

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

**Objection to Motion of Public Service Company of New Hampshire to Rescind
TransCanada's Intervenor Status or Alternatively to Strike TransCanada's
Objections to PSNH's Data Requests and Compel Answers to Those Requests**

NOW COMES TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast Inc. (together, "TransCanada")¹ pursuant to Admin. Rule Puc 203.07(e) and objects to the Motion of Public Service Company of New Hampshire ("PSNH") to Rescind TransCanada's Intervenor Status or Alternatively to Strike TransCanada's Objections to PSNH's Data Requests and Compel Answers to Those Requests ("Motion") filed with the Commission in this docket on February 21, 2014. In support of this Objection TransCanada states as follows:

Introduction

On January 16, 2014 PSNH propounded 176 data requests on TransCanada, with many of the data requests individually containing multiple parts² and accordingly the total number of data requests it propounded on TransCanada to date is in excess of 425.

¹ In the discovery responses and objections the defined term the "Companies" was used to clearly distinguish the difference between the entities that were granted party status in this case and the affiliates of those parties. There is no issue with using the defined term TransCanada, notwithstanding PSNH's attempt to make it one.

² Superior Court Rule 23(b) requires counting each subquestion as a separate question.

TransCanada fully complied with its discovery obligations. In a letter dated January 31, 2014 in this docket the Commission modified the procedural schedule and provided that objections to data requests be submitted by February 7, 2014, which TransCanada did, and that responses be submitted by February 14, 2014, which TransCanada also did. In total, TransCanada provided responses to 157 data requests. TransCanada's outside counsel and in house counsel and personnel at TransCanada spent many hours reviewing PSNH's data requests and preparing and submitting objections and/or responses to each request as applicable. TransCanada did this even though the vast majority of PSNH's requests i) were repetitive, ii) asked for information which is publicly available, iii) sought information completely unrelated to this proceeding or the parties therein, and iv) were out of bounds for reasons that TransCanada articulated in each of its objections. As stated by the New Hampshire Supreme Court, a party's obligation is to timely object to unreasonable discovery requests, not to perform unlimited investigation in creating responses. *See Kearsarge Computer, Inc. v. Acme Staple Co.*, 116 N.H. 705, 707 (1976).

Nevertheless, although PSNH disputes TransCanada's objections, TransCanada is willing to work with PSNH and Commission representatives to try to resolve these disputes without litigation.³ In that regard, TransCanada does not think PSNH made a sufficient good faith effort to resolve the discovery dispute with TransCanada in this docket (page 2, footnote 1 of the Motion). Outside counsel for PSNH called TransCanada's outside counsel and during the approximately three minute phone call

³ In its January 24, 2014 Objection to PSNH's Data Requests, page 6, TransCanada had recommended that the Commission consider establishing a mechanism for sorting through and limiting the data requests and cited to a number of dockets where the Commission had designated its general counsel or a staff attorney to oversee this process and make a recommendation to the Commission. CLF made a similar request.

demanded a response to essentially all the data requests to which TransCanada had objected. During the call, counsel for PSNH also indicated that PSNH would file a motion to have TransCanada's intervention rescinded.

Neither PSNH nor its counsel provided any written detail of any of its reasons as to why TransCanada must or should respond to any of the objected to requests. Even though there was no indication that PSNH was willing to go over the issues with TransCanada at that time, TransCanada is willing to work with PSNH and Commission representatives to try to address the issues associated with each of the disputed questions. PSNH's Motion is the first time TransCanada became aware of some details associated with PSNH's discovery issues. The absence of any attempt prior to filing the Motion to provide to TransCanada these and possibly other details concerning the dispute makes the Motion premature other than for the possible purpose of complying with procedural time limits. Accordingly, any decision on the Motion should be stayed until the parties and Commission representatives have a meaningful opportunity to resolve the discovery disputes without further motion practice. As such, the portions of the Motion that call for the rescission of TransCanada's intervenor status are premature.

Moreover, the issue in this docket is whether the investments made by PSNH, a regulated electric utility in the state of New Hampshire, in a scrubber at the Merrimack coal facility were prudent in light of the facts and circumstances known to PSNH. PSNH's data requests appear to be an attempt to shift the focus away from where it belongs in this docket, which is whether PSNH "has exhibited inefficiency, improvidence, economic waste, abuse of discretion, or action inimical to the public interest". *Re Public Service Company of New Hampshire*, 81 NH PUC 531, 541 (1996)

(citing Appeal of Seacoast Anti-Pollution League, 125 N.H. 708 (1985)); *see also Appeal of Easton*, 125 N.H. 205, 215 (1984); *Re Public Service Company of New Hampshire*, 87 NH PUC 876, 886 (2002). It is “the Commission’s responsibility and obligation under the law ...to determine whether PSNH conducted itself with the level of care expected of highly trained specialists... .” *Public Service Company of New Hampshire*, 87 NH PUC 876, 886 (2002).

PSNH’s data requests appear to be an attempt to change the focus of this docket from its own actions and what it knew when it decided to go forward with the scrubber investments to the unrelated and irrelevant actions and knowledge of others that are not parties to this case. What is even more concerning is that PSNH’s vitriolic and angered pleading seeking to eliminate TransCanada from participation in the docket without further attempts to resolve disputed issues is extreme at this point in the proceeding.⁴

PSNH’s discovery strategy and the Motion filed against TransCanada are disrupting the efficient resolution of the prudency issue in this docket. The Motion is creating an unnecessary and unproductive expenditure of resources of all the parties in the case. Prior to making any meaningful attempt to resolve its discovery disputes, PSNH filed the Motion. PSNH also sought to rescind the intervenor status of CLF or in the alternative compel answers to all of PSNH’s data requests. This has created a whole new set of procedural issues for the Commission to resolve before the case can move forward. Although TransCanada has met its discovery obligations, as explained in more detail below, it is willing to work with PSNH and Commission representatives to work

⁴ See also motion of PSNH to rescind the intervenor status of CLF. TransCanada is not seeking to limit the information that is included in the record in general; rather, it is resisting attempts to require the inclusion of unrelated and irrelevant information in the record that will only cause the unnecessary expenditure of resources and delay resolution of the prudency issues in this case.

through any issues with the responses and objections on a question by question basis. TransCanada requests that the Commission require PSNH to take these additional steps to try to resolve any discovery disputes before seeking resolution exclusively by seeking to have parties' intervenor status rescinded.

Discovery Compliance

While the Commission has a fairly liberal standard when it comes to discovery, PSNH's Motion should be denied as most of the questions that it asked of TransCanada, and to which TransCanada objected, are objectionable on multiple grounds for the reasons TransCanada specified in the particular objections.⁵ See *Re Investigation into*

⁵ For examples of the tailoring of the objections to the particular requests from PSNH, see questions and responses to PSNH data requests 4, 5, 24a and 166, copied below.

Question 4: Provide copies of TransCanada's annual reports for the years 2006 to present.

Answer 4: Objection for the reasons set forth in the General Objections above. More specifically, TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast Inc. (hereinafter together, the "Companies") object to the request on the basis that it seeks information that is readily available from publicly available sources and PSNH is asking the Companies to find information and conduct research for it.

Question 5: Who is Hal Kvisle? What position, if any, did Mr. Kvisle hold with TransCanada?

Answer 5: Objection for the reasons set forth in the General Objections above. More specifically, the Companies object to the request on the basis that it seeks information that is readily available from publicly available sources and PSNH is asking the Companies to find information and conduct research for it; and the Companies object to the request on the basis that it seeks information that is irrelevant to this proceeding—a proceeding to determine whether PSNH's actions with regard to a specific investment in a scrubber project in a specific geographic region and market were prudent.

Question 24.a: Page 7, Line 2 – You testify that “the purpose clause [of the Scrubber Law] refers to the careful and thoughtful balancing of the cost and benefits”. Please provide a listing of all possible “benefits” that the Legislature may have included in the referenced “balancing.”

Answer 24.a: Objection for the reasons set forth in the General Objections above. More specifically, the Companies object to the request on the basis that it is overly broad, unduly burdensome and are not reasonably calculated to lead to the discovery of information that is relevant and admissible in this proceeding; and the Companies object to the request on the basis that it is asking Mr. Hachey to speculate about the motives or reasons others have for taking a particular action or for expressing a particular opinion (See Order No. 25,445 in this docket, at 29, denying a motion to compel on the basis that “it would require discovery into the thought process of elected representatives”) or to speculate about information that he does not possess and that was not the basis of his testimony.

Whether Certain Calls are Local, 86 NH PUC 167, 168-169 (2001) (where the Commission, based on a recommendation from Staff, required answers to some but not all discovery questions, following an analysis that denied questions that were too narrow or too broad because they were “not relevant to the policy aspect of the docket.”) See also *Re Lower Bartlett Water Precinct*, 85 NH PUC 371, 372 (2000) (where the Commission denied certain data requests saying it does so when it “can perceive of no circumstance in which the requested data would be relevant”). In analyzing a motion to compel, for example, the Commission will “balance[] such factors as the relevancy of the requested information, the effort needed to gather it, the availability of the information from other sources, and any other relevant criteria.” *Re Public Service Company of New Hampshire*, 76 NH PUC 559, 561 (1991); see also *Public Service Company of New Hampshire*, Order No. 25,595 (Docket DE 13-108), 2013 WL 6328136 (Nov. 15, 2013) (stating that “we also consider whether the response would be unduly burdensome for the respondent to compile and whether the information is otherwise publicly available” and finding that certain requests by the Conservation Law Foundation would be burdensome and would require PSNH to “create information logs and files not maintained by the Company in its normal course of business”).

Furthermore, the purpose of discovery is to narrow the issues and to prevent unfair surprise by making evidence available in time for both parties to evaluate it and adequately prepare for trial. See *Keene*, supra at 707. PSNH has attempted to expand,

Question 166: Does TransCanada contend that installation and operation of scrubber technology at Merrimack Station resulted from a discretionary decision made by PSNH management?

Answer 166: Objection for the reasons set forth in the General Objections above. More specifically, the Companies object to the request on the basis that it is repeated question. See the response to question 137.

rather than narrow, the issues and to force TransCanada to search for information that is unrelated to and has no relevance to the prudency issues that will be considered during the hearing. Because PSNH asked such an inordinate number of data requests instead of carefully choosing its questions and focusing on issues of relevance to this docket, PSNH's Motion should be denied.

Finally, as the party filing the Motion it is PSNH's burden to show why the Commission should overrule each of TransCanada's objections and compel responses to each of the data requests for which PSNH is now seeking a response. Admin. Rule PUC Puc 203.25 provides that the party seeking relief through a motion "shall bear the burden of proving the truth of any factual proposition by a preponderance of the evidence" and PSNH has failed to do so.

Undue Burden: It is entirely appropriate for TransCanada to object to the numerous data requests on the basis of undue burden, as the total number of data requests PSNH propounded on TransCanada was in excess of 425. As noted in the objections, many of the data requests sought information that is publicly available⁶ and/or unrelated to PSNH's prudency.⁷ To require TransCanada to answer these requests would be an undue burden because the information could be obtained by PSNH itself and/or would

⁶ See, e.g., Request 4, 5, 6, 9, 10, 22, 24m, 29c, 29d, 33b, 33c, 35, 64b, 65, 65a, 65b, 70a, 70b, 70c, 70d, 70e, 85e, 87, 91a, 91b, 94e, 95d, 96c, 96d, 101d, 101e, 104b, 108, 109, 110, 111, 129c, 148, 152, 153, 154, 155, 156, 157, 158, 162, 163, 173, 174, 175, 175a, 175b, 175c, 175d, 175e, 175f, and 175g.

⁷ 9, 10, 12, 22, 23, 24j, 24k, 24l, 24m, 30c, 30d, 31a, 31b, 31c, 31d, 32a, 32b, 32c, 34a, 34b, 34c, 34d, 34e, 34f, 35, 36, 37a, 37b, 37c, 37d, 37e, 37f, 37g, 37h, 38a, 38b, 38c, 38d, 38e, 38f, 39a, 39b, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 57d, 58c, 61f, 62, 64a, 64b, 64c, 64d, 64e, 64f, 64g, 64h, 64i, 65, 65a, 65b, 66, 67, 68, 71a, 71b, 71c, 71d, 71e, 72a, 72b, 72c, 74b, 74c, 75a, 75b, 75c, 75d, 75e, 76b, 76c, 78, 79, 80, 81, 82, 83a, 83b, 84, 85, 85a, 85b, 85c, 85d, 85e, 87, 91a, 91b, 91c, 92, 93, 94a, 94b, 94c, 94d, 94e, 95a, 95b, 95c, 95d, 95e, 95f, 95g, 96a, 96b, 96c, 96d, 96e, 96f, 96g, 96h, 96i, 96j, 97, 97a, 97b, 97c, 97d, 97e, 97f, 98a, 98b, 98c, 98d, 98e, 99a, 99b, 99c, 99d, 99e, 100a, 100b, 100c, 100d, 101a, 101b, 101c, 101f, 102a, 102b, 102c, 102d, 102e, 103a, 103b, 104b, 107, 108, 109, 110, 111, 113a, 113b, 114, 125a, 125b, 125c, 126a, 126b, 133, 135, 139, 147a, 147b, 147c, 147d, 149, 150, 151, 156, 157, 159, 160, 161, 171, and 176.

provide no information that would help determine the prudence of PSNH's investments in the Merrimack scrubber.

Further, PSNH's own Motion supports TransCanada's objection based on undue burden. PSNH asked TransCanada so many data requests that PSNH is not even willing to put in its Motion the specifics of why each of the objections to the requests for which it is now seeking to compel responses are inadequate.⁸

Specific Objections: TransCanada's objections were specific to the data requests. Counsel for TransCanada and multiple personnel from TransCanada went through each data request individually and tailored each objection to each data request, as there were often multiple bases for objecting to each request. Many of PSNH's data requests were repetitive and similar. Accordingly, many of the objections were repetitive and similar. However, just because many of the data requests PSNH asked are objectionable on similar grounds as well as more than one ground (and often on a number of different grounds) does not mean that the objections provided are non-specific and instead general in nature.

TransCanada established thirteen different General Objections, and then chose the objections that were relevant to each individual question and included the specific objection(s) in the response to each individual question as applicable.

TransCanada has followed standard practice before this Commission in responding to the PSNH discovery requests. The objections are specific and directly

⁸ See for example the Motion at 34: "A question by question recitation of those questions would not only be unduly burdensome, but given the inadequacy of TransCanada's objection thereto, would also be an exercise in futility." TransCanada agrees that the number of unrelated and irrelevant data requests is creating an undue burden on all parties but as noted above it is nevertheless willing to try to work through the discovery issues with PSNH and Commission representatives.

related to the question being asked.⁹ By arguing that TransCanada's objections are facially inadequate, PSNH is asking that its arguments related to the objections be accepted over TransCanada's without further analysis or attempts to resolve the dispute. Notwithstanding PSNH's pessimism, some if not all of these discovery disputes could very well be resolved if the parties and Commission representatives worked to focus on the substantive issues in the case. Similarly, by arguing that TransCanada's objections are facially inadequate PSNH is asking that TransCanada be subject to a higher standard when it comes to objections to data requests than what PSNH has followed in this and numerous other dockets. See, e.g., PSNH objections to TransCanada's data requests attached to Motions to Compel in this docket dated July 16, 2012, September 11, 2012, and October 9, 2012.

With respect to specificity, ironically, PSNH's Motion fails for not containing sufficient specificity (i.e., a question by question reasoning) to show that it has met its burden pursuant to Admin. Rule PUC Puc 203.25. PSNH propounded the numerous data requests and it may not now make general arguments because there are objections to many of those requests. Without providing the specifics of its dispute, PSNH has failed to meet its burden to support granting the Motion.

PSNH also argues that "TransCanada makes so many objections that resolving them is virtually impossible." Motion at 8. PSNH spends most of the Motion objecting to TransCanada's general objections and then on page 24 only offers a "few examples" of what it claims are TransCanada's "Frivolous Objections".¹⁰

⁹ See examples in footnote 4 above.

¹⁰ For example, on page 25 of the Motion it refers to question #135 where it asked for copies of all economic analyses performed by TransCanada relating to the relicensing of the Wilder, Bellows Falls, and Vernon Hydroelectric Projects on the Connecticut River. TransCanada objected to this question on a

TransCanada has complied with its discovery obligations by objecting to those requests that it cannot or should not answer and the number of objections is in large part based on the number of requests. Without an earnest attempt to resolve the dispute it is premature to claim resolution is “virtually impossible.” While the parties may not be able to resolve every issue in this discovery dispute, TransCanada thinks the number of disputed issues could at a minimum be reduced to a much smaller number once PSNH understood the objections and Commission representatives participated and provided their recommendation to the Commission.

Unrelated Parties and Information: PSNH has no grounds for asserting that TransCanada entities not involved in this docket should be compelled to respond to PSNH data requests or that parties to the case are obligated to obtain information from them. TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast Inc. are the entities that were granted intervenor status in this docket. See Secretarial Letter dated December 23, 2011. These are the same entities that have participated in many dockets at the Commission in recent years. PSNH claims that in its objections and responses

number of grounds, see Attachment A to this Objection. Not only did Mr. Hachey never mention these projects in his testimony, but TransCanada cannot envision how the relicensing of these projects is in any way relevant to the issues in this docket. Relicensing has nothing to do with prudence and these hydropower facilities are nothing like and do not face the same issues as the scrubber project. If the Commission is going to spend time going over this kind of information this docket will take an inordinate amount of time to resolve. Similarly, on page 24 of the Motion PSNH cites to question #30, which actually contained four separate and distinct questions. TransCanada responded to the first two and then objected to the last two, which seek information that Mr. Hachey did not provide in his testimony. The portion of his testimony that these questions allegedly relate to concern the PowerAdvocate Report that PSNH provided in response to a discovery request. In his testimony Mr. Hachey cited specific quotes from that Report. PSNH takes those specific quotes from the Report and uses those quotes as a jumping off point for asking for all peak price predictions that any TransCanada company made (including those companies that are not a party to this docket) over the last nine years and for detail about how all of those TransCanada companies predict whether prices have reached their peak. For all of the reasons stated specifically in the TransCanada objection there is no reason to compel a response to these requests. In its Motion PSNH also cites the objection to question #23, which asks for any and all documents relating to cost estimates for scrubber technology in coal-fired generating plants that TransCanada owns. The TransCanada entities that have been granted intervention in this docket and that have put forth Mr. Hachey’s testimony do not own any coal-fired power plants. What PSNH is seeking is objectionable for all of the reasons specifically listed in the TransCanada objection to this question.

TransCanada attempts “to masquerade as a different, more limited entity”. Motion p. 9, footnote 16. In making this argument PSNH is trying to unfairly expand the scope of the docket and TransCanada’s participation in it and the scope of TransCanada’s discovery obligations. In this docket and other Commission proceedings the only two entities that have sought and been granted party status are TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast Inc. Other TransCanada companies or affiliates have no involvement in this docket.

Nonetheless, PSNH has attempted through numerous data requests to obtain information from and pertaining to entities that are not a party to this docket. If PSNH wishes to obtain information from the public domain and try to introduce such information into the record during the hearing then it may certainly attempt to do so. However, the companies that are participating in this docket should not be required to respond to unreasonable demands for information that is publicly available or otherwise not available to Mr. Hachey, TransCanada Power Marketing Ltd. or TransCanada Hydro Northeast Inc. because of regulated codes of conduct prohibiting such disclosure.

Rescission of Intervenor Status

PSNH’s request that the Commission rescind TransCanada’s intervenor status should be denied as it would be highly prejudicial to TransCanada at this late stage of the proceeding and premature because of the lack of any real attempt to resolve the discovery dispute. Rescinding TransCanada’s intervention status at this point for exercising its legitimate procedural rights by objecting to data requests would be an unprecedented and unjustified action that would have a chilling effect on future interventions and participation in Commission dockets. TransCanada has invested much time and many

resources in this docket, as have many other parties; to rescind intervention and party status more than two years after the proceeding commenced would be contrary to the interests of justice. At the beginning of this docket PSNH attempted unsuccessfully to have TransCanada denied intervention in this docket; it should not be allowed to relitigate this issue now based on unsubstantiated claims of procedural infirmities. See PSNH's Objection to Petitions to Intervene dated December 13, 2011. TransCanada submits that through its participation in this proceeding, along with other intervenors, it has contributed to a full and thorough examination of issues that are critical to and have far reaching consequences for New Hampshire electric ratepayers, including TransCanada's customers.

Even if it is determined TransCanada has an obligation to provide substantive responses to some of the requests, the proper remedy would be to compel each of those responses individually, not to require responses to all questions and not to exclude a party's further participation in the proceeding. *See Keene, supra* at 707-08.

WHEREFORE, TransCanada respectfully requests that this honorable Commission:

- A. Deny PSNH's Motion in its entirety, including its request to rescind TransCanada's party intervenor status and to compel responses to all its data requests; and
- B. Grant such further relief as it deems appropriate.

Respectfully submitted,

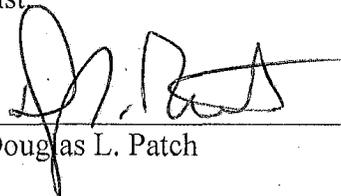


Douglas L. Patch
TransCanada Power Marketing Ltd.
TransCanada Hydro Northeast Inc.
By Their Attorneys
ORR & RENO, P.A.
45 South Main Street
Concord, NH 03302-3550
Telephone: (603) 223-9161
dpatch@orr-reno.com

March 3, 2014

Certificate of Service

I hereby certify that on this 3rd day of March, 2014 a copy of the foregoing objection was sent by electronic mail to the Service List.



Douglas L. Patch

1120348_1