

**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 PSNH for Reconsideration of Order No. 25,687 Striking
Certain Portions of the Testimony of Michael Hachey, Witness for TransCanada
Power Marketing Ltd. and TransCanada Hydro Northeast Inc.**

NOW COMES TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast Inc. (together, “TransCanada” or “the Companies”), intervenor in this docket, pursuant to Admin. Rule Puc 203.07(f) and objects to the Motion of Public Service Company of New Hampshire (“PSNH”) for Reconsideration of Order No. 25,687 Striking Certain Portions of the Testimony of Michael Hachey, Witness for TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast Inc. (“Motion”). In support of this Objection, TransCanada states as follows:

1. On July 2, 2014 the Commission issued Order No. 25,687 (“the Order”) in which it denied PSNH’s request to rescind TransCanada’s intervenor status, but struck portions of Mr. Hachey’s testimony and said that the Commission may draw inferences adverse to TransCanada regarding the information TransCanada did not produce. PSNH filed the Motion for Reconsideration of this order on July 16, 2014. In support of this Objection, TransCanada incorporates by reference the arguments it has raised in prior pleadings in this docket on the discovery issue, and emphasizes in particular

TransCanada's June 20, 2014 Objection to Motion of PSNH to Rescind Party Intervenor Status of TransCanada.¹

2. The Commission may grant a motion for rehearing if "good reason for the rehearing is stated in the motion." RSA 541:3. This includes errors of law, as a motion for rehearing filed with the Commission must specify "every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." RSA 541:4; see *Appeal of Campaign for Ratepayers Rights*, 145 N.H. 671, 674 (2001). The "purpose of a rehearing 'is to direct attention to matters said to have been overlooked or mistakenly conceived in the original decision...'" *Dumais v. State Pers. Comm'n*, 118 N.H. 309, 311 (1978) (citation and internal quotation marks omitted). As the Commission has noted in prior orders in this and many other dockets, a motion for rehearing or reconsideration pursuant to RSA 541:3 that restates arguments and asks for a different outcome will fail. Order No. 25,671 at 3 (citing *Public Service Co. of N.H.*, Order No. 25,168 at 10 (Nov. 12, 2010)).

3. PSNH's Motion must be denied because it does not state any good cause for rehearing, nor does it cite any matters that the Order overlooked or mistakenly conceived. The Motion must also fail because it does nothing more than to restate arguments PSNH already made to the Commission. Although page 5 of the Motion says:

¹ In addition to the June 20, 2012 Objection, TransCanada made several other filings in this docket that include arguments and citations that are relevant to this pleading and are incorporated by reference:

- January 24, 2014 Objection to Public Service Company of New Hampshire's Data Requests and Motion to Direct PSNH to Submit Reasonable Number of Data Requests;
- March 3, 2014 Objection to Motion of Public Service Company of New Hampshire to Rescind TransCanada's Party Intervenor Status or Alternatively to Strike TransCanada's Objections to PSNH's Data Requests and Compel Answers to Those Requests;
- April 25, 2014 Objection to Public Service Company of New Hampshire Motion to Compel TransCanada to Respond to Data Requests;
- May 19, 2014 Motion for Reconsideration and/or Clarification of Order No. 25,663; and
- TransCanada letter to the Commission dated June 6, 2014.

“PSNH will not repeat the arguments contained in its June 13, 2014, Motion to Rescind”, the Motion then improperly proceeds to do just that. Therefore, the Motion must be denied because the Motion fails to meet every prong of the Commission’s rehearing standard.

4. PSNH’s Motion should also be denied because it is premature² and will cause unnecessary delay in this docket, something that PSNH itself indicated it wishes to avoid. PSNH has complained that the actions of TransCanada and other intervenors have “impair[ed] the orderly and prompt conduct of the proceedings” and were causing undue delay that might ultimately be borne by its customers.³ *See, e.g.*, 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 (Feb. 21, 2014). However, PSNH fails to take responsibility for the delays in this proceeding caused by its own dilatory tactics such as -- putting forth frivolous arguments in objections to data requests resulting in the need for Motions to Compel and Commission orders -- propounding inordinate numbers of data requests on the OCA and intervenors (blatant tactics aimed at stretching the patience and resources of any intervenor that questions PSNH’s actions) -- and now, this latest Motion. For these

² *See Appeal of Northern New England Telephone Operations, LLC d/b/a FairPoint Communications – NNE 165 N.H. 267, 271-272 (2013)* (arguments are preserved for appeal provided that any matter determined in the action or proceeding are included in a motion for rehearing within 30 days of any order or decision, including a final order on the merits). This means that a party aggrieved by a preliminary order in a proceeding need not move for rehearing of every PUC order that gives rise to arguments it ultimately makes on appeal so long as the arguments are included in the motion for rehearing of the final order.

³ In its Objection to Motion for Reconsideration dated May 22, 2014 PSNH also said: “this Commission has been unable to advance this docket because of continued disputes over what discovery TransCanada will answer, or refuse to answer.” It went on to say: “Intervenors such as TransCanada must not be allowed to continually delay this proceeding by quibbling over discovery – especially after they enjoyed an extensive discovery period during which PSNH provided tens of thousands of pages of information in response to many hundreds of questions. The delays being caused by these extended discovery complaints come at a very high cost – carrying costs (interest) on the unrecovered deferred balance of PSNH’s investment in the scrubber are accruing at over \$100,000 per week, and increasing. These costs may ultimately be borne by consumers.”

reasons PSNH's latest attempt in its longstanding effort to have TransCanada removed from this docket (*see* PSNH's Motion to Rescind TransCanada's Intervenor Status dated February 21, 2014) must be denied.

5. Although TransCanada does not agree with the result of Order No. 25,687, it will abide by it so that this docket can proceed. For the reasons stated in its June 20, 2014 Objection to PSNH's motion to rescind TransCanada's intervenor status, TransCanada thinks that the Commission's decision on the Motion to Compel was unlawful and contrary to the public interest and thus the sanction the Commission imposed on TransCanada in the latest Order was beyond the scope of the Commission's authority. However, given the current status of the docket, the Commission's clear direction at the June 2, 2014 status conference that it intends to adhere to the schedule it outlined in the May 16, 2014 Secretarial letter, and the holding in the *FairPoint* case noted above, TransCanada does not intend to seek rehearing of the Order at this juncture; instead it intends to participate under the schedule laid out by the Commission and reserves the right to pursue appellate routes, to the extent appropriate or necessary, in accordance with the *Fairpoint* decision cited above.

6. The remedy PSNH is once again requesting, rescinding TransCanada's status as a party to the docket or striking all of Mr. Hachey's testimony, would be an extraordinary, unprecedented and unjustified remedy for all of the reasons previously noted by TransCanada in this docket and importantly, as noted by the Commission. As the Commission noted in the Order, the sanction it chose "represents our careful weighing of PSNH's interests in limiting testimony that may be related to the missing information, and our interest in having the benefit of the TransCanada Intervenors'

participation.” Order at 10. It would not be in the interests of justice nor would it be in the public interest to strike any more of Mr. Hachey’s testimony, to strike the testimony in its entirety, or to rescind the intervenor status of the one remaining intervenor that brings a business perspective to this docket and that serves large industrial and commercial customers whose interests can be directly or indirectly affected by the outcome of this docket.

7. In support of its Motion (pp. 4-5), PSNH cites John Reed’s rebuttal testimony which says: “Mr. Hachey did not provide much of the relevant information regarding the price forecasts he references...” Rebuttal Testimony of John J. Reed, p. 15 (Bates p. 233). This statement is inaccurate. Mr. Hachey provided all of the information regarding the price forecasts that he relied on to develop his prefiled testimony, the forecasts that were available to PSNH, but which it did not use. Through the data request at issue, a portion of which TransCanada did not answer, PSNH sought forecasts produced by or available to non-party affiliates of TransCanada. The information that TransCanada did not produce was not available to, reviewed by or relied upon by either Mr. Hachey or PSNH and was *never* “referenced” in Mr. Hachey’s testimony. For these reasons, TransCanada argued the information sought was irrelevant. PSNH is overstating its case and its rebuttal witnesses are overstating the impact of the TransCanada affiliate/proprietary information that was not provided.

8. PSNH argues: “It defies reason to believe that if TransCanada had projected gas prices that *supported* Hachey’s testimony, it would not have produced that information.” This argument ignores TransCanada’s repeatedly and consistently stated

basis for not providing the information articulated in its June 6, 2014 letter, among other pleadings:

With respect to the confidentiality of third party non-affiliate forecasts, while the Commission's Order said that the information at issue "is not likely sensitive given its age" TransCanada and the non-affiliated third parties respectfully disagree. The *methodology* that TransCanada and other private party forecasters use to develop energy market forecasts is highly sensitive commercial information that, if disclosed would harm TransCanada and the private party forecasters financially. The forecasting *methodology* is intellectual property and neither TransCanada nor private party forecasters agree to provide such information in response to the request. Providing confidential responses of the methodology under normal discovery practices (*i.e.*, subject to a protective order) is extremely risky and therefore not a feasible option, given that if the information were disclosed to and used by competitors, it is unlikely that the Commission could fashion any remedies that could adequately compensate for the financial damages resulting from the disclosure. Further, this assumes the party harmed is even aware of or able to prove the use of its methodology by a competitor.

9. PSNH uses its Motion (p. 8) to introduce facts about TransCanada that PSNH apparently obtained from internet searches or other search methods. Most of this information appears to relate to the fracking issue and a data request to which TransCanada provided an answer, and to TransCanada's argument that PSNH should have known that fracking would have an impact on natural gas prices and should have taken this into account. This is an issue about which there is much information in the public domain. While PSNH is free to attempt to use this information (what PSNH itself calls "extrinsic" information, Motion p. 8) in the development of its case, it will ultimately be up to the Commission to decide questions of admissibility and relevance either at the hearing or via motions *in limine*. TransCanada submits, however, that the availability of such information does not support any change to Order No. 25,687, if anything it demonstrates that PSNH has been able to obtain a significant amount of information about TransCanada that it intends to use during cross examination of Mr.

Hachey and further underscores that TransCanada should not have been ordered to produce additional information from non-party affiliates.

10. In the Motion PSNH proposes to take one large step beyond the potential adverse inference included in Order No. 24,555 when it declares that TransCanada should not be allowed to rebut any of the suppositions that PSNH lists on pages 11-12 of its Motion. Although the Commission has retained the authority to draw inferences adverse to TransCanada regarding the information TransCanada did not produce, this does not and should not mean that TransCanada, or any other party for that matter, is precluded from introducing any other evidence that might contradict any such adverse inferences. PSNH's pleading is a patent attempt to displace focus from its potentially imprudent \$422 million expenditure using ratepayer funds on a forty-year old coal plant. In so doing, it attempts to refocus the Commission's attention onto the actions of a company that is not an intervenor in or the subject of this docket. Such an attempt ignores the interests of justice and the ratepayers that may ultimately have to pay for some or all of the costs of the scrubber.

11. PSNH's Motion and its continued attempts to obtain more information from TransCanada and to have TransCanada removed from the proceeding or to significantly restrict its participation during the proceeding is a thinly-veiled attempt to shift the Commission's focus away from an important issue, i.e., the fact that PSNH failed to develop or rely upon reasonable natural gas forecasts to assist it in determining the prudence of proceeding with the scrubber project. At the Long Deposition, PSNH was asked to provide "any underlying materials relied upon by the person preparing the MMBtu price" that was used in the September 2, 2008 report filed with the Commission.

See Response to Data Request Deposition 4 (Attachment A). The September 2008 report referred to the PSNH study as relying upon a 2012 price of \$11 per MMBtu for the first year price of natural gas and then that value was escalated at a rate of 2.5 percent per year for future years of the analysis. *See* DE 08-103, submission dated September 2, 2008, p. 15. The response that PSNH provided is four pages of dispatch prices at Newington for the first four months of 2008 (January, February, March and April of 2008). PSNH provided no studies or reports which would have been readily available to support the natural gas price assumption and escalation rate specified in PSNH's September 2008 report.

12. Based on his deposition testimony, there is no evidence that Mr. Long even knew who prepared the gas price assumptions PSNH apparently relied upon (Long Deposition, Tr. p. 78, line 20), nor did Mr. Long review any such information. (Long Deposition Tr., p. 77, lines 16-17). See Attachment B, excerpts from the Deposition, which was filed with the Commission on October 11, 2013. PSNH's attempt to predict the future price of natural gas through to the year 2027 without conducting or reviewing any forecasts and instead relying upon four months of dispatch prices at Newington was a significant failure on PSNH's part and it underscores the absurdity of requiring TransCanada to produce forecasts that PSNH never used in making its decision about the scrubber investment. This is especially true given what PSNH told its Risk and Capital Committee and its Board of Trustees in June and July of 2008 about the price spread between natural gas and coal over a 15 year period going forward from 2012 being critical to the economics of the project. Copies of the presentations to the Committee and the Board were included in Attachment 10 to Mr. Hachey's prefiled testimony. This

entire discovery and intervention battle is an attempt by PSNH to divert the Commission's attention away from PSNH's failure to conduct and/or review appropriate forecasts.⁴

13. PSNH wants to keep any evidence of its failure to rely upon a proper forecast of gas prices and its use of four months of dispatch prices at Newington as a proxy for a forecast out of the record. That is why it is fighting so intensely to limit or exclude TransCanada's participation. In its Motion, PSNH even goes so far as to argue that TransCanada's counsel should not be allowed to cross examine PSNH witnesses or any other witnesses about gas price forecasts.⁵ This is a preemptive attempt to avoid full and fair discussion of issues that are critical to a thorough analysis of the prudence of PSNH's actions.

14. TransCanada urges the Commission to maintain its focus in this docket on whether the investment in the scrubber at Merrimack Station made by PSNH, a regulated electric utility, was prudent in light of the facts and circumstances known or available to PSNH at the time and to deny the latest PSNH Motion.

WHEREFORE, TransCanada respectfully requests that this honorable Commission:

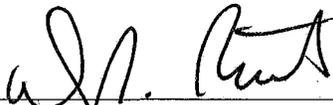
A. Deny PSNH's Motion for Reconsideration of Order No. 25,687; and

⁴ During his deposition Mr. Long made it very clear that he did not believe in forecasting: "long term forecasts are typically not reliable" (Attachment B, Deposition Tr. at 72, line 24, page 73, line 1), and yet he later admitted "we understood that you don't look at a short-term forecast and assume that's the way it's going to be forever." Attachment B, Deposition Tr. at 88, lines 20-23. Thus, Mr. Long's deposition reveals that although PSNH understood the impropriety of relying on a short-term forecast, it nonetheless did that very thing in this case.

⁵ This argument is directly contrary to the conclusion drawn by the Commission in *Re City of Nashua*, 90 NH PUC 568, 572 (2005). Under the holding in that case, even if the Commission decided to eliminate Mr. Hachey's testimony, TransCanada would still have the right to cross examine witnesses and pursue discovery.

B. Grant such further relief as it deems appropriate.

Respectfully submitted,



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Certificate of Service

I hereby certify that on this 23rd day of July, 2014 a copy of the foregoing objection was sent by electronic mail to the Service List.



Douglas L. Patch

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