.

Respectfully submitted,

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

By:  _____

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CERTIFICATE OF SERVICE

I hereby certify that I served an electronic or written copy of this filing on the various Petitioners pursuant to Rule Puc 203.11.



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