

STATE OF NEW HAMPSHIRE
BEFORE THE
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

Docket No. DE 12-295

POWER NEW ENGLAND, LLC

**Petition for Review of the Reasonableness of Certain Charges of Public Service Company
of New Hampshire for Services to Competitive Suppliers**

**OBJECTION OF ELECTRICITY N.H., LLC D/B/A/ E.N.H. POWER
TO PSNH'S MOTION TO COMPEL RESPONSES BY ELECTRICITY N.H. LLC D/B/A
E.N.H. POWER TO DATA REQUEST 1-27**

NOW COMES Electricity N.H., LLC d/b/a E.N.H. Power ("ENH Power"), an intervenor in the above captioned docket, and respectfully submits this objection to Public Service Company of New Hampshire's ("PSNH") May 13, 2013 Motion to Compel ENH Power to Respond to Data Request PSNH 1-27 (the "Motion"). In support of its objection, ENH Power states as follows:

1. On March 26, 2013, ENH Power filed the direct testimony of Kevin Dean. On April 18, 2013, PSNH propounded 39 data requests on ENH Power. On April 26, 2013, ENH Power timely objected to twenty-two of the data requests (4, 6, 7, 9, 10, 11, 12, 13, 16, 19, 20, 22, 23, 24, 25, 27, 33, 34, 35, 37, 38 and 39), and on April 30, 2013, ENH Power responded to all of the unobjectionable requests and all but four of the objectionable requests (12, 25, 27 and 39), notwithstanding and without waiving its objections. On May 3, 2012, counsel for PSNH contacted counsel for ENH Power requesting responses to three requests (12, 25 and 27) and clarification on ENH Power's response to an additional request (31). Following the technical session on May 7, counsel for ENH Power explained that ENH Power is without sufficient

information to answer requests 12, 25 and 27 and would maintain its objections. PSNH filed a motion to compel a response from ENH Power to data request 27 on May 13, 2013.

2. As the Commission stated in a recent order, when addressing a motion to compel discovery, “we consider whether the information being sought is relevant to the proceeding, or reasonably calculated to lead to the discovery of admissible evidence. In general, discovery that seeks irrelevant or immaterial information is not something we should require a party to provide.” *Electric Utility Customers*, Order No. 24,439 (December 7, 2012) at 2. The party seeking to compel discovery has the burden of proof. New Hampshire Administrative Rule Puc 203.25.

3. At the outset, ENH Power disputes PSNH’s attempt to redefine the scope of the issues in this docket. As the Commission set forth in the Order of Notice, this docket “raises, inter alia, issues related to whether it is useful for the Commission to conduct a review of the reasonableness of the approved tariff charges separate from a review of PSNH’s revenue requirements in the context of a future distribution rate case and, if so, whether the relief requested by the petition is in the public interest and should be granted.” The central question raised is whether PSNH’s supplier service charges are just and reasonable charges that do not exceed PSNH’s actual costs of supplying the services that are not already recovered from its distribution customers. Indeed, regardless of any external factors, PSNH as a regulated distribution utility is prohibited from assessing unjust or unreasonable charges. R.S.A. 374:2 (“Every charge that is unjust or unreasonable, or in excess of that allowed by law or by order of the commission, is prohibited.”).

4. Via data request 1-27, PSNH seeks detailed information about ENH Power’s profits and expenses as a competitive supplier on a per customer basis for both customers in

PSNH's service territory and in the other New Hampshire distribution utilities' service territories, as well as the proportion of ENH Power's per customer expenses that are attributable to PSNH's charges. The information which PSNH seeks is sensitive commercial or financial information which is protected from disclosure pursuant to RSA 91-A:5. *Electric Utility Customers*, Order No. 25,439 (December 7, 2012) at 5-6. The disclosure could undermine ENH Power's competitive position, and a nondisclosure agreement would not address the potential harm of requiring that the information be disclosed. *Id.* Furthermore, compelling ENH Power to respond to request 1-27 is not likely to result in the production of admissible evidence because it seeks information that is irrelevant to the above-captioned action. *Id.*

5. PSNH fails to explain how ENH Power's profits and expenses provide any information relevant to the reasonableness of PSNH's charges or the development of a competitive marketplace in New Hampshire. ENH Power has already entered the marketplace and is only a single participant. Whether ENH Power is profitable and how much it spends to provide electric supply services to its customers has no bearing on the decision making of other competitive suppliers to enter the New Hampshire market. More to the point, a single competitive supplier's profit margin does not inform the Commission on the reasonableness of PSNH's charges (which should be based on PSNH's own costs), and is not reasonably calculated to lead to the discovery of admissible evidence. By definition, any unreasonable and excessive charges levied by PSNH against competitive suppliers will inhibit the development of a robust competitive market in New Hampshire.

6. Rather than lead to the discovery of admissible evidence, PSNH's data request appears to be calculated to expose ENH Power's highly sensitive commercial and financial information. ENH Power's profits and expenses are at the heart of its business as a competitive

supplier and would be very valuable information for ENH Power's competitors. As the Commission has recognized, competitive suppliers such as ENH Power compete with PSNH for electric supply customers. See *Electric Utility Customers*, Order No. 25,439 (December 7, 2012) at 6 (agreeing that members of the Retail Energy Supply Association compete with PSNH).

7. Providing sensitive financial information to PSNH, a competitor of ENH Power, even under a nondisclosure agreement, would cause significant harm to ENH Power's competitive position in New Hampshire and would have a chilling effect on the development of a competitive market as required by R.S.A. 374-F.

8. PSNH further raises ENH Power's response to Staff request 1-2 as grounds for compelling ENH Power to respond to PSNH request 1-27, stating that the "underlying information" required to respond to the two data requests is "essentially the same."¹ Motion at ¶

9. ENH Power disagrees. Staff request 1-2 sought information related to PSNH's charges normalized on per customer and total revenue bases. By contrast, PSNH request 1-27 seeks information related to ENH Power's profits and expenses. There can be no doubt that PSNH's charges are relevant to the issues raised in this docket—indeed they are the focus of the docket. ENH Power's profits and expenses, on the other hand, are clearly not relevant. Moreover, the information required to respond to Staff request 1-2 was information entirely available on PSNH's own invoices to ENH Power – in other words, PSNH already possesses the data used to respond to Staff request 1-2. PSNH request 1-27, by contrast, requests ENH Power to disclose ENH Power's internal confidential and highly sensitive financial information.

9. In addition to seeking information that is not relevant and that is protected sensitive financial information, PSNH seeks information that is not readily available to ENH

¹ To the extent that PSNH asserts that Staff request 1-2 and PSNH request 1-27 "are not substantially different," Motion at ¶ 9, ENH Power directs PSNH to ENH Power's response to Staff request 1-2.

Power. Unlike the information provided in response to Staff request 1-2, which required ENH Power to perform only simply mathematical calculations, a response to PSNH request 1-27 would require a complex financial analysis. ENH Power does not maintain profit and expense calculations on a per customer basis, nor are such figures easily determined. Variables such as the date on which each customer enrolled, the available price of electric supply at the time of enrollment, the customer's rate, the timeliness and/or completeness of the customer's payments, and the length of time the customer has been enrolled with ENH Power all play a role in ENH Power's profits and expenses. ENH Power is uncertain how it could provide a response to PSNH 1-27 even if ENH Power possessed the level of detailed information required to conduct an investigation. Even attempting to perform the required financial analysis would be excessively burdensome and costly and it would be an unreasonable to compel ENH Power to expend the necessary time and resources. Accordingly, to the extent that a response is required to PSNH request 1-27, ENH Power's response would be that it lacks sufficient information to provide an answer to the request.

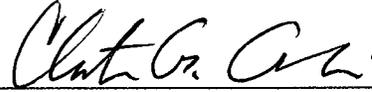
10. As set forth above, ENH Power asserts that PSNH has failed to satisfy its burden to demonstrate that the information requested in PSNH 1-27 is relevant to the issues raised in this docket or is reasonably calculated to lead to the discovery of admissible evidence. In addition, PSNH has failed to demonstrate adequate grounds to compel disclosure of highly sensitive commercial and financial information that would compromise ENH Power's competitive position.

WHEREFORE, for the foregoing reasons, Electricity N.H., LLC d/b/a/ ENH Power respectfully requests that the Commission deny PSNH's Motion to Compel, and grant such other relief as the Commission deems fair and just.

Respectfully submitted,

Electricity N.H., LLC d/b/a/ E.N.H. Power
By Its Attorneys
Bernstein, Shur, Sawyer & Nelson, P.A.

Dated: May 23, 2013



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Certificate of Service

I hereby certify that a copy of the foregoing Objection has on this 23rd day of May, 2013, been sent by email to the service list in DE 12-295.



Christopher G. Aslin, Esq.