

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

**Public Service Company of New Hampshire**  
**Least Cost Integrated Resource Plan**

**Docket DE 10-261**

**Public Service Company of New Hampshire's Motion to Compel Office of  
Consumer Advocate's Response to PSNH's Second Set of Data Requests**

Public Service Company of New Hampshire ("PSNH" or the "Company"), in accordance with Puc 203.09(i)<sup>1</sup>, hereby moves the New Hampshire Public Utilities Commission (the "Commission") to compel the Office of Consumer Advocate ("OCA") to respond to PSNH Data Requests 2-3, 2-4, 2-5, and 2-11. In support of its motion, PSNH states as follows:

1. On September 12, 2011, in accordance with the procedural schedule in this case, PSNH propounded its second set of data requests to the OCA to which OCA objected and responded on September 21, 2011. PSNH now seeks to compel OCA's response to PSNH Data Requests 2-3, 2-4, 2-5, and 2-11 so that it can understand the bases for the statements in OCA's pre-filed direct testimony in this docket which relates to the Company's Least Cost Integrated Resource Plan. PSNH has conferred with the OCA in a good faith effort to resolve this dispute informally, as required by N.H. Code of Admin. Rule Puc 203.09(i), but still has not received adequate responses to requests 2-3, 2-4, 2-5, and 2-11. The Company is entitled to understand the bases for the OCA's

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<sup>1</sup> By agreement with the Office of Consumer Advocate and as memorialized in an October 12, 2011 letter to the Commission, the Company and the OCA agreed that PSNH would have until one week from receipt of OCA's further responses to the Company's Set Two data requests to move to compel in order to minimize the number of motions filed in regarding these requests.

positions in this docket, particularly where the OCA has taken the position that the Company's LCIRP is inadequate.

2. At the outset, the Company would note that with respect to discovery, "[i]n the context of civil litigation, New Hampshire law favors liberal discovery, *see, e.g., Yancey v. Yancey*, 119 NH 197, 198 (1979), and that discovery is regarded as "an important procedure `for probing in advance of trial the adversary's claims and his possession or knowledge of information pertaining to the controversy between the parties.'" *City of Nashua*, 91 NH PUC 452, 454 (2006). Given the "liberality of the applicable discovery rule," the Commission will deny a motion to compel "only when [it] can perceive of no circumstance in which the requested data will be relevant." *Re Pub. Serv. Co. of N.H.*, 86 NH PUC 730, 730-31 (2001). For the reasons set forth below, each of the data requests seek relevant information to which the Company is entitled.

### **The Company's Data Requests**

#### **PSNH 2-3 and 2-4**

3. In his pre-filed direct testimony submitted to the Commission on July 27, 2011 in this docket, Mr. Traum testified on behalf of the Office of Consumer Advocate regarding his view of the sufficiency of the Company's planning for environmental regulatory requirements. Specifically, Mr. Traum, in an effort to support his argument that the Company had not sufficiently taken into account environmental regulatory requirements with regard to the operation of its generating assets, compared the Company's consideration of those requirements to potential operational changes made by other fossil generation owners to their fleets as result of such regulations. Testimony of Kenneth Traum at 5-7. In making this comparison, Mr. Traum cited to Canal Station and

the Tennessee Valley Authority as examples of fossil generation owners who are addressing concerns regarding the impact of environmental requirements on their facilities. *Id.* at 6. In response to the question “Do you believe that PSNH has undertaken the necessary planning process required, which other similarly situated entities are doing?,” Mr. Traum then testified that the Company is not and should have more specifically addressed “reasonably foreseeable regulatory changes.” *Id.* at 6-7.

4. Because Mr. Traum held up Canal Station as an example of a fossil generation owner who in his view is engaging in adequate planning for environmental regulatory changes, the Company asked Mr. Traum the following two data requests:

PSNH 2-3: Referencing page 6, lines 8-12: What is your understanding of the applicability of the Clean Air Interstate rule to the Canal Station in Massachusetts?

PSNH 2-4: What is your understanding of the applicability of the Clean Air Interstate rule to Newington Station?

5. In both cases, Mr. Traum responded by objecting and stating that the request sought the same information as a previously propounded request<sup>2</sup>, referred to OCA’s objection to that request<sup>3</sup>, and stated that OCA continues to object for the same

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<sup>2</sup> In its first set of data requests, the Company propounded 1-11, which asked:

Referencing page 6 lines 4-12, a study performed by Levitan for NStar, the quote from the Levitan report referred to financial challenges facing the Canal Station in Massachusetts.

a. As of the June 1, 2010 date of the Levitan report, what was the applicability of the Clean Air Interstate Rule (CAIR) to electric generating units (such as Canal) in Massachusetts?

b. As of June 1, 2010, what was the applicability of CAIR to electric generating units (such as Newington Station) in New Hampshire?

<sup>3</sup>OCA objected as follows:

a. Objection. This data request seeks a legal opinion, is overbroad and unduly burdensome, and not reasonably calculated to lead to the discovery of information that would be admissible in this proceeding. The request seeks information that is equally, if not more, available to the requester and can be undertaken by the discovering party as readily as by the OCA, and therefore is unduly burdensome.

b. Objection. This data request seeks a legal opinion, is overbroad and unduly burdensome, and not reasonably calculated to lead to the discovery of information that would be

reasons, “including that it seeks a legal opinion” and seeks “information equally available to the requester.”

6. Commission rules require that objections to data requests must “clearly state the grounds on which they are based.” Puc 203.09(g). In objecting to PSNH 2-3 and 2-4, OCA never explains why the requests are overly broad and burdensome, or why the subject addressed in the requests are not relevant to the proceeding. OCA should not be permitted to rely on these objections given these deficiencies.

7. PSNH 2-3 and 2-4 do not seek a legal conclusion. Rather, these requests seek the witness’s understanding of whether the Clean Air Interstate Rule, which was referred to in the Levitan report referenced in Mr. Traum’s testimony, has any application to Canal Station (to which he compared the Company), or Newington Station, which is the subject of the Continuing Unit Operation (“CUO”) study that is part of the Company’s LCIRP filing. OCA’s claim that the information is equally available to the Company is incorrect – what the Company seeks is Mr. Traum’s understanding of the applicability of this law since it is Mr. Traum who has contended that it is appropriate to compare the response of Canal Station to environmental regulations to the Company’s response with regard to Newington Station.

8. Disclosure of facts or data underlying expert opinions is permissible in discovery conducted during proceedings before the Commission. *City of Nashua*, 91 NH PUC at 456. “A party is entitled to disclosure of the opposing party’s experts, the substance of the facts and opinions about which they are expected to testify, and the basis of those opinions.” *Id.* (citing *McLaughlin v. Fisher Eng’g*, 150 N.H. 195, 202 (2003))

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admissible in this proceeding. The request seeks information that is equally, if not more, available to the requester and can be undertaken by the discovering party as readily as by the OCA, and therefore is unduly burdensome.

(emphasis added); *see also Porter v. City of Manchester*, 151 N.H. 30, 54 (2004). The principle stated in the *McLaughlin* case and adopted by the Commission in *City of Nashua* is derived from Superior Court Rule 35(f), *McLaughlin*, 150 N.H. at 202, which governs expert witness disclosure in New Hampshire civil litigation. As a general matter, the Commission follows the directions provided by Superior Court Rule 35 with respect to discovery. *See, e.g. City of Nashua*, 91 NH PUC at 454; *City of Nashua*, 90 NH PUC at 298. OCA should not be permitted to espouse opinions on issues adverse to the Company and then hide behind a claim that the basis for the opinion is legal in nature and thus not subject to discovery. For this reason alone, the Commission should order OCA to respond to these requests.

9. OCA will likely argue that the Company is precluded from moving to compel its response to PSNH 2-3 and 2-4 on the basis that these two requests are similar to PSNH 1-11, to which OCA objected and the Company did not move to compel. In light of OCA's objection to 1-11, the Company rephrased the request to be premised on Mr. Traum's understanding of the issue in an attempt to address OCA's objection that the request sought a legal opinion or that the information was equally available to PSNH. While the Commission rules set out a time frame for moving to compel, *see Puc* 203.09(h), the Commission rules on discovery are aimed at amicable resolution of discovery issues prior to moving to compel. PSNH issued this question as part of a second round of discovery in order to provide OCA with an opportunity to respond to the question when re-framed. There is nothing in the rules that prohibit this, and certainly to the extent the Commission interpreted its rules to require a motion to compel in lieu of a

follow up data request where the time frame for discovery provided for such, the Commission has the authority pursuant to Puc 201.05, to waive any such requirement.

**PSNH 2-5**

10. In a similar vein, PSNH submitted data request 2-5 in an effort to obtain OCA's response to a question that it had appeared to omit in its responses to the Company's set one requests. Specifically, PSNH 2-5 asked that the OCA answer PSNH 1-19(a). PSNH 1-19 asked as follows:

Referencing page 13, line 2, regarding PSNH's sole reliance on Emera to provide natural gas fuel:

a. Please identify any other suppliers, marketers or third parties with entitlements on PNGTS that you believe may provide PSNH's customers with better value than the operational and pricing provisions incorporated in the Emera fuel supply agreement with PSNH to serve Newington?

b. Have you conducted any independent assessment of the availability and value of alternative fuel supply arrangements to serve Newington? If yes, please provide any studies or memoranda addressing such benefits and costs.

OCA responded to PSNH 1-19 as follows:

RESPONSE: Objection. This data request is overbroad and unduly burdensome, and not reasonably calculated to lead to the discovery of information that would be admissible in this proceeding. This request also seeks information that is readily available to the requester, is overbroad, and therefore is unduly burdensome. This request is also argumentative and seeks to engage the witness in a written dialogue about information not included in testimony. Subject to and without waiving this objection, the OCA responds as follows:

b. No.

11. In PSNH 2-5, the Company merely asked that the OCA answer subpart (a) of the question, which it now refuses to do. OCA claims that is not obligated to answer part (a) because the Company did not move to compel its response and because OCA had objected to PSNH 1-19(a) in its entirety. On its face, the response to PSNH 1-19(a) did

not contain any answer to that subpart, and it was certainly reasonable that the Company provided OCA with another opportunity to answer the question through a set two discovery request instead of moving to compel. As indicated above, the philosophy behind the Commission's rules is to encourage parties to resolve discovery issues. Given that another round of discovery existed, the Company thought it prudent to point out that the response was missing and provide the OCA with another opportunity to respond. That OCA objected that it was not required to do so is an overly rigid view of the rules.

12. Further, OCA's objections that the request is "argumentative, overbroad, unduly burdensome and seeks information that is available to the requestor" are not valid objections in this instance, and are not adequately explained as required by Puc 203.09(g). In his testimony, Mr. Traum was explicitly critical of the Company's sole source procurement of natural gas for Newington Station, arguing that the Company should utilize competitive procurement processes rather than sole source agreements for this gas supply in order to seek the lowest possible fuel prices. Testimony of Kenneth Traum at 12-13. The Company propounded 1-19(a) in an effort to determine whether Mr. Traum was aware of any other suppliers, marketers or third parties with entitlements on PNGTS that could provide lower fuel prices. For OCA to now claim that the question is argumentative, when it is based on a premise asserted by Mr. Traum, is not persuasive. PSNH 1-19(a) is not aimed at trying to get the witness to argue with the propounder of the question, but rather seeks to understand the basis for the OCA's witness' opinion.

13. OCA's argument that the request is unduly burdensome is similarly unpersuasive. All Mr. Traum had to do was indicate that he was either aware of such suppliers and list them, or indicate that he is not aware of any. This is important factual

information for the Company to know in order to assess the basis and credibility of Mr. Traum's opinions. OCA should not be permitted to rely on Mr. Traum's opinions in this case, yet when asked whether there are any facts that substantiate such opinions, avoid answering those questions through reliance on legal objections. Because the Company is entitled to understand the basis for his views, Mr. Traum should be compelled to respond to this request.

**PSNH 2-11**

14. In his discussion regarding the Newington CUO, Mr. Traum is critical of the development of capacity revenues in the CUO study, and the decision to not include the Northern Pass Project in the CUO. Testimony of Kenneth Traum at 33-34. Specifically, Mr. Traum takes the position that "excluding the proposed HQ line completely tends to increase Capacity Revenues, Net Energy Margins, and the NPV for Newington Station" and that "a robust and balanced CUO study with a 10 year horizon cannot ignore Northern Pass..." *Id.* at 34.

15. Because Mr. Traum testified that the Northern Pass Project should have been included in the CUO, the Company sought to discover the extent of his understanding of the status of the Project. The Company first issued 1-51, which asked "To the best of your knowledge, had the NPT project received a Proposed Plan Application (PPA) Approval under Section I.3.9 as of June 2011?" OCA objected, stating that "The request is argumentative and seeks information that is equally available to the requester and can be undertaken by the discovering party as readily as by the OCA, and therefore is unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence."

16. In an effort to address OCA's objections, the Company rephrased the request in its second set of data requests, asking in PSNH 2-11: "Regarding your response to PSNH 1-51, please provide your understanding of whether the NPT Project received a Proposed Plan Application Approval under Section I.3.9 of the ISO-NE tariff? If such an approval was granted, please provide the date of the approval." OCA objected, stating that it "objected to PSNH to OCA 1-51 and our objection still stands. This information is equally available to the requester." The Commission should direct the OCA to respond. Just as is the case with OCA 2-5, Mr. Traum should not be permitted to espouse an opinion on an issue in this case as central as the adequacy of the CUO study and then be unwilling to answer discovery requests that test the extent of his knowledge on that very issue. The Company must be allowed to evaluate the bases for his opinions and test his knowledge as a matter of law and basic fairness. In addition, OCA's overly narrow view of the Commission's procedural rules should not preclude a response.

17. For the reasons stated above, the Commission should compel OCA to respond to PSNH 2-3, 2-4, 2-5 and 2-11.

WHEREFORE, PSNH respectfully requests that the Commission:

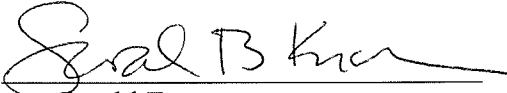
- A. Grant this Motion to Compel OCA's responses to data requests PSNH 2-3, 2-4, 2-5, and 2-11; and
- B. Grant such other relief as is just and equitable.

Respectfully submitted,

Public Service Company of New Hampshire

By Its Attorneys

Dated: October 21, 2011

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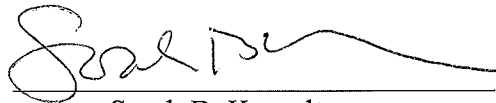
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#### **Certificate of Service**

I hereby certify that a copy of this Motion to Compel has been served electronically on the persons on the Commission's service list this 21st day of October, 2011.



Sarah B. Knowlton