

**THE STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 15-491

PNE ENERGY SUPPLY, LLC, ET AL. v. PSNH D/B/A EVERSOURCE ENERGY

Transfer Question from Superior Court

**Order Denying Motion to Compel Production of
Confidential Documents filed with the Commission**

ORDER NO. 25,903

May 20, 2016

In this Order, we deny PSNH's Motion to Compel Production of Confidential Documents filed with the Commission, because we have previously determined that no discovery is necessary or permissible in this proceeding.

I. PROCEDURAL BACKGROUND

This proceeding was commenced to consider questions transferred to the Commission by the Hillsborough North Superior Court (Court), with respect to its Case No. 216-2015-CV-00265, *PNE Energy Supply, LLC and Resident Power Natural Gas and Electric Solutions, LLC v. Public Service Company of New Hampshire d/b/a Eversource Energy* (Court Case). The Court Case involves a claim by plaintiffs PNE Energy Supply, LLC (PNE), and Resident Power Natural Gas and Electric Solutions, LLC (Resident Power), against defendant Public Service Company of New Hampshire, d/b/a Eversource Energy (PSNH), for tortious interference with contractual relations.

In Order No. 25,881 (April 8, 2016) (Initial Order), we addressed the scope of this proceeding and certain procedural issues. We found in the Initial Order that, in view of the procedural posture of the matter in the context of a motion to dismiss filed with the Court, it is

“neither necessary nor permissible for us to authorize any discovery or other factual investigation in this docket.” Initial Order at 3. Instead, we clarified that the transferred questions would be determined based on facts alleged by PNE and Resident Power in their complaint, while also considering “documents the authenticity of which are not disputed by the parties ... official public records ... or ... documents sufficiently referred to in the complaint.” *Id.*; *see also Beane v. Dana S. Beane & Co.*, 160 N.H. 708, 711 (2010).

On April 29, 2016, PSNH filed a Motion to Compel Production of Confidential Documents filed with the Commission (Motion), seeking production by PNE and Resident Power of documents subject to confidential treatment granted in related dockets opened by the Commission in 2013. PNE and Resident Power timely filed an Objection to PSNH’s Motion (Objection).

II. POSITIONS OF THE PARTIES

A. PSNH’s Motion

In its Motion, PSNH requested that the Commission require PNE and Resident Power to provide unredacted copies of certain documents that were provided to the Commission in several dockets related to the same core of relevant facts as the instant proceeding. Motion at 1. PSNH maintained that “information contained in some of those documents may be relevant to this proceeding.” *Id.* In particular, PSNH indicated it seeks unredacted copies of the following documents:

1. Affidavit of PNE President Howard Plante submitted in Docket DE 13-049 in support of the Joint Request for Waiver;
2. Agreement between PNE, Resident Power, and FairPoint Energy LLC dated February 6, 2013, filed in Dockets DE 13-059 and 13-060; and
3. Prehearing Memorandum of PNE and Resident Power filed in Dockets DE 13-059 and 13-060.

PSNH also asserted the likely relevance of a memorandum that contained Commission Staff's Recommendations for an Immediate Show Cause Hearing filed in Dockets DE 13-059 and DE 13-060, because the memorandum contains redacted information that "appears to relate to PNE's communications with Staff in the 'days leading up to [PNE's default at ISO New England],' and to a further affidavit submitted by PNE's President concerning those events." Motion at 2 (citing Staff Memorandum dated February 27, 2013, at 4).

PSNH claimed it was never provided access to these confidential documents and, without such access, it is unaware whether the official records of the Commission include information that is material and relevant to the legal briefs required by the Initial Order. Motion at 3. Based on the information available to it, PSNH included arguments regarding the likely relevance of the redacted portions of such documents. Motion at 3-5. PSNH argued that it "does not seek discovery." Instead, PSNH maintained that it seeks documents on file with the Commission that are official records, "the authenticity of which is not disputed by the parties," and which are "readily available to both [PNE and Resident Power] and the Commission - but not to PSNH." Motion at 6.

PSNH indicated that, if the Commission were to decide that the confidential documents it seeks should be produced prior to the due date of its reply memorandum of law, then the documents would be addressed in that memo. Motion at 7. If, instead, the Commission were to rule on the issue at a later date, PSNH requested permission to file a supplemental memo to address only the information in those documents. *Id.*

B. PNE and Resident Power's Objection

In their Objection, PNE and Resident Power argued that the Commission must deny the Motion because it seeks discovery beyond the scope of the current record in contradiction to and

in circumvention of the Initial Order. Objection at 1-2. PNE and Resident Power also asserted that PSNH is estopped from seeking discovery by its earlier positions both in the Court Case and at the prehearing conference in this proceeding. Objection at 2, 4-7. In addition, PNE and Resident Power claimed that granting the Motion would provide PSNH with an “unfair advantage” and deprive them of the opportunity to discover additional “information related to their claim and to which they are entitled.” Objection at 2. They asserted that this need for related information would warrant “discovery into PSNH's *motives* for its improper conduct,” and described in some detail the scope of such factual discovery. Objection at 7 (emphasis in original); *see also id.* fn. 1.

PNE and Resident Power also maintained that PSNH had failed to demonstrate that the information it seeks through the Motion is relevant to this proceeding. Objection at 2. According to them, PSNH has conceded it does not even know whether the information is material to the issues being briefed, and its “attempts to tie the information it *thinks* these documents contain to the issues in this proceeding fail because they are littered with speculative assertions regarding facts not raised in the Complaint and emphasize events that occurred *before* - and have no connection to - PSNH's improper conduct.” *Id.* (emphasis in original). PNE and Resident Power attempted to demonstrate that the confidential information contained in the specific documents sought by PSNH is not relevant to this proceeding. Objection at 8-11.

PNE and Resident Power claimed that PSNH would suffer no harm if the Motion were denied, because PSNH would not be denied access to “public records” of the Commission, emphasizing that the redacted information remains subject to confidential treatment as previously granted by the Commission in the 2013 dockets. Objection at 11-13. According to PNE and Resident Power, PSNH is “complaining about a valid process that may be invoked by

parties before the Commission to protect confidential information,” and this is “hardly ‘unfair.’” Objection at 12. They noted also that, in the years since this information was made confidential, PSNH has not filed a motion with the Commission under Puc 203.08(k) requesting the release of such information. *Id.* PNE and Resident Power concluded that, if PSNH were denied the information it seeks, PSNH would “merely proceed under the same standard [for review of a motion to dismiss] that applied in the [Court], and that the Commission has articulated here.” Objection at 13.

PNE and Resident Power finally requested that, if PSNH's request were granted and it were permitted to “obtain the discovery it seeks” and to supplement its briefing, then PNE and Resident Power also should be permitted “to conduct discovery, to file a supplemental memo, and to respond to PSNH's supplemental briefing.” *Id.*

III. COMMISSION ANALYSIS

PSNH's Motion requests that we compel PNE and Resident Power to produce unredacted versions of documents containing information previously found by the Commission to contain confidential information. Our procedural rules governing discovery permit the filing of motions to compel responses to data requests, including the production of relevant documents. *See* N.H. Code Admin. Rules Puc 203.09(i). In this proceeding, however, we have found that discovery is “neither necessary nor permissible,” based on the procedural posture of the matter and the directives contained in the relevant orders of the Court. Initial Order at 3. PSNH's Motion effectively seeks a discovery remedy in a context where no discovery is permitted.

As noted by PNE and Resident Power, PSNH has never made a filing under Puc 203.08(k), which provides that an order of the Commission granting confidential treatment is “subject to the ongoing authority of the [C]ommission on its own motion, or on the motion of

staff, any party, or member of the public to reconsider the determination.” PSNH has instead sought an order compelling document production by PNE and Resident Power in a proceeding in which discovery is not allowed. We therefore deny the Motion.

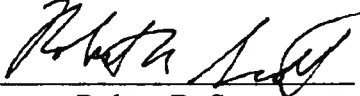
Based upon the foregoing, it is hereby

ORDERED, that PSNH’s Motion to Compel Production of Confidential Documents filed with the Commission is DENIED.

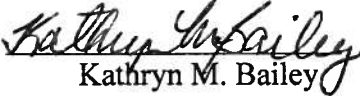
By order of the Public Utilities Commission of New Hampshire this twentieth day of May, 2016.



Martin P. Honigberg
Chairman

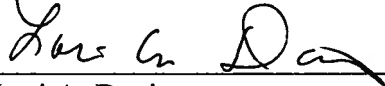


Robert R. Scott
Commissioner



Kathryn M. Bailey
Commissioner

Attested by:



Lori A. Davis
Assistant Secretary

SERVICE LIST - EMAIL ADDRESSES - DOCKET RELATED

Pursuant to N.H. Admin Rule Puc 203.11 (a) (1): Serve an electronic copy on each person identified on the service list.

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FILING INSTRUCTIONS:

- a) Pursuant to N.H. Admin Rule Puc 203.02 (a), with the exception of Discovery, file 7 copies, as well as an electronic copy, of all documents including cover letter with:**
- DEBRA A HOWLAND
EXEC DIRECTOR
NHPUC
21 S. FRUIT ST, SUITE 10
CONCORD NH 03301-2429
- b) Serve an electronic copy with each person identified on the Commission's service list and with the Office of Consumer Advocate.**
- c) Serve a written copy on each person on the service list not able to receive electronic mail.**