

THE STATE OF NEW HAMPSHIRE

before the

PUBLIC UTILITIES COMMISSION

Public Service Company of New Hampshire
Least Cost Integrated Resource Plan

Docket No. DE 10-261

**PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE'S MOTION TO AMEND ITS
JULY 15, 2011 MOTION FOR PROTECTIVE ORDER RE: DETAILED FIVE YEAR
CAPITAL BUDGETS**

Pursuant to RSA 91-A:5,(IV)(Supp.) and N.H. Code Admin. Rules Puc § 203.08, Public Service Company of New Hampshire ("PSNH" or the "Company") hereby amends its Motion for Protective Order Re: Detail Five Year Capital Budgets dated July 15, 2011 to restrict dissemination of documents responsive to OCA 2-4 to Conservation Law Foundation ("CLF") in light of a recently filed lawsuit against the Company in federal court. In support hereof, PSNH states as follows:

1. On July 21, 2011, CLF filed a citizen suit against PSNH under Section 304 of the Clean Air Act in U.S. District Court for the District of New Hampshire (the "CLF Lawsuit") in which it asks the Court to impose millions of dollars in civil damages and injunctive relief against the Company relating to its operation of Merrimack Station. A copy of the CLF Lawsuit is attached to this Motion as Exhibit 1. At the same time that the CLF Lawsuit is pending, CLF seeks access in this docket to Company confidential documents that describe the Company's planned work at Merrimack Station and other of its generation units. In light of the CLF Lawsuit, the Company is moving to amend its Motion for Protective Order Re: Detailed Five Year Capital Budgets filed in this docket on July 15, 2011 to restrict dissemination of those

confidential materials to CLF. Because CLF is now an active litigant against PSNH, requesting millions of dollars in civil penalties and injunctive relief be assessed against the Company, the factual background regarding the Commission's analysis of the situation contained in its Order No 25, 234 has markedly changed. As a result, the balance now tips in favor of the Company's privacy interests in non-disclosure. CLF should no longer be allowed access to confidential materials in this proceeding; the Commission should allow the federal court to determine what information must be supplied by PSNH to CLF pursuant to the Federal Rules of Civil Procedure.

2. As explained in the Company's July 15, 2011 Motion for Protective Treatment (the "July 15 Motion"), PSNH produced a detailed capital budget which itemized every capital addition planned for each of PSNH's generating units for the period 2011 through 2015 in response to OCA 2-4. The Company requested protective treatment for the itemized five year capital budget it produced to OCA and Staff on the basis that if disclosed to competitive electric suppliers, the disclosure could cause competitive harm to the Company.¹ The July 15 Motion further requested that the Commission limit CLF's and other environmental intervenors' access to the documents to a viewing of the documents at the Company's offices subsequent to their execution of a non-disclosure agreement. July 15 Motion at 8.

3. The Company now amends its July 15 Motion to request that the Commission allow the Company to protect from disclosure to Conservation Law Foundation the documents responsive to OCA 2-4.² This is necessary given the CLF Lawsuit, which alleges that PSNH

¹ The Commission previously denied protective treatment to a more high level five year budget produced by PSNH in response to OCA 1-33, concluding in part that the Company had not demonstrated that "actual competitive harms would result from disclosure of these general, non-itemized figures to third parties." Order 25,234 at 8.

² In a letter to the Commission dated April 27, 2011 in this proceeding, New Hampshire Sierra Club stated, "The New Hampshire Sierra Club will not enter any agreement that compromises the public process regarding matters properly before the Public Utilities Commission. New Hampshire Sierra Club believes that no intervener with substantial interests adverse to petitioner Public Service

failed to obtain preconstruction approval and/or permits under the Clean Air Act and the State Implementation plan in performing work at its generating units at Merrimack Station. CLF also asks that the Court “Order Defendant PSNH to perform an audit of all operations at its generating assets, including Merrimack, Schiller, and Newington Stations, to determine if it has planned, undertaken, or completed other modifications that would require permits under the CAA and the N.H. SIP.” Exhibit 1 at 22. CLF asks the Court to impose civil penalties of \$32,500 to \$37,500 per day (approximately \$12 Million to \$14 Million per year) against the Company, with such penalties beginning as early as 2006.

4. The Company previously raised its concern that CLF was using its participation in this docket as an opportunity to gain discovery for other litigation. Specifically, in its April 8, 2011 Motion for Protective Order Re: Generation and Emission Planning Documents (regarding OCA 1-39 and 1-49), the Company, in seeking the authority to withhold production of documents responsive to OCA 1-39 and 1-49 to environmental intervenors, informed the Commission that CLF and the New Hampshire Sierra Club had each served notices of intent to bring suit against PSNH. CLF objected to that motion, arguing that:

“If the Commission were to grant the protective order requested by PSNH, then the parties, their potential witnesses and their counsel would never have the opportunity to review and analyze relevant information (i.e. regarding the adequacy of PSNH’s planning process) **due to a completely speculative and extraneous concern about possible future litigation.**” Objection at 2 (emphasis added).

The Commission granted the Company’s request for protective treatment regarding OCA 1-39 and 1-49, but concluded that “**potential plans for litigation** by parties to a proceeding before the

Company of New Hampshire should ever enter such an agreement.” PSNH assumes NH Sierra Club would not enter in a nondisclosure agreement; therefore, the Company does not address NH Sierra Club’s interest in this Motion to Amend.

Commission are irrelevant to the balancing analysis required under the RSA 91-A framework.”

Order 25,234 at 10-11 (emphasis added).³

5. It is unquestionable that CLF has moved from “potential plans for litigation” to actual litigation against the Company, and that in fact, the Company’s concerns were not in the least bit speculative. The Commission must now factor the existence of the CLF Lawsuit into its analysis under RSA 91-A, including the Company privacy’s interest in non-disclosure and the potential harm PSNH could suffer if the information sought by CLF were disclosed. *Lambert v. Belknap County Convention*, 157 N.H. 375, 382 (2008).

6. Here, the Company has a strong privacy interest in business confidential documents, given the pendency of the CLF Lawsuit. CLF alleges in its lawsuit that PSNH "continues to be in violation of" the Clean Air Act by performing certain work at its facilities. Exhibit 1 at 22. CLF asks the Court to determine if permits were required for work performed in the past (such as the turbine replacement project which the Commission ruled in DE 08-145 "is generally consistent with the federal standard for fossil fuel generation efficiency adopted in Order No. 24,893" and was in fact "in the nature of normal operation and maintenance activities") as well to reach such a determination regarding work that is "planned" at Merrimack, Schiller, and Newington Stations. *Id.* Compelling PSNH to disclose this confidential information to CLF could adversely affect PSNH's ability to defend against the claims in CLF's Lawsuit.

³ The Commission stated, “We also agree with CLF that potential plans for litigation by parties to a proceeding before the Commission are irrelevant to the balancing analysis required under the RSA 91-A framework; instead we must consider the Company’s privacy interests in non-disclosure in our analysis.” Order 25,234 at 10-11. As a result, the Commission continued, “We do find that the balance tips in favor of disclosure of this information to non-competitor intervenors in this docket contingent upon execution of nondisclosure agreements with the Company. This would enable the public’s interest in the Commission having a full examination of environmental issues on this docket to be satisfied, while protecting the Company against competitive harms.” *Id.*

7. The harm that PSNH would suffer should the document be released to CLF is not unlike the kind of harm recognized by the New Hampshire Supreme Court and the Commission in prior cases. In *Perras v. Clements*, 127 N.H. 603 (1986), the Court recognized this interest, finding that the plaintiff was not entitled to receive through a public records request an appraisal report relating to his own property when release of that information would affect the State's bargaining position in litigation between the parties, and where the plaintiff could seek to obtain that information through discovery in the litigation. *Perras* at 605. CLF has chosen a federal court forum in which it may pursue discovery relating to its claims. The Commission should not allow CLF to use this docket as a means to gain information for that federal court case.

8. This Commission has also granted protective treatment to documents relating to the settlement of litigation, where the release of the documents could jeopardize the utility's settlement of a claim and "...make it more difficult for [the utility]... to obtain environmental litigation settlements in the future, a result which may disadvantage ratepayers." *Re EnergyNorth Natural Gas, Inc.*, 88 N.H.P.U.C. 447 at 452 (2003). See also *Re: Eastern Utilities Associates*, 76 N.H.P.U.C. 236 at 248(1991) (Commission authorized withholding of utility holding company earnings where disclosure of information appeared likely to create potential liabilities for utility under federal securities law and would be an invitation to costly litigation and information not necessary to rely on adjudication of issues in the docket).

9. Given the Company's strong privacy interest in the information, the Commission must consider whether disclosure of the five year capital plan would inform the public of the conduct and activities of *its government*. Order No. 25,234 at 10. As described in detail in the July 15 Motion, disclosure of the five year capital plan to CLF will not reveal the workings of

the government. CLF has the high level five year capital spending plan which is sufficient to reflect the Company's projected spending on its plants.

10. For the reasons stated above, and in the July 15 Motion, which PSNH incorporates by reference, PSNH requests that the Commission authorize the Company to withhold from disclosure to CLF its detailed five year capital plan produced in response to OCA 2-4.

WHEREFORE, PSNH respectfully requests the Commission allow PSNH to amend its July 15 Motion to provide for the withholding from disclosure to CLF the attachment to OCA-02 Q-OCA-004, and to order such further relief as may be just and equitable.

Respectfully submitted,
Public Service Company of New Hampshire

August 9, 2011
Date

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CERTIFICATE OF SERVICE

I hereby certify that, on the date written below, I caused the attached Motion to Amend Motion for Protective Order to be served pursuant to N.H. Code Admin. Rule Puc §203.11.

August 9, 2011
Date

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Sarah B. Knowlton

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