

THE STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

Docket No. DE 09-067

Complaint of Clean Power Development, LLC
Against Public Service of New Hampshire

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE’S
MOTION
FOR A
MORE DETAILED STATEMENT OF THE ISSUES
AND FOR OTHER RELIEF

Pursuant to Rule Puc §203.07, Public Service Company of New Hampshire (hereinafter “PSNH” or “the Company”) hereby moves the Commission: to furnish a more detailed statement of the issues involved in this proceeding; to issue an appropriate Order of Notice if it intends to commence an adjudicative proceeding; and for other relief as more specifically set forth below. This Motion is based upon RSA 541-A:31 and Rules Puc 203.12 and 204.05 and filed pursuant to Rule Puc 203.07.

In support of the Motion, PSNH states as follows:

I. Background

- A. On April 7, 2009, Clean Power Development, LLC (“CPD”) filed a complaint against PSNH with the Commission concerning PSNH duties to purchase the output of CPD’s proposed biomass generating plant in Berlin, New Hampshire.

From that date through early October, 2009, numerous filings were made in this docket by CPD, PSNH, and a number of other interested parties.

- B. On October 9, 2009, the Commission issued an “Order of Notice” in this investigation docket scheduling a prehearing conference which was held on November 3, 2009. The Order of Notice stated that the process was commenced under the provisions of Puc 204.04 (“Investigation”) and RSA 365:4 (“Investigation”).
- C. The Order of Notice expressly indicated that the proceeding was not being noticed an adjudicative proceeding. To this end, the Order of Notice indicated, “In order to determine *whether* an adjudicative proceeding shall be commenced to resolve the CPD complaint and, if so, how such proceeding would be conducted, the Commission, consistent with Puc 204.05, will hold a prehearing conference to take the statements and hear the recommendations of CPD and PSNH.” Order of Notice, at 3 (emphasis added).
- D. As a result of the Order of Notice, numerous parties submitted motions for intervenor status. These parties raised many and varied issues. Some intervenors raised energy-related issues. Others raised issues that were purportedly legal. And still others raised myriad additional concerns, including, *inter alia*, jobs, economic development, public health, welfare, land use, forestry practices, environmental, etc.
- E. Toward the conclusion of the November 3, 2009, prehearing conference the Commission entertained objections to the various petitions for intervenor status. In response, PSNH noted that the hearing was an “investigation” and not an “adjudicative proceeding.” As such PSNH took no position on the petitions for intervention. However, PSNH noted that if the Commission ultimately decided to commence an adjudicative proceeding, a new Order of Notice would need to be issued establishing that process and setting forth the issues involved. If that were to happen, PSNH noted that based upon the issues stated in the new Order of Notice, it would be able to determine whether each petition for intervention “states facts demonstrating that the petitioner's rights, duties, privileges, immunities or other substantial interests may be affected by the proceeding or that the petitioner

qualifies as an intervenor under any provision of law” as required by RSA 541-A:32, I (b) and Rule Puc 203.17.

- F. Subsequent to PSNH’s statement of position concerning intervention petitions, the Commission announced that it did intend to commence an adjudicative proceeding. The Commission did not specify what issues were going to be adjudicated in that process. A number of potential issues had been bantered about, including, *inter alia*, the nature and extent of any power purchase obligations under state law and the nature and extent of any power purchase obligation under the Public Utility Regulatory Policies Act (PURPA). The Commission adjourned the hearing shortly thereafter, directing the parties to file comments by the close of business today (November 6th) with recommendations concerning how to proceed and what issues needed to be adjudicated.

II. Discussion

A. If the Commission intends to commence an adjudicative proceeding in this docket, it must issue an Order of Notice to that effect.

- a. Rule Puc 203.12, “Notice of Adjudicative Proceeding” and Commission precedent govern this situation. The caption of Rule Puc 203.12 itself is noteworthy – “Notice of Adjudicative Proceeding.” No such Notice has been given in this docket pursuant to this Rule. The October 9, 2009, Order of Notice expressly stated that the Commission was not convening an adjudicative proceeding. As noted earlier, the October 9 Order of Notice indicated that the proceeding was being held “to determine whether an adjudicative proceeding shall be commenced” and cited Rule Puc 204.04, “Investigation,” as the legal authority under which the hearing was to be held.
- b. RSA 541-A:31, II provides, “An agency may commence an adjudicative proceeding at any time with respect to a matter within the agency’s jurisdiction.” That is what the Commission has announced its intention to do in this proceeding. If the Commission has indeed determined to commence an adjudicative proceeding, it must comply with its own rules. Therefore, to

implement any such decision, the Commission must comply with Rule Puc 203.12.

- c. For a properly noticed adjudicative proceeding, Rule Puc 203.12 sets forth several requirements. One such requirement is “A statement of the legal authority under which the hearing is to be held.” The October 9, 2009 Order of Notice referenced Rule 204.04 as the legal authority for the November 3rd prehearing conference. That Rule does not provide for an adjudicative proceeding. Had the Commission intended to commence an adjudicative proceeding by the October 9 Order of Notice – which the Commission expressly said it did not – Rule 204.05, “Adjudicative Proceedings” would have been cited as the legal authority for the hearing.
- d. An Order of Notice commencing an adjudicative proceeding must also include “A reference to the particular statutes and rules involved, including this chapter.” Rule Puc 203.12 (a)(3). (The reference to “this chapter” is not defined in the Rule.) There are no references in the October 9 Order of Notice referencing the particular statutes and rules involved – nor could there be as the issues that are to be the subject of the putative adjudicative proceeding remain unknown at this time.
- e. Rule Puc 203.12 (b) further provides that for proper notice of an adjudicative proceeding, “The commission shall direct the petitioner or other party to the docket to disseminate a notice issued pursuant to this section to the general public by causing the notice to be published in a newspaper of general circulation serving the area affected by the petition or by such other method as the commission deems appropriate and advisable in order to ensure reasonable notification to interested parties.” Since the Commission never noticed an adjudicative proceeding, the required dissemination of a notice issued pursuant to the Commission’s adjudicative proceeding notice rule was never given. The October 9, 2009 Order of Notice was not issued pursuant to Rule Puc 203.12. To commence an adjudicative proceeding going forward, such notice must be disseminated.

B. The parties are entitled to a detailed statement of the issues

- a. As just noted, the issues to be pursued in the putative adjudicative proceeding have not yet been announced by the Commission. Both RSA 541-A:31, III(d) and Rule Puc 203.12 (a)(3) require that a proper Order of Notice commencing an adjudicative proceeding must include “A short and plain statement of the issues presented.” The statute goes even farther, requiring, “Upon request an agency shall, when possible, furnish a more detailed statement of the issues within a reasonable time.” PSNH anticipates that the Commission will indeed issue an Order of Notice setting forth the issues to be adjudicated. But, if that assumption is incorrect, by this Motion, PSNH is formally making such a request under RSA 541-A:31, III(d).
- b. The need for a new Order of Notice commencing an adjudicative proceeding with a detailed statement of the issues is clearly demonstrated by the facts of this proceeding. As discussed earlier, PSNH was asked whether it objected to any of the petitions for intervention that have been filed. But, without knowledge of what the issues are, PSNH cannot make an intelligent response that comports with law and regulation. For example:
 - i. Petitioner for Intervention Jonathan Edwards raised the following issues as part of the basis for his request for intervention: cheaper power; fuel price, fuel availability, forest sustainability; plant efficiency; synergy with surrounding industry and community; transmission interconnection; environmental; plant location; health and welfare issues; noise; quality of life; facility appearance; wood dust and fire hazard risk.
 - ii. Petitioner for Intervention ECM-Eastern Construction Management, LLC raised the following issues as part of its basis for its request for intervention: the business success of ECM; cost; forest resources; job loss.

- iii. Petitioner Town of Winchester raised the following issues as part of the basis for its request for intervention: economic development; environmental mitigation; jobs; forest resources; stranded costs.
 - iv. Petitioners for Intervention Representatives Robin Read, Robert Perry, David Borden, and Judith Spang (who filed substantially identical requests for intervention) raised the following issues as part of their basis for their requests for intervention: cost; the economy; the environment; siting issues.
 - v. Petitioner for Intervention Carbon Action Alliance raised the following issues as part of its basis for its request for intervention: the ability of the state to reduce or avoid CO₂ emissions; environmental harm; cost.
 - vi. Petitioner for Intervention Representative James McClammer raised the following issues as part of the basis for his request for intervention: cost; development of alternative and sustainable energy.
 - vii. Petitioner for Intervention New Hampshire Sierra Club raised the following issues as part of its basis for its request for intervention: sustainable wood harvesting; sustainable renewable energy; reduction of carbon emissions.
 - viii. Petitioner for Intervention City of Berlin raised the following issues as part of the basis for its request for intervention: cost; economic development; siting; economic, environmental, public health and welfare interests.
- c. It is unlikely that the Commission intends to deal with each and every one of the myriad issues noted above. As PSNH noted during the recent prehearing conference, most, if not all of the issues set forth above are more properly the subject of consideration by the state's Site Evaluation Committee. If this Commission deems it appropriate to review the issues of concern raised by these various petitioners for intervention, PSNH suggests that the proper method for doing so would be for the Commission's four members of the Site Evaluation Council to move that Council to *sua sponte* assert jurisdiction

pursuant to RSA 162-H:5, III over facilities which may otherwise escape such review.

C. Petitions for Intervention cannot be acted upon at this time

- a. The parties and potential to an adjudicative proceeding are entitled to notice of the issues involved. RSA 541-A:31, III (d). The Commission has not determined what issues are to be included as part of the adjudicative proceeding in this docket going forward.
- b. It is unclear whether each of the petitions for intervention discussed above state facts demonstrating that the petitioner's rights, duties, privileges, immunities or other substantial interests may be affected by the proceeding or that the petitioner qualifies as an intervenor under any provision of law. RSA 541-A:32, I (b). There is no way of knowing unless and until the Commission properly delineates what issues are involved in this proceeding, as required by RSA 541-A:31. Until then, neither PSNH, nor any other party, is in a position to determine whether a petitioner qualifies for intervention, and, if not, whether to raise an objection thereto pursuant to Rule Puc 203.15 (d)(2). For the reasons set forth above, PSNH must reserve its right under Rule Puc 203.15 (d)(2) to object to one or more petitions for intervention until the Commission has determined what issues are intended to be part of the adjudicative process. In addition, PSNH must reserve its right under Rule Puc 203.15 (d)(2) to object to one or more petitions for intervention until such time as the Commission has determined what issues are intended to be part of the adjudicative process.
- c. Moreover, without proper notice of the issues to be involved in an adjudicative proceeding, other parties whose rights, duties, privileges, immunities or other substantial interests may be affected by the proceeding would not know about the proceeding, would not seek intervention, and would be able to seek rehearing if they are directly affected by any decision ultimately rendered by the Commission. (RSA 541:3, Motion for Rehearing, "Within 30 days after any order or decision has been made by the commission, any party to the action or proceeding before the commission, *or*

any person directly affected thereby, may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order....”). For example, if this Commission determines that as part of this docket it wants to determine what a utility’s duties are today under the Public Utility Regulatory Policies Act (“PURPA”) to purchase power from qualifying facilities, it is quite likely that other parties that have not intervened in the “investigation” of CPD’s complaint against PSNH might become very interested. Not only would such a proceeding directly impact the rights, duties, privileges, immunities or other substantial interests of the state’s other electric distribution entities, but many consumers of electricity, business organizations, and other legislators might be concerned about the costs that may result from a return to the days of mandated rate orders.

D. The Commission has precedent to guide its actions

- a. The Commission has previously encountered and set forth the procedure for the situation where an investigation leads to an adjudicative proceeding. In *Re Policy Water Systems, Inc.*, 69 NH PUC 697 (1984), the Commission initially commenced an investigation. The utility requested that the Commission issue an order specifying with reasonable detail each of the issues involved in that investigation. The Commission denied that request, ruling as follows:

WHEREAS, pursuant to the above stated statutes the Commission is conducting an investigation of the proposed tariff; and

WHEREAS, *after said investigation is complete, the Commission will issue an Order of Notice scheduling a hearing and specifying the issues involved in such hearing*; and

WHEREAS, *RSA 541-A:16 (III)(d) provides as follows*:

III. In a contested case, all parties shall be afforded an opportunity for an adjudicative proceeding after reasonable notice. The notice shall include:

(d) A short and plain statement of the issues involved. Upon request an agency shall, when possible, furnish a more detailed statement of the issues within a reasonable time;

and

WHEREAS, *the Order of Notice to be issued upon completion of the pending investigation will meet the requirements of RSA 541-A:16 (III)(d)*; and

WHEREAS, after the issuance of said Order of Notice, Policy Water Systems, Inc. may file a motion for a more detailed statement of the issues pursuant to RSA 541-A:16 (III)(d), if, in its opinion, the Order of Notice does not contain sufficient detail.

69 NH PUC at 997-8 (emphases added).

- b. As noted in the quoted extract, the Commission in *Re Policy Water Systems, Inc.* held an investigation and ruled that:
 - i. after that investigation, it would issue an Order of Notice scheduling a hearing and specifying the issues involved;
 - ii. the Order of Notice that would be issued after the investigation would meet the requirements of RSA 541-A:16 (III)(d) [now recodified as RSA 541-A:31, III(d)];
 - iii. the utility could then file a motion for a more detailed statement of the issues if the Order of Notice did not contain sufficient detail.
- c. In the instant docket the Commission must follow the same procedure it found proper in *Re Policy Water Systems, Inc.*, as the statutory underpinnings remain the same.


II. **Conclusion**

WHEREFORE, PSNH respectfully moves:

- A. For the reasons set forth above, if the Commission intends to commence an adjudicative proceeding, to provide adequate notice by the issuance of an Order of Notice as required by RSA 541-A:31 and Rule Puc 203.12;
- B. For the Order of Notice which is required to be issued to state the legal authority under which the hearing is to be held (RSA 541-A:31, III (b));
- C. For the Order of Notice which is required to be issued to contain a reference to the particular sections of the statutes and rules involved (RSA 541-A:31, III (c));
- D. For the Order of Notice which is required to be issued to include not only a short and plain statement of the issues involved, but also a more detailed statement of the issues as requested by PSNH pursuant to this Motion. (RSA 541-A:31, III (d));
- E. For the reasons set forth above, for the Commission to table its call for objections to petitions for interventions until such time as proper notice has been issued providing the detailed statement of issues that will be part of any adjudicative process in order to allow parties the opportunity to determine what rights, duties, privileges, immunities or other substantial interests may be affected by the proceeding.

Respectfully submitted this 6th day of November, 2009.

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE


By: 

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CERTIFICATE OF SERVICE

I certify that on this 6th day of November, 2009, I caused the attached
Motion to be served pursuant to
N.H. Code Admin. Rule Puc 203.11.

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

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