

**THE STATE OF NEW HAMPSHIRE
BEFORE THE
NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 11-250

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Investigation of Merrimack Station Scrubber Project and Cost Recovery

**Third Motion to Compel Public Service Company of New Hampshire
to Respond to Data Requests**

NOW COMES TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast Inc. (together, "TransCanada"), an intervenor in this docket, and moves this Honorable Commission, pursuant to Admin. Rule Puc 203.09(i), to compel Public Service Company of New Hampshire ("PSNH") to respond to certain data requests TransCanada made of PSNH, the objections to which were provided on October 3, 2012, as described in more detail below. In support of this Motion TransCanada states as follows:

1. The Commission has under advisement issues raised by TransCanada's first Motion to Compel filed in this docket on July 16, 2012 and Second Motion to Compel filed in this docket on September 11, 2012. In the meantime PSNH has objected to certain other data requests propounded by TransCanada in this docket that raise somewhat similar issues. TransCanada incorporates all arguments presented in the prior Motions to Compel and the Legal Brief submitted in this docket. In light of the pending discovery issues which the Commission is in the process of deciding TransCanada

thought it important to bring these new objections to the Commission's attention so that they could, if possible, be addressed in conjunction with the other discovery issues.

2. In accordance with the procedural schedule in this docket on September 27, 2012 TransCanada submitted data requests to PSNH related to the Jacobs Report on the Scrubber Project that was done for the Commission. On October 3, 2012 PSNH objected to three of these data requests. A copy of the PSNH objections to TC 5-4, 5 and 6 are included as Attachment A to this Motion.

3. TransCanada's data requests seek information about whether PSNH provided information to the NH Legislature or the NH Department of Environmental Services ("DES") or any other state officials about the Sargent and Lundy ("S & L") \$250 million estimate of the cost of completing the Scrubber Project. As the Commission will remember from attachments to TransCanada's first Motion to Compel in this docket DES Commissioner Nolin had represented to the NH Legislature on two separate occasions in two different letters: "Based on data shared by PSNH" the cost to complete the Scrubber Project "will not exceed \$250 million". HB 1673, the bill that contained the scrubber law, included a fiscal note that said: "PSNH estimates that the installation will be at a cost not to exceed \$250 million..." See Attachment B to this Motion. The data requests at issue in this Motion seek information about representations, or the lack thereof, that were made to the Legislature and/or state officials related to the S & L estimate and the fact that it was an estimate, as opposed to a hard cost figure.

4. According to the Jacobs Report, S & L was retained "to satisfy legislative and stakeholders' discussions" (p. 27 of redacted report). As the Jacobs Report also notes, the S & L estimate was "conceptual", "generic", "not site specific" (p. 32), done

“in an expedited time line and with no vendor guarantees in writing” (p. 27), and included a caveat that it contained “no specific mercury guarantee” (p. 27). When the Jacobs Report compares the original S & L estimate with the revised estimate that rose from \$250 million to \$457 million it refers to the fact that the original estimate did not include PSNH retained work which ended up accounting for \$106 million (p. 35).

5. PSNH has argued throughout this docket that it was “mandated by the Legislature” to do the Scrubber Project and because of that almost anything and everything that they have done related to this Project should be considered to be prudent. The problem with this argument, as TransCanada and others have argued in prior pleadings, is that PSNH not only supported the “mandate”, it actively lobbied for that “mandate” from the Legislature and then fought any efforts to study the Project further when it became clear that it was much more expensive than originally reported, that the price of natural gas had plummeted, that migration of default service customers (the only customers by law from whom they could recover these costs) was increasing, that there were other regulatory requirements on the horizon that would add significantly to the costs of keeping Merrimack Station going, and that the economy had suffered a major setback that significantly reduced future demand for power. As is becoming increasingly apparent from the discovery that has been obtained and from a review of the legislative history, it appears that both DES and the Legislature relied upon PSNH representations that the Project would not cost any more than \$250 million, i.e. that this was much more than a conceptual estimate, and that the costs of the Project would be offset by savings on SO₂ allowances. See Paragraph 6 below and the documents cited in Paragraph 3 above. The Jacobs Report strongly suggests that PSNH knew that the \$250 million estimate was

significantly understated and apparently never brought this to the attention of either DES or the Legislature. If this is, in fact, the case, and this is what TransCanada is trying to establish through discovery, then arguably it reflects upon and contributes significantly to a review of the prudence of moving ahead with the Project, especially given that PSNH had an opportunity to reconsider moving ahead under the variance provision in the law and/or under legislation (SB 152, 2009) that they actively opposed. Based on the Jacobs Report it seems quite clear that significant foreseeable expenses were not included in the S & L estimate and that this estimate included significant caveats noted above. It therefore seems extremely relevant whether PSNH made state officials aware of the limitations and exceptions of the S & L estimate.

6. The legislative history from 2006, a portion of which is included as Attachment C to this Motion, shows how PSNH referred to this Project as being “beneficial to customers” (see p. 27 of Attachment C), how they described the legislation as producing “the maximum amount of mercury reductions for the most reasonable cost” (p. 28 of Attachment C), and how “two hundred and fifty million dollars is an awful lot of money in PSNH’s view” (see p. 30 of Attachment C). Legislators clearly were asked to consider the \$250 million project cost to be authoritative and credible. They relied on the representation that the cost estimate was credible (see the comments of Rep. Ross, Chairman of the House Science, Technology and Energy Committee, to the Senate Committee, p. 3 of Attachment C, that the costs are “reasonable and affordable” and that the SO₂ reductions from the scrubber “can be used to alleviate the costs of the two hundred million dollars that were talking about”, p. 5 of Attachment C). See also RSA 125-O:11, VIII: “The mercury reduction requirements set forth in this subdivision

represent a *careful, thoughtful balancing of cost*, benefits, and technological feasibility and therefore the requirements shall be viewed as an integrated strategy of non-severable components.” [Emphasis added.] As noted above, state officials at DES also clearly relied on PSNH’s representations about the costs of the Project. In addition to the Commissioner Nolin letters cited above, see the comments of Robert Scott, Director of Air Resources, about the “faith” state officials put in PSNH (p. 32 of Attachment C), about the SO₂ credits making the “installation of scrubbers very economical” and how it “ends up being a cost savings to the ratepayer” (p. 34 of Attachment C). See also the chart that Mr. Scott presented to the Legislature (see reference to the chart on p. 34 of Attachment C) showing the specific impact that a \$250 million project would have on default service customers. Attachment D to this Motion (a colored copy obtained from DES, without the notation “Attachment #11” from the legislative file, is included for easier reading).

7. There is nothing in the legislative history to suggest that PSNH attempted to clarify or even identify the clearly-stated limitations of the S & L estimate that are noted in the Jacobs Report. TransCanada would like to find out specifically whether PSNH ever communicated with state executive or legislative officials to let them know about any of the caveats, exclusions or limitations of what was a generalized estimate. TransCanada believes it appropriate and necessary to request information from PSNH about representations provided to executive and legislative branch officials at the time that this legislation was considered and ultimately enacted. If the Legislature believed there was such a “careful, thoughtful balancing of the cost” with the other factors, but PSNH failed to make legislators or state officials aware of the limitations of the estimate

that was the basis for this legislation, then TransCanada submits that this failure to communicate with state officials, or if in fact there was some communication, the substance of that communication, is directly relevant to the prudence of PSNH's actions and the capital expense that ratepayers are now being asked to pay for. TransCanada submits that the responses to these questions could lead to the discovery of evidence that would be relevant to the issue of prudence and admissible in this proceeding.

8. As noted in the prior Motions to Compel the standard for discovery in Commission proceedings is broad and extends to information that is relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence. *Re Investigation into Whether Certain Calls are Local*, 86 NH PUC 167, 168 (2001). The Commission will typically allow "wide-ranging discovery" and will deny discovery requests only when it "can perceive of no circumstance in which the requested data would be relevant." *Re Lower Bartlett Water Precinct*, 85 NH PUC 371, 372 (2000). 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 opponent, and whether the evidence is in the possession of his opponent or someone else." *Scontsas v. Citizens Insurance Co.*, 109 N.H. 386, 388 (1969).

9. Counsel for TransCanada has made a good faith effort to resolve these discovery issues informally with PSNH as required by Puc 203.09(i)(4), to no avail. Counsel for TransCanada has contacted the other parties to this docket and they take the following positions on this Motion: Staff takes no position; the Conservation Law Foundation and the Sierra Club support the Motion; and: "The OCA supports

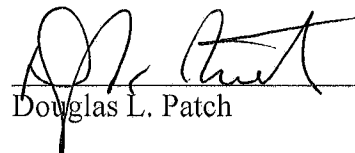
TransCanada's motion to compel under the Commission's standards of discovery. 'In assessing a motion to compel discovery...our inquiry is limited to issues related to relevance or potential relevance in the instant case.' *Re Pennichuck Water Works, Inc.* 92 NHPUC 20 (2007). The initial cost figures PSNH provided to the legislature formed the basis of the legislature's action on RSA 125-O. PSNH is relying on the terms of RSA 125-O in determining that the scrubber installation is in the public interest. The information as requested by TransCanada may be relevant or lead to the production of relevant data regarding PSNH's current petition to recover the prudent costs of the scrubber from default energy customers."

WHEREFORE, TransCanada respectfully requests that this honorable Commission:

- A. Compel PSNH to respond to data requests TC 5-4, 5-5, and 5-6; and
- B. Grant such further relief as it deems appropriate.

Respectfully submitted,

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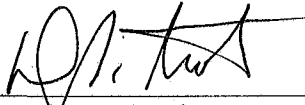


Douglas L. Patch

October 9, 2012

Certificate of Service

I hereby certify that on this 9th day of October, 2012 a copy of the foregoing motion was sent by electronic mail to the Service List.



Douglas L. Patch

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