

THE STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

Public Service Company of New Hampshire

Investigation of Scrubber Costs and Cost Recovery

Docket DE 11-250

Objection
of
Public Service Company of New Hampshire
to
Joint Motion for Deposition of Gary Long

August 8, 2013

Pursuant to Rule Puc 203.07(e), Public Service Company of New Hampshire ("PSNH" or the "Company") hereby objects to the "Joint Motion for Deposition of Gary Long" (the "Motion") dated July 29, 2013, submitted by the Office of the Consumer Advocate ("OCA"), TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast Inc. (together, "TransCanada"), the Conservation Law Foundation ("CLF") and the Sierra Club ("SC") (collectively, the "Moving Parties"). The Motion is untimely, is inconsistent with Commission policy, and seeks information which is not relevant to the proceeding.

In support of this Objection, PSNH states as follows:

1. Nearly five years ago, on August 22, 2008, the Commission opened its Docket No. DE 08-103, "Investigation of PSNH Installation of Scrubber Technology at Merrimack Station." In

the Secretarial letter initiating that docket, the Commission recognized that, “RSA 125-O:11, enacted in 2006, requires PSNH to install new scrubber technology at Merrimack Station by July 1, 2013 that will achieve at least an 80 percent reduction in mercury emissions.” By that same letter, the Commission directed PSNH to file a comprehensive status report concerning the Scrubber project by September 12, 2008.

2. By Motion dated August 25, 2008, PSNH requested that the Commission accelerate the schedule set forth in its August 22, 2008, Secretarial letter because the mandate for installation of scrubber technology contained in the Scrubber Law (RSA 125-O:11, et seq.), required PSNH to complete that installation and have scrubber technology operational “as soon as possible.” The Commission later agreed that under the law, time was of the essence in the completion of the Scrubber.¹ By Secretarial letter dated August 28, 2008, the Commission denied PSNH’s request, but welcomed the early filing of the materials sought by the Commission “as it will assist the Commission in conducting a timely review of these important materials.”

3. On September 2, 2008, PSNH filed the materials requested by the Commission. Those materials included a 73 page report and Memorandum of Law, which were filed under cover of a five page cover letter signed by PSNH President Gary Long.

4. OCA was expressly allowed to participate in Docket No. DE 08-103 by the Commission’s August 22, 2008, Secretarial letter. OCA in fact participated fully in that proceeding, first by objecting to PSNH’s Motion to Accelerate the schedule on August 25, 2008, and next by the filing of a Memorandum of Law on September 11, 2008.

¹.” Order No. 24,898 at 10; “The legislative history supports a conclusion that the Legislature viewed time to be of the essence. This conclusion is consistent with the economic performance incentives that PSNH can earn, pursuant to RSA 125-O:16, if the scrubber project comes on line prior to July 1, 2013.”

5. Filings were made in Docket No. DE 08-103 by both TransCanada and CLF on September 12, 2008, with subsequent filings made by both of these Moving Parties. The Sierra Club later participated in that proceeding.
6. Ultimately, the Commission's determination in Docket No. DE 08-103 was the subject of the *Stonyfield Farm* appeal and decision by the New Hampshire Supreme Court (*Appeal of Stonyfield Farm*, 159 N.H. 227, 229 (2009)). All the Moving Parties (OCA, TransCanada, CLF and the Sierra Club) participated in that Supreme Court case as *amici curiae*.
7. PSNH made nearly two dozen filings in Docket No. DE 08-103 from August 25, 2008, through June 28, 2012. On November 18, 2011, the Commission established the instant docket (DE 11-250), and Docket No. DE 08-103 was subsequently closed.
8. TransCanada, CLF and Sierra Club each filed Petitions to Intervene in this ongoing proceeding. Each of their respective petitions for intervention expressly stated that their intervention "would not impair the orderly and prompt conduct of the proceedings."
9. The Commission established its initial procedural schedule for the conduct of this docket by Secretarial letter dated December 23, 2011:

Data Requests re Temporary Rates	December 30, 2011
PSNH Responses	January 13, 2012
Technical Session	January 23, 2012 at 9:00 a.m.
Testimony of Intervenors/Staff	February 3, 2012
Hearing on Temporary Rates	February 15-16, 2012 at 10:00 a.m.

10. This initial procedural schedule has been modified several times during the course of this proceeding, including:

a. Schedule of June 26, 2012:

PSNH's Filing	06/15/12
Rolling Discovery on PSNH ends	08/31/12
PSNH Responses and Objections to Data Requests	09/14/12
Technical Session	09/21/12
PSNH Responses and Objections to Technical Session Questions	10/05/12
Staff and Intervenor Testimony	10/31/12
Data Requests to Staff and Intervenors	11/07/12
Staff and Intervenor Responses and Objections to Data Requests	11/26/12
Rebuttal Testimony	12/04/12
Settlement Conference	12/11/12
File Settlement	12/20/12
Hearing on the Merits	01/08-09/13

- b. September 14, 2012: “[T]he deadline for discovery of PSNH on issues contained in the reports prepared by the Audit Staff and Jacobs has been extended through September 27, 2012. Responses to any data requests will be due by October 11, 2012.”
- c. October 15, 2012: “As a result of unresolved discovery disputes ... the Commission has suspended the procedural schedule.”
- d. January 29, 2013: “The Commission has determined to suspend its decision pursuant to RSA 541:5... .”

- e. Staff's Proposed Schedule submitted pursuant to Order No. 25,506 on May 29, 2013:

	<u>Staff</u>	<u>PSNH</u>	<u>OCA</u>
Commission response to post order filings			June 21, 2013
Parties response to Commission Order			July 19, 2013
Technical Session	June 6, 2013	June 6, 2013	July 24, 2013
PSNH responses and Objections to Technical Session Questions	June 20, 2013	June 20, 2013	August 7, 2013
Staff and Intervenor Testimony	July 19, 2013	July 19, 2013	September 6, 2013
Data Requests to Staff and Intervenor	July 26, 2013	July 26, 2013	September 20, 2013
Staff and Intervenor Responses and Objections to Data Requests	August 16, 2013	August 16, 2013	October 2, 2013
Rebuttal Testimony	August 26, 2013	August 26, 2013	October 16, 2013
Settlement Conference	September 6, 2013	September 9, 2013	October 30, 2013
File Settlement, if any	September 18, 2013	September 18, 2013	November 6, 2013
Hearing on the Merits	September 24-25, 2013	September 24-25, 2013	November 18-20, 2013

- f. Jun 7, 2013: "the Commission has determined to suspend its decision pursuant to RSA 541:5 in the above-captioned proceeding pending further consideration of the issues... ."
- g. July 15, 2013: "In order to reach the hearing on the merits as expeditiously as possible, we adopt the following procedural schedule, building from the schedules proposed by PSNH, the OCA and Staff in a May 29, 2013 letter."

Technical session	July 24, 2013 at 9 AM
PSNH Response and Objections to Technical Session Questions	August 7, 2013
Staff and Intervenor Testimony	August 23, 2013
Data Requests to Staff and Intervenor	September 6, 2013
Staff and Intervenor Responses and Objections to Data Requests	September 20, 2013
Rebuttal Testimony	October 4, 2013
Settlement Conference	October 18, 2013
File Settlement, if any	November 1, 2013
Hearing on the Merits	November 12-14, 2013 at 9 AM

11. These multiple schedules demonstrate that the Commission has provided the Moving Parties with ample opportunities to engage in discovery regarding the Scrubber project. The Moving Parties fully utilized that opportunity for discovery, submitting data requests as early as December 30, 2011, and continuing to submit questions and follow-ups through the most recent Technical Session on July 24, 2013. Throughout this period, the Moving Parties asked hundreds of discovery questions; PSNH supplied thousands of pages in response; and, PSNH created an entire data room of responsive project documents comprising tens of thousands of pages of additional discovery disclosure. Yet despite the numerous extensions of the discovery period in this docket, not once did the Moving Parties use the standard discovery process to ask the questions they now want answered.

12. Per the Commission's procedural schedule, the "rolling discovery" period ended and all discovery questions to PSNH were required to be asked by August 31, 2012. The purpose of the recent, delayed July 24, 2013, Technical Session was to allow parties an opportunity to ask follow-up questions regarding discovery responses the Company had already provided to timely filed requests.

13. The Moving Parties' request to depose PSNH President Gary Long was made during this very last Technical Session, almost a year after the end of the procedural schedule's deadline for the submission of discovery to PSNH, and more than 18 months after the original discovery schedule was set. The Moving Parties have had ample opportunity to use the standard discovery process or to request such a deposition for the past year and a-half. The Motion comes too late.

14. The Moving Parties base their request for a deposition on the proposition that, "As intervenors in this docket the Moving Parties have the right to conduct discovery pursuant to

N.H. Admin. R. Puc 203.09.” Motion ¶1. The Commission has provided the Moving Parties with an extended procedural schedule that provided more than an ample opportunity to conduct discovery. As noted, the “Rolling Discovery on PSNH” ended on August 31, 2012 – nearly one year ago. The Moving Parties were well aware of Mr. Long’s five-page cover letter submitted in Docket No. DE 08-103 for nearly five years. Moreover, although PSNH does not agree with the Moving Parties’ characterization of Mr. Long’s involvement or actions related to the Scrubber, that alleged involvement has been known to the Moving Parties for years.

15. PSNH submitted the pre-filed testimony of its witnesses in this docket in June of last year. If discovery was needed regarding Mr. Long, all five of the Moving Parties had the opportunity to conduct such discovery during the procedural schedule’s discovery period. The Moving Parties’ Motion should be denied as being nothing more than an untimely request to conduct additional discovery on PSNH nearly a year after the discovery period has ended.

16. In *Lower Bartlett Water District*, 85 NHPUC 411 (2000), the Commission noted that the failure of a party to assert their rights in a timely manner has due process implications: “There is simply no reasonable explanation for why they waited so long to seek relief. We believe it is consistent with the letter and the spirit of the Administrative Procedures Act and notions of due process to avoid rewarding parties for withholding a motion for such an extended period.” In the *Lower Bartlett* case, the delay discussed was a matter of weeks; in the instant case, the delay is almost a year. As the Moving Parties were aware of Mr. Long’s five-page cover letter five years ago; were aware of what testimony was filed on behalf of PSNH over one year ago; and had a rolling discovery deadline that ended eleven months ago - there is no reasonable explanation for why they waited until now to conduct further discovery. In accordance with “the letter and the

spirit of the Administrative Procedures Act and notions of due process,” the Motion should be denied.

17. The Motion states, “The Moving Parties have made a good faith effort to resolve this discovery issue informally with PSNH, but to no avail.” The only effort the Moving Parties made regarding this matter occurred during the July 24, 2013, Technical Session, long after the discovery period in the procedural schedule had expired, when TransCanada indicated the desire to depose Mr. Long. Nothing was done earlier in this process; nothing was done after the Technical Session, except for the filing of this Motion. PSNH does not believe that the request for deposition demonstrated a good faith effort to comply with the procedural schedule of this proceeding. In fact, according to the procedural schedule in place as of the date of the Motion, “Staff and Intervenor Testimony” is due on August 23. The Motion asks for Mr. Long’s deposition to take place on August 21. The Moving Parties request is untimely, and should be denied.

18. The Moving Parties allege in the Deposition Motion that the Commission is “*required*” to authorize the requested deposition (Motion ¶2); that they are “*entitled*” to make inquiry of Mr. Long” (Motion ¶6); and that the Commission “*must*” grant a deposition of Mr. Long (Motion ¶8, emphases added). Any such “requirement,” “entitlement,” or mandate is limited in both time and substance. The time for that inquiry has long expired.

19. If Mr. Long possessed information of such importance that his deposition was necessary, clearly one of the five Moving Parties would have, and should have, known that before the discovery period had run. The four supporting attachments to the Motion supplied by the Moving Parties demonstrate that, as a matter of fact, they knew everything on which they now base their urgent need for a deposition for months, if not years. Attachment 1 to the Motion was

supplied by PSNH in September, 2008; Attachments 2 and 3 date from 2009 and were supplied as data request responses in June, 2012; Attachment 4 includes items that date back to 2008 which were supplied as data request responses in August 2012. The Moving Parties also refer to “the legislative history of SB 152 and HB 496 from the 2009 session” – a session which ended in June of 2009. It is inexplicable that years have gone by before the Moving Parties realized who Mr. Long is, what his position with the Company was, and what role he may have had in the Scrubber project. The Moving Parties have not asserted any reasonable basis for their failure to abide by the governing procedural schedule.

20. Moreover, even apart from the untimeliness of the requests, the questions the Moving Parties seek to pose on Mr. Long are irrelevant to and outside the scope of this proceeding. The Moving Parties continue to try to “virtually repeal” the Scrubber law by second-guessing the bases for the Legislature’s initial enactment and subsequent refusal to change that law. None of that is relevant. The law is the law. It was within the purview of the Legislature, for whatever reason, to enact the law and to maintain that law, and its mandate that scrubber technology must be installed and operational at Merrimack Station by July, 2013, as a binding legal requirement to be obeyed by PSNH and by this Commission. The Legislature’s findings and public interest determinations contained in the Scrubber law are binding and unchallengeable. Indeed, this Commission has consistently ruled that the law imposed a mandate; it has no jurisdiction to “pre-approve” the Scrubber installation; and that the Legislature did not place a cap on costs or rates and reserved the review of the overall cost of the project for itself. Order No. 24,898 at 12. Thus, the Commission has removed these issues from consideration and any testimony on these issues would be irrelevant and inadmissible.

21. The Moving Parties' claim that, "During this technical session PSNH was non-committal about the witnesses it would be calling to testify at the hearing." Motion ¶5. That matter has no bearing on the Motion. Nonetheless, PSNH clearly explained that until the testimony of all intervenors, OCA, and Staff has been filed, it is not possible to know what issues need to be addressed and therefore, who may be required as witnesses. As noted earlier, pre-filed testimony of PSNH's initial witnesses was filed in this proceeding over a year ago.

22. The Moving Parties' assertion that they were unable to "avail themselves of the discovery methods typically employed in Commission proceedings" "[b]ecause Mr. Long has not submitted prefiled testimony in this case, or appeared at technical sessions" is unpersuasive. The very Commission rule that the Moving Parties rely upon as authority for their deposition request, N.H. Admin. R. Puc 203.09, includes the provision that "(b) Unless inconsistent with an applicable procedural order, any person covered by this rule shall have the right to serve upon any party, data requests, which may consist of a written interrogatory or request for production of documents." The Moving Parties indeed did have the ability to ask questions which they deemed necessary and relevant; but they did not. The Moving Parties appear to be laboring under the misconception that if a Party-Intervenor does not file testimony, they are immune from having to participate in the discovery process. Rule Puc 203.09 (b) indicates otherwise. It is inexplicable how Mr. Long could be subject to discovery via deposition if he was not subject to discovery using the Commission's standard discovery procedures.

23. This Commission has previously indicated that the use of depositions in discovery is the exception, not the rule. "We do not intend to issue subpoenas to compel deposition testimony unless a party can establish that the Commission's standard discovery procedures are inadequate." *Re: Statewide Electric Utility Restructuring Plan*, 82 NHPUC 325, 327 (1997).

Here, the Moving Parties completely failed to use the Commission's standard discovery procedures to obtain the information they now deem necessary. Accordingly, the Commission should deny the Motion.

WHEREFORE, PSNH objects to the Joint Motion for Deposition of Gary Long.

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

- A. Deny the Joint Motion for Deposition of Gary Long; and
- B. Grant such other and further relief as justice may require.

Respectfully submitted this 8th day of August, 2013.

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2013, 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).

A handwritten signature in dark ink, appearing to read "Robert A. Bersak", is positioned above a horizontal line.

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