

**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

Motion for Reconsideration and/or Clarification of Order No. 25,663

NOW COMES TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast Inc. (together, “TransCanada”), an intervenor in this docket, and moves the New Hampshire Public Utilities Commission pursuant to RSA 541:3 and Admin. Rule Puc 203.07 to rehear and reconsider or to clarify Order No. 25,663 dated May 8, 2014. In support of this Motion, TransCanada states as follows:

Rehearing Standard

1. The Commission may grant rehearing when a motion states “good reason for the rehearing.” RSA 541:3. Such a showing may be made “by new evidence that was unavailable at the original hearing, or by identifying specific matters that were either ‘overlooked or mistakenly conceived.’” *Verizon New Hampshire Wire Center Investigation*, 91 NH PUC 248, 252 (2006), quoting *Dumais v. State*, 118 N.H. 309 (1978). See also *Lambert Const. Co., Inc. v. State*, 115 N.H. 516, 519 (1975). “A successful motion does not merely reassert prior arguments and request a different outcome. See *Connecticut Valley Electric Co.*, 88 NH PUC 355, 356 (2003).” 91 NH PUC at 252. RSA 541:4 requires that a rehearing motion “set forth every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable.”

2. On May 8, 2014 the Commission issued Order No. 25,663 (“Order”), Order on Public Service Company of New Hampshire (“PSNH”) Motion to Compel, in which it ordered TransCanada to provide supplemental answers to PSNH Data Requests 34a, 52, 74b and 75c. Good reason exists for rehearing. As discussed in more detail below, the Order overlooks that the information sought by PSNH consists of reports that TransCanada’s witness did not rely upon in his testimony; were created by and in the possession of entities that are not parties to this docket; and that contain confidential, proprietary and commercially sensitive information about a competitive market. By issuing this Order, TransCanada submits, the Commission is acting beyond the scope of powers granted to it by the Legislature and if the Order is not reconsidered it will have a chilling effect on participation in future dockets. In view of the foregoing, the Order must be reconsidered or clarified.

PSNH Requests No. 34a and No. 52

3. The Order directs TransCanada to respond to PSNH’s Request No. 34a with “fuel price forecasts for natural gas and coal (not oil), that were produced by or were in possession of TransCanada affiliates during the period January 1, 2005, through December 31, 2008 and that were long term forecasts that included prices for 2012 or beyond,” Order at 7. The Order overlooks that PSNH’s question concerned only Mr. Hachey’s testimony about PSNH’s assumptions, not TransCanada’s. The Order describes PSNH’s Request No. 34a as seeking information about page 13, line 18 of Mr. Hachey’s prefiled testimony where “*You* testify about assumptions regarding the forecast price of natural gas.” (Emphasis added.) However, a careful review of Mr. Hachey’s prefiled testimony (page 13, lines 16 through 19) reveals that his statements concern only

“the natural gas assumption that *PSNH* used in [its] presentations” (emphasis added), and does not relate at all to Mr. Hachey’s or TransCanada’s assumptions about natural gas price forecasts. Thus, insofar as the Order mistakenly conceives the question the Commission has directed TransCanada to answer, the Order is in error and must be reconsidered.

4. In addition to mistakenly conceiving PSNH’s Request No. 34a, the Order also overlooks that the information TransCanada has been ordered to produce is irrelevant to the issue of whether PSNH acted prudently, the central issue in this docket. Mr. Hachey’s or TransCanada’s assumptions about natural gas price forecasts are simply not relevant to the issue of what PSNH knew at the time it took the actions under investigation in this docket. PSNH did not have any TransCanada forecasts and therefore could not rely upon them to support any conclusions it reached when deciding to invest in the scrubber. Because irrelevant information is inadmissible at hearing, *see* RSA 541-A:33, II, it is not discoverable. *See, e.g., Public Service Company of New Hampshire, Order on Motions to Compel and Motions to Rescind Intervenor Status, DE 11- 250, Order No. 25,646 (Apr. 8, 2014) at 3.* Accordingly, the Commission erred in ordering TransCanada to provide the information sought in PSNH Data Request No. 34a.

5. The information sought in Request No. 34a is also beyond the scope of Mr. Hachey’s prefiled testimony, and is therefore improper. A review of Mr. Hachey’s prefiled testimony clearly indicates that in constructing his testimony, based on his understanding of the scope of this docket’s prudence review, he was very careful to examine only the information available to PSNH (i.e., publicly available information and information provided by PSNH in response to discovery requests) at the relevant time

period, and this did not include any of the information that TransCanada is now being required to produce.¹ Despite this fact, PSNH has persisted in pushing for information from non-party affiliates. The Commission's Order directs the TransCanada parties to this docket to provide information from non-party affiliates even though Mr. Hachey did not review, consider or rely upon the information the Commission is compelling TransCanada to produce. As Mr. Hachey noted in his prefiled testimony at page 21, based on a PSNH response to a data request, it appears that PSNH itself did not even rely on *any* forecasts for its gas price estimate, which makes forecasts produced by or available to TransCanada affiliates that are not parties to this docket (and not available to PSNH) even less relevant to this review of PSNH's actions.

6. TransCanada is a very large company and the information which the Commission is now directing non-party affiliates to produce is not only voluminous but is highly sensitive, commercial and proprietary information about competitive markets. Its release would place TransCanada at a distinct competitive disadvantage versus other competitive market participants. Moreover, requiring a company the size of TransCanada to search for this kind of information is a major undertaking. The Commission has recognized that it is not appropriate to compel disclosure of sensitive commercial or financial information that is protected from disclosure and denied a

¹ See Mr. Hachey's prefiled testimony, including his understanding of the standard of review the Commission will use in this prudence docket ("The Commission's analysis should be based on what is known or could reasonably have been known at the time of the conduct..." – p. 2 of Hachey Prefiled Testimony); see p. 17 where he refers to the gas forecast information available to PSNH at the time that it chose to ignore; see p. 19 where he says: "This forecast was at odds with contemporaneous forecasts available to PSNH ... the assumption PSNH used did not realistically reflect actual pricing seen in the market."; see p. 20 where he lists the forecasts available to PSNH in September of 2008; see also Mr. Hachey's prefiled testimony regarding the cost to go analysis that he did "[b]ased on information provided by PSNH in this proceeding..." p. 23; see also p. 24 of Mr. Hachey's prefiled testimony indicating that he "undertook to use many of PSNH's own assumptions and much of its data to view the scrubber decision from a mid-year 2008 vantage point..." and "the primary exception we took to PSNH's analysis was that we used three of the four gas forecasts...readily available to PSNH..." and did not use the fourth forecast because PSNH refused to provide the complete forecast in response to TransCanada's discovery requests.

Motion to Compel on that basis. Order No. 25,439, DE 12-097 (December 7, 2012).²

The Commission has also clearly recognized that the kind of information that PSNH is seeking from non-party affiliates at issue here is exempt from disclosure. *Re Public Service Company of New Hampshire*, 96 NH PUC 319, 322 (2011); *Re Public Service Company of New Hampshire*, 89 NH PUC 327 (2004). TransCanada submits that the very same basis used by the Commission to deny the Motion to Compel a discovery request in the Purchase of Receivables docket, DE 12-097, is present here, i.e., the data request is seeking sensitive commercial information, it could be used to undermine the competitive position of TransCanada, and the responses would not result in the production of admissible evidence.

7. When Mr. Hachey responded to Request 34a for TransCanada he indicated that the Companies that are parties to this docket “purchase proprietary energy forecasts but these were not reviewed or relied upon in preparing my testimony and accordingly are not provided.” See Attachment B to the April 18, 2014 PSNH Motion to Compel. Given the Commission’s Order, and in the spirit of cooperation, TransCanada is willing to attempt to provide the energy forecasts referred to in the response to Request 34a that are in the possession of the companies that are parties to this docket. However, these forecasts, which are voluminous, were prepared by Ventyx and ESAI (Energy Security Analysis, Inc.) and the agreements that TransCanada has with these companies to purchase the forecasts require the forecasts to be kept confidential and prohibit

² “We have reviewed the data request and have determined that the detailed information which PSNH seeks is sensitive commercial or financial information which is protected from disclosure, that the disclosure could undermine the competitive position of RESA members, and that because RESA members compete with PSNH, a nondisclosure agreement would not address the potential harm of requiring that the information be disclosed. Further, we find that responses are not likely to result in the production of admissible evidence and, therefore, deny the motion to compel insofar as it requests the detailed data.” Order No. 25,439 at 5-6.

disclosure to third parties. TransCanada could seek a waiver from the third-party vendors of the confidentiality provisions and limitations on third party disclosure but will not disclose the materials if the vendors do not consent. TransCanada wants to make it clear to the Commission, however, that it will not provide forecasts that were produced by or that are in the possession of affiliates that are not parties to this docket for the reasons explained above.

8. As the Commission correctly noted in the Order at 7, Request 52 “is a subset of the information sought in Request 34a” and thus the arguments noted above pertain equally to the provisions of the Order that direct TransCanada to respond to Request 52.

PSNH Requests No. 74b and No. 75c.

9. The Commission also ordered TransCanada to provide supplemental responses to Requests 74b and 75c³, both of which pertain to the effects of horizontal drilling and hydraulic fracturing on future gas supply and prices and the first acknowledgement by TransCanada of its impact on gas prices. Request 74b seeks “any studies or statements made by TransCanada in the 2008/2009 timeframe on the effects of horizontal drilling and hydraulic fracturing on future gas supply and prices.” Order at 7-8. Request 75c asks “[w]hen did TransCanada first acknowledge the impact of Marcellus gas on gas prices?”

10. Attached to this Motion is information which TransCanada has obtained about statements a TransCanada official made in November of 2008 on this subject, as

³ As TransCanada noted in its supplemental discovery responses to PSNH on April 16 and again in its Objection to the PSNH Motion to Compel dated April 25, 2014, at 1, at a meeting to resolve the discovery dispute counsel for PSNH said they no longer needed a response to any of the questions contained in Request 75 other than 75d, which TransCanada answered, thus TransCanada submits that PSNH waived its ability to compel a response to 75c.

well as information which it has already provided to PSNH in response to Request 66, a natural gas supply assessment from July 4, 2008, both of which TransCanada believes are responsive to the requests at issue and the Order. See Attachments 1 and 2 to this Motion. TransCanada is unwilling to provide any internal studies that non-party affiliates may have done on the effects of horizontal drilling and hydraulic fracturing on future gas supply and prices. To the extent public information exists, PSNH should conduct its own search. Again, for the same reasons noted above, TransCanada submits that if there is any such non-public information it is not only highly confidential, commercially sensitive competitive information, it is also irrelevant to this docket. The Commission should not direct TransCanada affiliates to provide responses to these requests. In addition TransCanada notes that non-party affiliates are not producers of natural gas, the entities that would have the best handle on the impacts that horizontal drilling and hydraulic fracturing would have on future gas supply and prices. Again, TransCanada submits that it is critical to remember that this docket is a review of the prudence of PSNH's decision to proceed with the scrubber. In preparing his testimony Mr. Hachey never had access to, nor did he review, consider or rely upon any such internal documents that non-party affiliates may have produced. For these reasons TransCanada can not provide such information that may have been produced by non-party affiliates.

Lack of Authority and Chilling Effect

11. TransCanada submits that by ordering TransCanada non-party affiliates to respond to data requests from PSNH the Commission is acting beyond the powers granted to it by law.⁴ As the NH Supreme Court has noted the Commission must act

⁴ See RSA 374:3 ("The public utilities commission shall have the general supervision of all public utilities and the plants owned, operated or controlled by the same so far as necessary to carry into effect the

within the scope of its delegated powers and can only exercise such powers as are expressly granted to it by the Legislature. *Appeal of Granite State Elec. Co.*, 121 N.H. 787, 792 (1981); *State v. New Hampshire Gas & Electric Co.*, 86 N.H. 16, 29 (1932). Those powers do not include the power to order affiliates of non-New Hampshire-regulated companies that are not even parties to a docket to respond to discovery requests. The TransCanada companies that are parties to this docket are not regulated electric utilities. TransCanada Power Marketing Ltd. is a competitive energy supplier that is subject to registration requirements but is explicitly under the law not a public utility. RSA 374-F:7,I. The other TransCanada entity that is a party to the docket, TransCanada Hydro Northeast Inc., is an owner of generation in New Hampshire and as such not a public utility in New Hampshire. RSA 362:4-c,I.

12. In its April 18, 2014 Motion to Compel, at 8, PSNH cited to *Re Verizon New England Inc.*, 92 NH PUC 234 (2007) in support of the argument that the Commission had authority to order the production of documents from affiliates. However, the *Verizon* case is clearly distinguishable on the basis that the affiliates at issue in this docket are not affiliated with a regulated New Hampshire utility as they were in the *Verizon* case. The *Verizon* case is thus inapposite. TransCanada submits that by ordering the production of documents by non-party affiliates of intervenors that are not

provisions of this title.”); see also RSA 374-F:7, which outlines the authority that the Commission has over competitive suppliers (“Competitive energy suppliers are not public utilities pursuant to RSA 362:2...the commission is authorized to establish requirements, excluding price regulation, for competitive electricity suppliers, including registration, registration fees, customer information, disclosure, standards of conduct, and consumer protection and assistance requirements.”); see also RSA 366 relative to the Commission’s authority over affiliates of public utilities. See Admin. Rule Puc 203.09(b) which says that any person granted intervenor status “shall have the right to serve **upon any party**, data requests...” [emphasis added.] By in effect serving data requests on non-party affiliates PSNH has exceeded the scope of this administrative rule and by directing TransCanada to respond to such requests the Commission is sanctioning a result that goes beyond the authority for discovery included in Commission rules.

regulated utilities in New Hampshire the Commission is acting beyond the powers granted to it by the Legislature.

13. Finally, TransCanada submits that if allowed to stand this Order will have a chilling effect on participation in future dockets. If the price of participation in any future Commission docket is that an entity that is not a public utility in New Hampshire has to be concerned about its non-party affiliates being ordered to produce highly competitive information this Order will surely have a chilling effect on such participation. This should be of serious concern to the Commission generally, but also of particular concern given the legislation pending before the General Court, HB 1602, that would require the Commission to open a docket to consider whether divestiture of PSNH assets is in the economic interest of PSNH ratepayers.

Conclusion

14. For the reasons noted above to the extent necessary TransCanada asks the Commission to reconsider Order No. 25,663 and to consider the responses TransCanada has described above as being responsive and sufficient to resolve this discovery dispute.

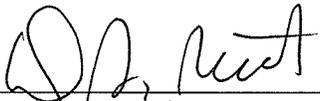
WHEREFORE, the Moving Parties respectfully request that this honorable Commission:

- A. Rehear and reconsider or clarify Order No. 25,663; and
- B. Grant such further relief as it deems appropriate.

Respectfully submitted,

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Douglas L. Patch

May 19, 2014

Certificate of Service

I hereby certify that on this 19th day of May, 2014 a copy of the foregoing motion was sent by electronic mail to the Service List.



Douglas L. Patch

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