

THE STATE OF NEW HAMPSHIRE  
before the  
PUBLIC UTILITIES COMMISSION

Public Service Company of New Hampshire  
Reconciliation of 2009 Stranded Cost Recovery and Default Energy Service  
Charges

Docket No. DE 10-121

ANSWER TO TRANSCANADA'S OBJECTION TO PSNH'S  
MOTION FOR PROTECTIVE ORDER RE: SUPPLEMENTAL POWER SUPPLY  
CONTRACTS

TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast, Inc. (TransCanada) filed an Objection to Public Service Company of New Hampshire's (PSNH's) Motion for Protective Order Re: Supplemental Power Supply Contracts (Objection). PSNH hereby answers said Objection.

1. Contractual Terms of Confidentiality. In Paragraph 3 of the Objection, TransCanada alleges the previous decisions of the Commission in *EnergyNorth* (88 Puc Rep 221 (2003)) is inapplicable because PSNH did not allege that it was contractually bound to maintain confidentiality. Each supplemental power purchase transaction is governed by an EEI Master Agreement, which include a standard confidentiality provision but allows parties to substitute their own confidentiality provisions. PSNH, except for two cases, has substituted a provision similar to the following standard provision which is always subject to negotiations between the counterparties:

Confidentiality. If the Parties have elected on the Cover Sheet to make this Section 10.11 applicable to this Master Agreement, the contents of the Transactions and all other documents relating to this Agreement, if any, and any information made available by a Party and/or any guarantor of a Party ("Disclosing Party") to the other Party ("Non-Disclosing Party") with respect to this Agreement or any Transaction, if any, are confidential and shall not be disclosed to any third party, except for such information (i) as may become generally available to the public, (ii) as may be required or appropriate in response to any summons, subpoena, request from a regulatory body, or otherwise in connection with any litigation or to comply with any applicable law, order, regulation, ruling, regulatory request, accounting disclosure rule or standard or any exchange, control

area or independent system operator rule, (iii) as may be obtained from a non-confidential source that disclosed such information in a manner that did not violate its obligations to the Disclosing Party, if any, in making such disclosure, (iv) as may be furnished to the Non-Disclosing Party's affiliates, and to each of such person's auditors, attorneys, advisors or lenders which are required to keep the information that is disclosed in confidence, or (v) as may be aggregated with other information pertaining to purchases and sales of the Product without reference to any counterparty and furnished to the Product industry price source publications generally recognized in the commodities markets. Notwithstanding the foregoing, the Parties (and each representative of the Parties) may disclose to any and all persons, without limitation of any kind, the tax treatment and any facts that may be relevant to the tax structure of a Transaction; provided, however, that neither Party (nor any representative thereof) may disclose any other information that is not relevant to understanding the tax treatment and tax structure of the Transaction (including the identity of any party and any information that could lead another to determine the identity of any party), or any other information to the extent that such disclosure could result in a violation of any federal or state securities law.

All but two of the forty transactions entered into in 2009 adopted either this provision or a similar version thereof. Excerpts of actual language in the agreements are attached as Attachment 1.

2. Suppliers' Interests in Confidentiality. TransCanada asks rhetorically "why aren't all of the suppliers in this docket arguing that the Commission should maintain confidentiality of this information?" Objection at 3. Such a suggestion would require each supplier to intervene in this proceeding to claim, independently of PSNH, its right to protection from disclosure to the public and specifically disclosure to other players in the competitive market such as TransCanada. Such a requirement would inhibit the prompt and orderly conduct of this proceeding and is unnecessary. Common sense dictates that the Commission can determine if it is less likely than not that competitive suppliers would want to continue contracting with PSNH in the future if other players in the market will regularly receive the confidential pricing terms of their power supply contracts with PSNH. Using the same logic that TransCanada discusses in its Objection that such information is essential to determining prudence, if the Commission were to sustain the Objection, then TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast, Inc. should also be required to disgorge all the terms of its power supply arrangements

it entered into in 2009 in order to provide a benchmark for the Commission's review of all relevant data. Under Admin Rule Puc § 203.09 (b), PSNH may serve discovery on any party to this proceeding.

3. Information Already Available. In Paragraph 4 of its Objection, TransCanada alleges that the information is filed quarterly by the suppliers at the Federal Energy Regulatory Commission (FERC). PSNH was not aware of the possible availability of data at the time it filed its Motion for Protective Order. Although counsel for TransCanada provided PSNH with what he believed was the appropriate link to the correct FERC website, the undersigned counsel for PSNH and one other person at PSNH were unable to access from the FERC website specific data of party, volume and price of power sold to PSNH. If TransCanada can demonstrate that the information is publicly available, then the Commission need not act on the Objection, since TransCanada has essentially admitted that it already has access to the data. TransCanada cannot have it both ways by requesting, on the one hand, that PSNH be required to provide the information, while on the other maintaining that the information is publicly available. PSNH is not required to respond to data requests when the information is already available publicly and can be accessed by the party requesting the information.

4. Intervenor's Substantial Interests. In Paragraph 6 of the Objection, TransCanada states the following:

Quite simply, denying intervenors access to purchases made to default service customers in 2009 . . . significantly inhibits the meaningfulness of TransCanada's intervention and its ability to protect its "rights, duties, privileges, immunities and other substantial interests that may be affected by this proceeding" See RSA 541-A:32 Admin. Rule Puc 203.17. Objection at 5.

As alleged in their earlier arguments, TransCanada can already access the information at the FERC website, as can any interested member of the public. TransCanada's rights, duties, privileges, etc. as an intervenor do not include getting access to competitive and confidential information of other competing energy

suppliers, nor do they include requiring PSNH to provide data that they claim is already public. The Commission Staff and the Office of Consumer Advocate have access to the information and are fully capable of adequately protecting the interest of PSNH's customers. The Commission's role is to balance the interests of the regulated utilities and its customers not TransCanada's interests. RSA 363:17-a. TransCanada has not alleged that it is a customer, and its intervention petition makes no such claim. In fact, TransCanada's substantial interests can only be negatively affected by the Commission reducing recovery of 2009 costs by any potential prudence disallowance making PSNH's energy service price more competitive to TransCanada's competitive power supply offered to PSNH's customers. As PSNH stated in its original motion for protective order, "It is well-established in the context of administrative proceedings that due process is a flexible concept, varying with the nature of the governmental and private interests that are implicated. *Matthews v. Eldridge*, 424 U.S. 319, 334 (1976)." *Id.* It is reasonable to restrict access to this information for the competitive and alternative suppliers in this proceeding. *See*, RSA 541-A:32, III.

5. Harm to the Public. The balancing test which the Commission must undertake should be to weigh the benefit of disclosure to the public against the harm to *PSNH's customers* from disclosing pricing terms to the competitors of its supplemental powder suppliers and the chilling effect it may have on future negotiations and terms with PSNH's suppliers. TransCanada misinterprets PSNH's request for confidentiality as a self-serving claim of harm. PSNH's interest is in protecting its customers from higher costs, not in shielding itself from a prudence review. If fewer suppliers are available to PSNH or terms offered to PSNH are more costly due to the risk of doing business with a regulated New Hampshire utility, then customers, not PSNH, lose in the end, which would benefit TransCanada since they are a competitive supplier.

WHEREFORE PSNH respectfully requests the Commission to overrule TransCanada's Objection, grant PSNH's Motion for Protective Order and grant such further relief as may be just and equitable.

Respectfully submitted,

Public Service Company of New Hampshire

September 16, 2010  
Date

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#### CERTIFICATE OF SERVICE

I hereby certify that, on the date written below, I caused the attached Answer to TransCanada's Objection to PSNH's Motion for Protective Order to be served pursuant to N.H. Code Admin. Rule Puc §203.11.

September 16, 2010  
Date

Gerald M. Eaton  
Gerald M. Eaton

## ATTACHMENT 1

### VENDOR ONE EEI

10.11 Confidentiality. If the Parties have elected on the Cover Sheet to make this Section 10.11 applicable to this Master Agreement, neither Party shall disclose the terms or conditions of a Transaction under this Master Agreement to a third party (other than the Party's employees, lenders, counsel, accountants or advisors who have a need to know such information and have agreed to keep such terms confidential) except in order to comply with any applicable law, regulation, or any exchange, control area or independent system operator rule or in connection with any court or regulatory proceeding; provided, however, each Party shall, to the extent practicable, use reasonable efforts to prevent or limit the disclosure. The Parties shall be entitled to all remedies available at law or in equity to enforce, or seek relief in connection with, this confidentiality obligation.

### VENDOR TWO EEI

10.11 Confidentiality. If the Parties have elected on the Cover Sheet to make this Section 10.11 applicable to this Master Agreement, neither Party shall disclose the terms or conditions of a Transaction under this Master Agreement to a third party (other than the Party's employees, lenders, counsel, accountants or advisors who have a need to know such information and have agreed to keep such terms confidential) except in order to comply with any applicable law, regulation, or any exchange, control area or independent system operator rule or in connection with any court or regulatory proceeding; provided, however, each Party shall, to the extent practicable, use reasonable efforts to prevent or limit the disclosure. The Parties shall be entitled to all remedies available at law or in equity to enforce, or seek relief in connection with, this confidentiality obligation.

### VENDOR THREE EEI

- (h) Section 10.11 shall be amended by (i) adding the phrase "or the completed Cover Sheet to this Master Agreement" immediately before the phrase "to a third party"; and (ii) in the seventh line, insert the phrase "or request by a regulatory authority" between the phrases "court or regulatory proceeding" and "; provided, however, each Party shall," (iii) in the eighth line, insert "notify the other Party within a reasonable time of any proceeding of which it is aware which may result in disclosure and", after the word "practicable," and the phrase, "use reasonable efforts"; and (iv) adding an additional sentence at the end of Section 10.11: "A Party may disclose any one or more of the commercial terms of a Transaction (other than the name of the other Party unless otherwise agreed to in writing by the Parties) to any industry price source for the purpose of aggregating and reporting such information in the form of a published energy price index."

## VENDOR FOUR EEI

(8) **Confidentiality.** Section 10.11 is amended to read in its entirety as follows:

Confidentiality. If the Parties have elected on the Cover Sheet to make this Section 10.11 applicable to this Master Agreement, the contents of the Transactions and all other documents relating to this Agreement, if any, and any information made available by a Party and/or any guarantor of a Party ("Disclosing Party") to the other Party ("Non-Disclosing Party") with respect to this Agreement or any Transaction, if any, are confidential and shall not be disclosed to any third party, except for such information (i) as may become generally available to the public, (ii) as may be required or appropriate in response to any summons, subpoena, request from a regulatory body, or otherwise in connection with any litigation or to comply with any applicable law, order, regulation, ruling, regulatory request, accounting disclosure rule or standard or any exchange, control area or independent system operator rule, (iii) as may be obtained from a non-confidential source that disclosed such information in a manner that did not violate its obligations to the Disclosing Party, if any, in making such disclosure, (iv) as may be furnished to the Non-Disclosing Party's Affiliates, and to each of such person's auditors, attorneys, advisors or lenders which are required to keep the information that is disclosed in confidence, or (v) as may be aggregated with other information pertaining to purchases and sales of the Product without reference to any counterparty and furnished to the Product industry price source publications generally recognized in the commodities markets. Notwithstanding the foregoing, the parties (and each Representative of the parties) may disclose to any and all persons, without limitation of any kind, the tax treatment and any facts that may be relevant to the tax structure of a Transaction; provided, however, that neither party (nor any Representative thereof) may disclose any other information that is not relevant to understanding the tax treatment and tax structure of the Transaction (including the identity of any party and any information that could lead another to determine the identity of any party), or any other information to the extent that such disclosure could result in a violation of any federal or state securities law.

## VENDOR FIVE Agreement

No confidentiality section

## VENDOR SIX Agreement

Applies confidentiality language in Article 10 of EEI MPPSA