

STATE OF NEW HAMPSHIRE
BEFORE THE
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

In re: Petition for Approval of Power Purchase Agreement) Docket No. DE 10-195
with Laidlaw Berlin BioPower, LLC)

WOOD-FIRED IPPS' MOTION TO COMPEL

Bridgewater Power Company, L.P., Pinetree Power, Inc., Pinetree Power-Tamworth, Inc., Springfield Power LLC, DG Whitefield, LLC d/b/a Whitefield Power & Light Company, and Indeck Energy-Alexandria, LLC (collectively, the "Wood-Fired IPPs") hereby move the Commission to order Public Service Company of New Hampshire ("PSNH") to provide full and complete responses to the Wood-Fired IPPs' fifth set of data requests and certain data requests issued by Commission staff, as follows:

STATEMENT OF FACTS

1. On November 1, 2010, the Wood-Fired IPPs issued a fifth set of data requests seeking discovery of PSNH's understanding regarding various provisions of the Power Purchase Agreement ("PPA") between PSNH and Laidlaw Berlin Biopower, LLC ("Laidlaw") and the related form of purchase option agreement ("POA"), for which PSNH has sought approval in this proceeding, as well as information regarding Laidlaw's proposed biomass power plant ("Facility") project development, construction, financing, operation and maintenance.

2. On November 8, 2010, PSNH responded to the Wood-Fired IPPs' fifth set of data requests. Many of these responses stated objections to the questions asked and the information sought to be discovered on various grounds. Copies of PSNH's responses to the Wood-Fired IPPs' data requests 5-1, 5-2, 5-3, 5-4, 5-5, 5-6, 5-7, 5-8, 5-9, 5-14, 5-16, and 5-28 are attached as Exhibit A.

3. On November 4, 2010, PSNH responded to data request 3-11 issued by the Commission staff, and on November 8, 2010 PSNH responded to data request 5-4 issued by the Commission staff, in each case asserting that certain information was provided to staff under a claim for confidential treatment, citing Rule Puc 203.08(d). These responses to staff are deemed also to have been made to the Wood-Fired IPPs pursuant to their data request 1-1 and PSNH's response thereto, in which it committed to provide the Wood-Fired IPPs with copies of its responses to other parties' data requests, including those issued by Commission staff and the Office of Public Advocate. Copies of PSNH's responses to these two staff data requests are attached as Exhibit B.

4. The Wood-Fired IPPs believe that PSNH's responses to their data requests and the two specified staff data requests state unfounded objections and overly restrictive claims of confidentiality. Therefore, the Wood-Fired IPPs have filed this motion to compel.

MOTION TO COMPEL

5. The New Hampshire Supreme Court has held that a party in a legal proceeding in New Hampshire is entitled to be "fully informed and have access to all evidence favorable to his side of the issue. This is true whether the issue is one which has been raised by him or by his opponents . . ." *Scotsas v. Citizens Insurance Co.*, 109 N. H. 386 (1969). *See also Yancey v. Yancey*, 119 N.H. 197, 198 (1979) (holding that New Hampshire takes a "liberal view of discovery"); *also cf. Barry v. Home*, 117 N.H. 693, 694 (1977) (stating intent of Superior Court Rule 35(b)(1) is to allow "very broad discovery").

6. Under general rules of discovery, even information and documents that would be inadmissible at trial may be subject to pre-trial discovery from a party "if the information sought

appears reasonably calculated to lead to the discovery of admissible evidence.” N.H. Super. Ct. R. 35(b)(1).

7. The Commission has confirmed that its policies are “consistent with Superior Court Rule 35(b) regarding the scope of discovery,” and that it requires parties “to show that the information being sought in discovery is relevant to the proceeding or is reasonably calculated to lead to the discovery of admissible evidence.” *City of Nashua*, Order No. 24,681 (October 23, 2006). The Commission has stated that “[d]iscovery should be relevant to the proceeding or reasonably calculated to the discovery of admissible evidence,” and the Commission “will deny a motion to compel discovery only ‘when [it] can perceive of no circumstance in which the requested data will be relevant.’” (citations omitted). *Re Public Service Company of New Hampshire*, 86 NH PUC 730, 731-732 (2001).

8. The Commission’s stated positions reflect important due process considerations in litigated regulatory proceedings. *See, e.g.*, N.H. Const. Pt. 1, Art 15 (right of due process established); N.H. Code Admin Rules Puc 203.09(a) (establishing intervenors’ right to discovery); RSA 541-A:33, IV and N.H. Code Admin. Rules Puc 203.24 (establishing right to full and effective cross examination for full and true disclosure of the facts); *Appeal of Office of Consumer Advocate*, 134 N.H. 651, 659-60 (1991) (applying N.H. Const. Pt. 1, Art 15 due process of law provisions to proceedings before the Commission).

9. Therefore, data requests for relevant information and documents must be answered even if the information provided and documents produced in response would not be admissible during the hearing, in the interest of guarantying full due process rights to all parties. There is no question that PSNH, as the regulated utility petitioner and proponent of pre-filed

testimony in this proceeding, is properly the subject of discovery and may be compelled to provide complete and definitive responses to relevant data requests.

I. PSNH's Objections that Data Requests Seek Legal Opinions

10. PSNH objected to a number of questions contained in the Wood-Fired IPPs' fifth set of data requests on the grounds that these questions seek "a legal opinion." These data requests include 5-1, 5-2, 5-3, 5-4, 5-5, 5-6, 5-7, 5-8, and 5-9. Exhibit A. In general, these data requests seek discovery of PSNH's understanding regarding various provisions of the PPA and the POA, and consist of re-issued versions of questions included in the Wood-Fired IPPs' third set of data requests, re-phrased to clarify that they seek PSNH's *understanding* and do not request a legal opinion from witnesses unqualified to provide such an opinion. PSNH had objected to the prior versions of these questions in their responses to the Wood-Fired IPPs' third set, and these objections are addressed in the Motion to Compel filed by the Wood-Fired IPPs on November 3, 2010.

11. For example, data request 5-3 asks PSNH whether it is PSNH's understanding that the renewable energy certificate ("REC") prices in the PPA, once approved by Commission order, cannot be subsequently modified by the Commission, and, if so, to identify with specificity the New Hampshire law that provides the Commission with the authority to issue such an order and, if it is PSNH's understanding that a Commission order approving the PPA long-term REC pricing can subsequently be modified by the Commission, to state and explain the New Hampshire law standard applicable to such modification, and identify the New Hampshire authority that PSNH understands would allow such an order.¹ PSNH responded to this data request as follows: "PSNH objects to this question as it seeks a legal opinion. The

¹ This question refers only to New Hampshire law and authority and does not reference any federal law. The Wood-Fired IPPs currently do not believe that any federal laws, including, without limitation, the Public Utility Regulatory Policies Act of 1978, as amended, are applicable to this question.

Commission's discovery process is primarily an opportunity to develop factual issues rather than to query opposing counsel on the legal support for a position.” Exhibit A.

12. PSNH’s objections on these grounds are unsustainable. First, the Commission has stated that, “as a matter of Commission practice and procedural rules, it would be improvident to declare flatly” that data requests asking a party to assert a position or to explain such a position with regard to how the law applies to the facts “are always out of bounds” and objectionable, merely because they call for opinion or contention. *Verizon New England, Inc., et al., Petition for Authority to Transfer Assets and Franchise*, Docket 07-011, Order No. 24,789 (September 21, 2007).

13. Second, it is not the Wood-Fired IPPs’ intent to obtain a legal opinion or elicit a conclusion of law from PSNH, but merely to discover PSNH’s *understanding* of and its *intent* with respect to various contractual terms and provisions to which it has agreed in the PPA and the POA. A complete understanding of these PPA terms and provisions, their operation and effect, both now and in the future during the twenty-year term of the PPA, is of paramount importance in evaluating whether the PPA and the POA should be approved under the RSA 362-F:9, II “public interest” standard. Therefore, PSNH should be compelled to provide complete and definitive responses to the referenced data requests.

II. PSNH’s Responses Subject to Claims of Confidential Treatment

14. PSNH’s responses to Commission staff data requests 3-11 and 5-4 assert that certain information contained in such responses are provided to staff under a claim for confidential treatment pursuant to N.H. Admin. Rules PUC 203.08(d).² The information claimed to be confidential includes two additional cash flow analyses based on alternative PPA pricing

² As noted above, these discovery responses to Commission staff are deemed also to have been made to the Wood-Fired IPPs pursuant to their data request 1-1 and PSNH’s response thereto in which it committed to provide the Wood-Fired IPPs with copies of its responses to other parties’ data requests.

structures in response to data request 3-11 and information regarding sales of RECs generated by Schiller Station Unit 5, including names of the purchasers and applicable purchase prices, in response to data request 5-4. Exhibit B.

15. PSNH has not yet filed a motion for confidential treatment or otherwise justified its claim that the materials referred to in these data request responses must be kept confidential, and it is unclear whether or not PSNH will seek to have these materials protected from disclosure only to the general public or also from disclosure to intervenors in this proceeding. The Wood-Fired IPPs have an important due process interest in having timely access to this information, which is highly relevant to the consideration of the “public interest” served – or not served – by the PPA and the POA under RSA 362-F:9, II.

16. The Commission has not looked favorably on proposals to deny parties access to confidential information, maintaining that “whatever information we might reasonably rely upon in making a decision should be accessible to all Parties . . .” *North Atlantic Energy Corporation*, 87 NH PUC 396, 399 (2002), cited in *City of Nashua, Petition for Valuation Pursuant to RSA 38:9*, Order No. 24,495 (July 29, 2005). The Commission's reluctance to deny parties access to information that the Commission may rely upon reflects important due process considerations in litigation that simply do not arise under standards applicable to public Right-to-Know Law requests and that are not a consideration in the balancing test applied under *Lamay v. New Hampshire Public Utilities Commission*, 152, N.H. 106 (2005). *See, e.g.*, N.H. Const. Pt. 1, Art 15 (right of due process established); N.H. Code Admin Rules Puc 203.09(a) (establishing intervenors' right to discovery); RSA 541-A:33, IV and N.H. Code Admin. Rules Puc 203.24 (establishing right to full and effective cross examination for full and true disclosure of the

facts); *Appeal of Office of Consumer Advocate*, 134 N.H. 651, 659-60 (1991) (applying N.H. Const. Pt. 1, Art 15 due process of law provisions to proceedings before the Commission).

17. In addition, the New Hampshire Supreme Court has held that a party in a legal proceeding in New Hampshire is entitled to be “fully informed and have access to all evidence favorable to his side of the issue. This is true whether the issue is one which has been raised by him or by his opponents and whether the evidence is in the possession of his opponent or someone else.” *Scontsas v. Citizens Insurance Co.*, 109 N. H. 386 (1969). *See also Yancey v. Yancey*, 119 N.H. 197, 198 (1979) (holding that New Hampshire takes a “liberal view of discovery”); *also cf. Barry v. Home*, 117 N.H. 693, 694 (1977) (stating intent of Superior Court Rule 35(b)(1) is to allow “very broad discovery”).

18. If deemed warranted by the Commission, the Wood-Fired IPPs are prepared to execute an appropriate confidentiality agreement prior to receiving material claimed to be confidential, consistent with the provisions of N.H. Code Admin. Rules PUC 203.08(j), which authorize the Commission to “include in its protective order a directive that all parties receiving the material shall also treat it as confidential.” Such a confidentiality agreement may include restrictions on disclosure of protected information to the Wood-Fired IPPs’ competitive employees and limit distribution to their counsel and outside consultants. This latter condition is consistent with the approach endorsed by the Commission in similar circumstances. *Public Service Company of New Hampshire*, 89 NH PUC 226, 230 (2004) (given the competitively sensitive nature of the information sought to be disclosed, “PSNH may condition its provision of executed contract documents to counsel for the Existing Wood-Fired Plants subject to counsel’s agreement not to disclose the documents to their clients”); *Re Kearsarge Telephone Company*, 92 NH PUC 441, 444 (2007) (competitor-intervenor’s outside counsel “should continue to have

review access to the documents . . . subject to appropriate protective agreement”, even though confidential information could be withheld from intervenor’s internal technical expert).

19. Because the materials withheld from disclosure to intervening parties are of high relevance to the matters at issue in this docket and the Wood-Fired IPPs and other parties require access to these materials to thoroughly and adequately prepare for meaningful participation in this proceeding, PSNH should be compelled to disclose to the Wood-Fired IPPs and all other parties unredacted copies of the materials referenced in PSNH’s responses to Commission staff data requests 3-11 and 5-4 at the earliest possible time, subject to any appropriate restrictions, if any, on further disclosure as the Commission deems necessary under the circumstances.

III. PSNH’s Other Objections to Wood-Fired IPPs’ Data Requests

20. The Wood-Fired IPPs’ data request 5-14 asks PSNH to provide any and all documents in its possession or under its control regarding “Laidlaw’s announcement on September 29, 2008 that it had reached agreement on the material terms of a contemplated 20-year power purchase agreement with PSNH, including the material terms agreed-to by such date” and, if such terms are different than those contained in the PPA presented to the Commission for approval in this docket, to “state how the terms differ, and describe the process pursuant to which the terms changed.” PSNH objects to this data request on the basis that a response to this request “would not provide or lead to relevant or admissible evidence” because the request seeks “negotiation documents” rather than focusing on the actual PPA as submitted to the Commission for approval. PSNH cites three prior Commission orders in support of this objection. *See Public Service Company of New Hampshire*, 89 NH PUC 226 (2004); *City of Nashua*, Order No. 24,654 (August 7, 2006), *rehearing denied*, Order No. 24,671 (Sept. 22, 2006); *Verizon New England Inc.*, *Orders on Motions to Compel Discovery Submitted by the Office of Consumer Advocate*,

Order No. 24,767 (June 22, 2007).³ Exhibit A. PSNH's objection on these grounds is not well-founded, as demonstrated below.

21. First, under the general rules of discovery described in paragraphs 5-8 above, even information and documents that would be inadmissible at trial may be subject to pre-trial discovery "if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." N.H. Super. Ct. R. 35(b)(1). The Commission has stated that "[d]iscovery should be relevant to the proceeding or reasonably calculated to the discovery of admissible evidence," and the Commission "will deny a motion to compel discovery only 'when [it] can perceive of no circumstance in which the requested data will be relevant.'" (citations omitted). *Re Public Service Company of New Hampshire*, 86 NH PUC 730, 731-732 (2001). More recently, the Commission has reaffirmed that its policies are "consistent with Superior Court Rule 35(b) regarding the scope of discovery," and that it requires parties "to show that the information being sought in discovery is relevant to the proceeding or is reasonably calculated to lead to the discovery of admissible evidence." *City of Nashua*, Order No. 24,681 (October 23, 2006). Therefore, a discovery request for relevant information and documents must be answered even if the information provided and documents produced in response would not be admissible during the hearing.

22. The Wood-Fired IPPs' data request 5-14 is intended to discover information and documents relevant to the Commission's evaluation of the PPA and the POA under the "public interest" standard specified in RSA 362-F:9, II. For example, information considered and positions taken by PSNH and Laidlaw during the negotiation process would serve to clarify the

³ The Wood-Fired IPPs note that, unlike the instant proceeding, none of these three orders was issued in a docket the subject of which was approval of a long-term, unmodifiable contract pursuant to which a regulated utility would purchase products and/or services based on an advance determination of prudence permitting full ratepayer recovery of costs incurred under the contract.

relative values of the wood price adjustment clause in Section 6.1.2(a)(ii) of the PPA, the twenty-year term of the PPA, the right of first refusal and purchase option granted to PSNH, and the projected future prices of energy, capacity and RECs. These relative values are of primary importance in evaluating the effects on ratepayers and other stakeholders of the proposed PPA, which would commit PSNH to purchase the Facility's net output at fixed base prices over a period of twenty years. PSNH ratepayers, including the Wood-Fired IPPs, should know what they are paying for, not just in the aggregate but on an itemized and unbundled basis, and this data request is intended to discover relevant information regarding these values that has not otherwise been disclosed by PSNH.

23. Second, this is not a case where the Wood-Fired IPPs have requested that PSNH provide a specific and detailed record of *all* contacts and negotiations between PSNH and Laidlaw; instead, data request 5-14 to which PSNH has objected on this ground is more targeted, seeking information with reference to a particular statement made by Laidlaw regarding contract negotiations and the process of development of the final terms of the PPA following such statement.⁴ *Cf. Public Service Company of New Hampshire*, Order No. 24,895 (September 17, 2008) (intervenor's motion to compel response to a data request asking PSNH to "provide in minute detail a record of its contacts and negotiations" with Lempster Wind was denied by the Commission as overly broad and intrusive).

24. Because the information sought to be discovered by the Wood-Fired IPPs' data request 5-14 is relevant to this proceeding and is reasonably calculated to lead to the discovery of admissible evidence bearing on the "public interest" standard for approval of long-term contracts

⁴ A similar data request was issued to PSNH by the Commission staff in this docket. Staff 1-16 requested "copies of all offers or counter offers made by PSNH in the process of negotiating the pricing provisions in the proposed PPA." PSNH objected to this staff data request on the same grounds as its objection to the Wood-Fired IPPs' data request 5-14.

for renewable energy under RSA 362-F:9, II, PSNH should be compelled to provide a complete and adequate response to this data request.

25. The Wood-Fired IPPs' data request 5-16 asks PSNH to provide any and all documents in its possession or under its control "regarding the final interconnection study or system impact study for the Facility performed by or in conjunction with ISO New England, including drafts of any such study" and the related interconnection application, and the "total dollar cost to interconnect the Facility and to construct all required system upgrades", and to "identify whether such total costs are included in the Facility total cost of \$125 million referenced" in the pre-filed testimony of Dr. Lisa Shapiro. PSNH objects to this data request on the grounds that it "relates to matters that are not within the scope of this proceeding," because "[m]atters relating to the Facility's interconnection were dealt with by the N.H. Site Evaluation Committee ("NHSEC") . . . [which] issued an Order granting confidential treatment for the System Impact Study." PSNH further asserts that the interconnection study process and eventual interconnection agreement fall within FERC jurisdiction, including applicable confidentiality provisions contained in the ISO New England transmission tariff. Exhibit A.

26. PSNH's response fails to mention that the order issued by the Site Evaluation Committee granting confidential treatment for the draft ISO New England System Impact Study for the Facility ordered that the draft study "shall not be disclosed to the public, but shall be available to the parties in a closed hearing and shall not be copied or redisclosed." *Order on Pending Motions*, N.H. SEC Docket No. 2009-02 (August 19, 2010) at 4. The primary concern underlying the protective treatment granted in this order was not access to confidential information by potential competitors, but rather the inclusion in the draft study of critical energy

infrastructure information “which could cause concerns for the security and safety of the public if made publically available.” Id. at 2.

27. The draft System Impact Study and related information regarding the interconnection process for the Facility are relevant to a complete understanding of the total construction costs and projected in-service date of the Facility, as well as the potential effects on other renewable energy project development in the region. This information should be made available to parties in this proceeding in similar fashion as in the NHSEC docket, subject to appropriate confidentiality restrictions such as those described in paragraph 18 above. Subject to such reasonable restrictions as are warranted under these circumstances, PSNH should be compelled to provide a complete and adequate response to data request 5-16.

28. The Wood-Fired IPPs’ data request 5-28 states as follows:

If any question in this Set 5 to PSNH asks for any documents, studies, reports, workpapers, projections, analyses, reviews, evaluations, calculations, pro formas, spreadsheets, forecasts, estimates or the like in the possession or control of PSNH, and any of the foregoing exist but are not in the possession or control of PSNH, please identify which of the foregoing exist and the name and address(es) of the person or entity who or which has possession or control of it or them.

29. PSNH objects to this data request on the grounds that it is excessively broad and unreasonably burdensome, because “[t]his would require PSNH to scour the globe looking for responsive information that is not in the possession or control of PSNH.” Exhibit A. The intent of this question is to identify the existence and location of any of the requested materials to aid further discovery of relevant information, to the extent of PSNH’s knowledge after a reasonably diligent inquiry.

30. For example, with reference to data request 5-10 (included in set 5), it is conceivable that PSNH is aware of the existence of a biomass fuel price forecast obtained by Laidlaw, but PSNH does not have possession or control of the price forecast. A complete

response would confirm PSNH's knowledge that such a forecast exists and is believed to be in the possession of Laidlaw. Similarly, with reference to data request 5-18 (included in set 5), PSNH may be aware of a wood supply analysis performed by LandVest for Laidlaw, but not have possession or control of the analysis or any related documents. A complete response would confirm PSNH's knowledge that such an analysis exists and that related documents are believed to be in the possession of either LandVest or Laidlaw or both.

31. Based on the foregoing, the Wood-Fired IPPs respectfully request that the Commission compel PSNH to provide a complete and adequate response to data request 5-28.

CERTIFICATION AND CONCLUSION

32. In accordance with N.H. Code of Admin. Rules PUC 203.09(i), counsel for the Wood-Fired IPPs has contacted counsel for PSNH to attempt in good faith to resolve the discovery disputes that are the subject of this motion.

33. To the extent that PSNH posits new or expanded arguments for objecting to the Wood-Fired IPPs' data requests referenced in this motion, the Wood-Fired IPPs reserve the right to respond to such arguments in writing or at oral argument.

34. In addition, to the extent that the responses to any data requests to which PSNH is compelled to respond create the need for follow-up data requests, the Wood-Fired IPPs request that the Commission amend the procedural schedule to provide the Wood-Fired IPPs with an opportunity for such additional discovery as they would have been afforded had PSNH provided timely and complete responses in the first instance.

WHEREFORE, the Wood-Fired IPPs respectfully request the following relief:

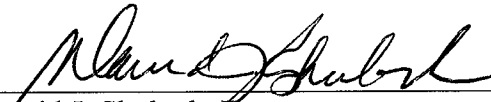
- A. Order PSNH to provide full and complete responses to all of the Wood-Fired IPPs' data requests referenced in this motion; and
- B. Grant such other and further relief as the Commission deems just.

Respectfully submitted,

BRIDGEWATER POWER COMPANY, L.P.,
PINETREE POWER, INC.,
PINETREE POWER-TAMWORTH, INC.,
SPRINGFIELD POWER LLC,
DG WHITEFIELD, LLC d/b/a WHITEFIELD POWER &
LIGHT COMPANY, and
INDECK ENERGY-ALEXANDRIA, LLC

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, I caused the attached Motion to Compel to be filed in hand and electronically to the Commission and electronically, or by U.S. Mail, first class, to the persons identified on the attached Service List in accordance with N.H. Admin. Code Rules PUC 203.11(a).

Date: November 12, 2010

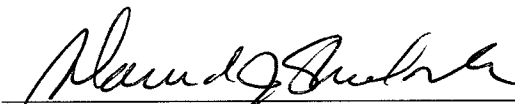

David J. Shulock, Esq.

EXHIBIT A

**Public Service Company of New
Hampshire
Docket No. DE 10-195**

Data Request IPP-05

Dated: 11/01/2010

Q-IPP-001

Page 1 of 1

Witness: Richard C. Labrecque
Request from: Wood-Fired Small Power Producers

Question:

Reference to PPA Section 24.2

- a. With reference to PPA Section 24.2 and the authority stated therein of the NHPUC to change the PPA, please describe with specificity PSNH's understanding of the authority that "applies when the Parties have irrevocably waived their right to seek to have the NHPUC change any term of this Agreement."
- b. Please provide the citation or reference to any authority noted in Q. 3-1(a).

Response:

- a. PSNH objects to this question as it seeks a legal opinion. The Commission's discovery process is primarily an opportunity to develop factual issues rather than to query opposing counsel on the legal support for a position.

Notwithstanding this objection, PSNH provides the following response:

The contractual provision contained in Section 24.2 contains standard language included in many similar power transactions. See, e.g., Maine PUC Docket No. 2006-324, Order dated July 24, 2006; Standard Offer Service Wholesale Sales Agreement between The Connecticut Light and Power Company and NRG Power Marketing, Inc., dated October 29, 1999 (attached to SEC Form 10-Q filing of NRG dated November 12, 1999).

- b. See the response to (a), above.

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Data Request IPP-05

**Dated: 11/01/2010
Q-IPP-002
Page 1 of 1**

**Witness: Richard C. Labrecque
Request from: Wood-Fired Small Power Producers**

Question:

Reference PPA

- a. If the NHPUC approves the PPA as filed, please explain PSNH's understanding as to whether the NHPUC subsequently, on its own motion or that of a non-party to the PPA, could hold a hearing and issue an order modifying or eliminating the REC purchase price under the PPA.
- b. Please explain PSNH's understanding of the standard of review that would apply to the proceeding noted in Q. 3-1(a) if the NHPUC were able to so act, and provide the citation or reference to any such standard in New Hampshire law.

Response:

- a. PSNH objects to this question as it seeks a legal opinion. The Commission's discovery process is primarily an opportunity to develop factual issues rather than to query opposing counsel on the legal support for a position.
- b. PSNH objects to this question as it seeks a legal opinion. The Commission's discovery process is primarily an opportunity to develop factual issues rather than to query opposing counsel on the legal support for a position.

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Data Request IPP-05

**Dated: 11/01/2010
Q-IPP-003
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**Witness: Richard C. Labrecque
Request from: Wood-Fired Small Power Producers**

Question:

Is it PSNH's understanding that the REC prices in the PPA, once approved by NHPUC order, cannot be subsequently modified by the NHPUC? If so, please identify with specificity the New Hampshire law that PSNH understands would provide the NHPUC with the authority to issue such an order. If it is PSNH's understanding that a NHPUC order approving the PPA long-term REC pricing can subsequently be modified by the NHPUC, please state and explain the New Hampshire law standard applicable to such modification, and identify the New Hampshire authority that PSNH understands would allow such an order.

Response:

PSNH objects to this question as it seeks a legal opinion. The Commission's discovery process is primarily an opportunity to develop factual issues rather than to query opposing counsel on the legal support for a position.

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Data Request IPP-05

**Dated: 11/01/2010
Q-IPP-004
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**Witness: Richard C. Labrecque
Request from: Wood-Fired Small Power Producers**

Question:

With reference to PPA Section 24.3 and its subparagraphs (which are misnumbered, but which will be referred to in this question by the numbers used in the PPA, i.e., 24.2.1, 24.1.2, 24.1.3 and 24.1.4) please explain PSNH's understanding as to:

- a. whether the entirety of Section 24.3 only applies to FERC proceedings or whether it also applies to proceedings before the NHPUC pertaining to the PPA; and
- b. whether the "public interest application of the just and reasonable standard review" stated in PPA Section 24.1.1 applies to the NHPUC, the Office of Consumer Advocate or intervenors in proceedings before the NHPUC regarding potential subsequent modification of the PPA.

Response:

- a. PSNH objects to this question as it seeks a legal opinion. The Commission's discovery process is primarily an opportunity to develop factual issues rather than to query opposing counsel on the legal support for a position.

Notwithstanding this objection, PSNH responds as follows: The cited section applies to proceedings before FERC.

- b. See the response to subsection (a), above.

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Data Request IPP-05

**Dated: 11/01/2010
Q-IPP-005
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**Witness: Richard C. Labrecque
Request from: Wood-Fired Small Power Producers**

Question:

Is it PSNH's understanding that the FERC has authority with respect to the REC pricing terms and conditions of the PPA? If so, please provide the specific citation or reference to such authority, and explain PSNH's understanding of the scope of FERC's authority over the REC pricing terms and conditions of the PPA.

Response:

PSNH objects to this question as it seeks a legal opinion. The Commission's discovery process is primarily an opportunity to develop factual issues rather than to query opposing counsel on the legal support for a position.

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Data Request IPP-05

**Dated: 11/01/2010
Q-IPP-006
Page 1 of 2**

**Witness: Richard C. Labrecque
Request from: Wood-Fired Small Power Producers**

Question:

PPA Section 22.1(iv) states that "interpretation and performance" of the PPA is controlled by "future laws."

- a. Does PSNH understand that it would be bound to continue to pay for RECs, energy or capacity under the PPA if any such "future law" were to:
 - i. preclude or otherwise limit full cost recovery of the amounts to be paid for any or all of RECs, energy, or capacity under the PPA?
 - ii. eliminate or reduce the amounts of Class I NH RECs required to be purchased by PSNH under RSA 362-F?
 - iii. reduce the alternative compliance payment ("ACP") schedule, amount, or its escalation or change over time for Class I NH RECs.

Please explain your answer to each subquestion in Q. 3-6(a) and in that explanation also provide the reference to the PPA sections that inform or direct your response.

- b. If the NHPUC approves the PPA as filed and the "future laws" identified in Q 3-6(a) become effective during the PPA term, is it PSNH's understanding that the NHPUC, on its own motion, or otherwise could after notice and hearing issue an order to:
 - i. reduce the amounts to be paid under the PPA that were affected by the future law to the amount allowed under the future law or limit the recovery from PSNH ratepayers to the amounts allowed under the future law?
 - ii. reduce or eliminate the REC payment under the PPA?
 - iii. adjust the REC payment under the PPA to utilize the ACP of the future law in lieu of the Renewable Products Payment under PPA Section 6.1.2(c), including cases where the future law reduces the ACP below the ACP in effect on June 8, 2010 or any subsequent date?

Please explain your answer to each subquestion in Q. 3-6(b) and in that explanation also provide the reference to the PPA sections that inform or direct your response.

Response:

- a.
 - i. PSNH objects to this question as it seeks a legal opinion, and requires speculation regarding unspecified future legislation. The Commission's discovery process is primarily an opportunity to develop factual issues rather than to query opposing counsel on the legal support for a position.

- ii. PSNH objects to this question as it seeks a legal opinion, and requires speculation regarding unspecified future legislation. The Commission's discovery process is primarily an opportunity to develop factual issues rather than to query opposing counsel on the legal support for a position.
 - iii. PSNH objects to this question as it seeks a legal opinion, and requires speculation regarding unspecified future legislation. The Commission's discovery process is primarily an opportunity to develop factual issues rather than to query opposing counsel on the legal support for a position.
- b.
- i. PSNH objects to this question as it seeks a legal opinion, and requires speculation regarding unspecified future legislation. The Commission's discovery process is primarily an opportunity to develop factual issues rather than to query opposing counsel on the legal support for a position.
 - ii. PSNH objects to this question as it seeks a legal opinion, and requires speculation regarding unspecified future legislation. The Commission's discovery process is primarily an opportunity to develop factual issues rather than to query opposing counsel on the legal support for a position.
 - iii. PSNH objects to this question as it seeks a legal opinion, and requires speculation regarding unspecified future legislation. The Commission's discovery process is primarily an opportunity to develop factual issues rather than to query opposing counsel on the legal support for a position.

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Data Request IPP-05

Dated: 11/01/2010

Q-IPP-007

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Witness: Richard C. Labrecque
Request from: Wood-Fired Small Power Producers

Question:

Does PSNH understand that the PPA provides that the amount of NH Class I RECs available to be purchased under the PPA during its term will:

- a. not be affected by a Change in Law?
- b. be determined under and by the term of RSA 362-F in effect as of June 8, 2010? Please explain your answer and provide the references to the PPA sections that inform or direct your answer, inclusive of PPA Section 6.1.2(c).

Response:

- a. PSNH objects to this question as it seeks a legal opinion. The Commission's discovery process is primarily an opportunity to develop factual issues rather than to query opposing counsel on the legal support for a position.
- b. PSNH objects to this question as it seeks a legal opinion. The Commission's discovery process is primarily an opportunity to develop factual issues rather than to query opposing counsel on the legal support for a position.

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Dated: 11/01/2010

Q-IPP-008

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Witness: Richard C. Labrecque
Request from: Wood-Fired Small Power Producers

Question:

Is it PSNH's understanding that the PPA provides that the Renewable Products Payment (as that term is defined in the PPA) will never be less than that which would result under the ACP schedule and mechanism in RSA 362-F, as it exists on June 8, 2010, even if during the PPA term RSA 362-F's ACP schedule and mechanism were subsequently repealed or amended to produce a lower alternative compliance payment?

Please explain your answer and provide the references to the PPA sections that inform or direct your answer, inclusive of PPA Section 6.1.2(c).

Response:

PSNH objects to this question as it seeks a legal opinion. The Commission's discovery process is primarily an opportunity to develop factual issues rather than to query opposing counsel on the legal support for a position.

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Data Request IPP-05

**Dated: 11/01/2010
Q-IPP-009
Page 1 of 1**

**Witness: Richard C. Labrecque
Request from: Wood-Fired Small Power Producers**

Question:

If the Facility and/or Facility Site is transferred in the process of the stock or membership interest sale of the companies owning same, or of their respective parent companies, does PSNH understand that it may exercise its right of first refusal pursuant to Article 7 of the PPA? Please explain your response.

Response:

PSNH objects to this question as it seeks a legal opinion, and requires speculation regarding an unspecified future transaction. The Commission's discovery process is primarily an opportunity to develop factual issues rather than to query opposing counsel on the legal support for a position.

Witness: Terrance J. Large
Request from: Wood-Fired Small Power Producers

Question:

Please provide any and all documents in the possession or under the control of PSNH regarding Laidlaw's announcement on September 29, 2008 that it had reached agreement on the material terms of a contemplated 20-year power purchase agreement with PSNH, including the material terms agreed-to by such date and, if such terms are different than those contained in the PPA presented to the Commission for approval in this docket, please state how the terms differ, and describe the process pursuant to which the terms changed.

Response:

PSNH objects to this question as the documents requested would not provide or lead to relevant or admissible evidence, because the matter before the Commission relates to the actual agreement reached between PSNH and Laidlaw as opposed to the negotiations that preceded it.

This question asks for negotiation documents. The Commission has had several recent opportunities to rule upon similar requests for negotiation documents. On each occasion, the Commission has rejected such requests.

In *Public Service Co. of New Hampshire*, 89 NH PUC 226 (2004), the Commission refused to compel the production of documents related to negotiations between an electric utility and the contractor it selected to build a wood yard (in connection with plans to convert a coal-fired boiler to one capable of burning wood). The Commission ruled that, as to such confidential and competitively sensitive negotiations, and "[i]n contrast to the results of any such negotiations, we can conceive of no circumstances in which we would deem the information [to be] admissible."

Similarly, in *City of Nashua*, Order No. 24,654 (August 7, 2006), reh'g denied, Order No. 24,671 (Sept. 22, 2006), the Commission refused to compel the City of Nashua to produce information concerning negotiations leading up to an agreement with an outside contractor for the operation of the water utility system the City is seeking to municipalize pursuant to RSA 38. In that decision, the Commission noted that the standard for allowing discovery in Commission proceedings is a liberal one but is still subject to "principles of reasonableness and common sense." Order No. 24,654, slip op. at 3. The Commission observed that, "the facts that drive the Commission's ultimate decision relate to the costs themselves, as fixed by the contracts in question, regardless of how the contracting parties may have regarded them during contract negotiations and regardless of whether the assumptions that drove such negotiations are at variance with public statements." Id. at 4.

In *Verizon New England Inc.*, Order on Motions to Compel Discovery Submitted by the Office of Consumer Advocate, Order No. 74,767, June 22, 2007, the Commission noted it is an established principle that the Commission will not compel the discovery of information simply to shed light on the thinking of parties that enter into contracts subject to our review. The rule applied in these situations is that parties are entitled to obtain information in discovery if the information is "relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence." Order No. 24,654 at 3. But, because the matter before the Commission relates to the actual agreement of the joint petitioners as opposed to the negotiations that preceded it, "[w]e do not perceive circumstances in which information about the negotiations . . . would become part of the record in this proceeding." Id.

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Q-IPP-016

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**Witness: Terrance J. Large
Request from: Wood-Fired Small Power Producers**

Question:

Please provide any and all documents in the possession or under the control of PSNH regarding the final interconnection study or system impact study for the Facility performed by or in conjunction with ISO New England, including drafts of any such study and the interconnection application referenced in Mr. Large's testimony at page 3, line 3, and the total dollar cost to interconnect the Facility and to construct all required system upgrades. Please identify whether such total costs are included in the Facility total cost of \$125 million referenced in Dr. Shapiro's testimony at page 3, line 16.

Response:

PSNH objects to this question as it relates to matters that are not within the scope of this proceeding. Matters relating to the Facility's interconnection were dealt with by the N.H. Site Evaluation Committee ("NHSEC"). The NHSEC issued an Order granting confidential treatment for the System Impact Study. (See "Order on Pending Motions," NHSEC Docket No. 2009-02 dated August 19, 2010.)

In addition, the interconnection study process and eventual interconnection agreement falls within FERC jurisdiction, including applicable confidentiality provisions. FERC, via the ISO-NE tariff, prohibits the release of such matters. See ISO New England, Inc. Transmission, Markets and Services Tariff, Section II, Schedule 22, Large Generator Interconnection Procedures, Section 13.1, Confidentiality.

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Dated: 11/01/2010

Q-IPP-028

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**Witness: Terrance J. Large
Request from: Wood-Fired Small Power Producers**

Question:

If any question in this Set 5 to PSNH asks for any documents, studies, reports, workpapers, projections, analyses, reviews, evaluations, calculations, pro formas, spreadsheets, forecasts, estimates or the like in the possession or control of PSNH, and any of the foregoing exist but are not in the possession or control of PSNH, please identify which of the foregoing exist and the name and address(es) of the person or entity who or which has possession or control of it or them.

Response:

PSNH objects to this question as excessively broad and unreasonably burdensome. This would require PSNH to scour the globe looking for responsive information that is not in the possession or control of PSNH.

EXHIBIT B

Witness: Richard C. Labrecque
Request from: New Hampshire Public Utilities Commission Staff

Question:

Ref. PSNH Confidential Response to Staff 1-15. Did PSNH update its cash flow analysis to reflect alternative pricing proposals including the prices in the proposed PPA? If the answer is yes, please provide copies of those analyses and state the conclusion that PSNH reached based on the results of each analysis. If the answer is no, explain why not.

Response:

Pursuant to Rule Puc 203.08(d), PSNH has a good faith basis for seeking confidential treatment of the attachment to this response, and, intends to submit a motion for confidential treatment regarding such document at or before the commencement of the hearing in this proceeding.

The attachment to this response contains two additional cash flow analyses. Pages 2 and 3 relate to the final pricing terms in the proposed PPA. Pages 4 and 5 relate to an interim proposal in which the REC prices in years 16 - 20 were different than in the final PPA. The analyses were not the basis for any conclusions, but were used to inform additional PPA negotiations.

Note: PSNH would like to point out a potentially misleading statement in the response to STAFF-01, Q-STAFF-015. The attachment to that response contains two cash flow analyses, neither of which relate to a pricing scenario that "ultimately became what was presented in the final PPA". The analysis on Page 2 of 9 to Q-STAFF-015 relates to a purely hypothetical pricing structure that was never an actual proposal for either party to consider in the negotiations. The analysis on page 8 of 9 is very similar to the final PPA pricing structure, but includes different REC prices in years 16 - 20.

PSNH also notes that the analyses attached hereto differ from those attached to STAFF-01, Q-STAFF-015 in regard to the assumed wood prices. The STAFF-015 analyses escalated the assumed Year 1 wood price by an assumed CPI. The analyses attached to this response index the Year 1 wood price by the year-to-year change in the NYMEX natural gas forward market prices from Aug 14, 2008 (shown below).

NYMEX (\$/Mbtu)	
2009	9.11
2010	9.17
2011	8.89
2012	8.64
2013	8.45
2014	8.43
2015	8.56
2016	8.67
2017	8.78
2018	8.90
2019	9.04
2020	9.22

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Docket No. DE 10-195**

Data Request STAFF-05

Dated: 11/01/2010

Q-STAFF-004

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**Witness: Terrance J. Large
Request from: New Hampshire Public Utilities Commission Staff**

Question:

Please provide on a monthly basis: (i) the number of Class 1 RECs produced by Schiller Unit 5 in 2009 and 2010; (ii) the identity of each purchaser of those Class I RECs; and (iii) the amount bought by each purchaser.

Response:

Pursuant to Rule Puc 203.08(d), PSNH has a good faith basis for seeking confidential treatment of the attachment to this response, and, intends to submit a motion for confidential treatment regarding such document at or before the commencement of the hearing in this proceeding.

The confidential attachment contains the number of RECs produced by Schiller Unit 5 in 2009 and 2010, the identity of the purchaser, and the amount purchased.

As the response to subpart (i) is not considered confidential, it is being provided below.

- (i) Schiller 5 produced 318,945 RECs in 2009 and 263,032 RECs through October 2010.