

THE STATE OF NEW HAMPSHIRE
BEFORE THE PUBLIC UTILITIES COMMISSION

Docket No. DE 11-250

PUBLIC SERVICE OF NEW HAMPSHIRE

Investigation of Merrimack Station Scrubber Project and Cost Recovery



CONSERVATION LAW FOUNDATION'S OBJECTION
TO MOTION FOR REHEARING OF ORDER 25,334
OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Pursuant to Rule Puc §203.07(f), Conservation Law Foundation (hereinafter "CLF") hereby objects to the Motion for Rehearing and/or Reconsideration of Order 25,334 filed Public Service Company of New Hampshire (hereinafter "PSNH"). The Motion does not allege sufficient good reason for rehearing or reconsideration and therefore should be denied. RSA 541:3. In support of this Objection, CLF states the following:

1. This docket addresses the cost of and cost recovery related to the installation and operation of the wet flue gas desulpherization system (the "FGD System") installed and being operated in some form at Merrimack Station. The Commission has observed that "this capital project is unique, in that it is the most costly single capital addition to a generation plant in recent Commission history, and that it is made pursuant to a specific statutory mandate." Order 25,346 at p. 20, April 10, 2012.

2. PSNH's Motion addresses the disclosure of information regarding disposal of wastewater from the FGD System. The Commission has determined that issues and information addressing both the prudence and the cost of PSNH's FGD System wastewater disposal are relevant in this docket. See, e.g., *Id.*, at p.22 (stating that "the prudence of the costs incurred for such shipments [of wastewater] will be an element of the permanent phase of this proceeding");

Order 25,334 at p. 9, March 12, 2012 (stating that the “manner in which wastewater from the Scrubber is being handled is important” and relevant to PSNH’s petition for cost recovery).

3. PSNH’s Motion claims that the Commission should “clarify” its order granting CLF’s Motion to Compel by limiting information to that which “reflects” only the date, volume, location and cost of each wastewater shipment. By using the term “reflects”, PSNH seeks to preclude the parties from reviewing any “bills of lading, truck manifests, invoices, transit arrangements, and receipts associated with the disposal of wastewater.” Motion at Par. 4.¹ According to PSNH, requiring it to document the costs and the manner by which such costs, pertaining to the construction and operation of the FGD System, were incurred “would be a diversion from the purpose of this docket.” Motion at Par. 5. Apparently, PSNH believes it should only be required to list information which it compiles, and which in its discretion it sees fit to provide, as the extent of factual inquiry the parties and Staff can make into the prudence of the costs for construction and operation of the FGD System. While “representative information” (*see*, Motion at Par. 1) may have been sufficient for the temporary rate portion of the docket, the permanent rate portion requires far more detailed review and access to information, as a matter of law.

4. N.H. Code of Admin. Rule 204.04(a) provides that “[t]he staff or any party shall serve upon any other party or the staff, data requests, which may consist of a written interrogatory or request for production of documents, as necessary to evaluate a petition, application or testimony.” (Emphasis added.) The manner by which PSNH is incurring costs, including those for disposal of FGD System wastewater and for which it is seeking cost recovery, is highly relevant to this investigation.

¹ It is likely that PSNH is also seeking to prevent review of the so-called “agreements” for disposal of FGD System wastewater repeatedly referenced by PSNH witness Smagula at the hearing on temporary rates. See, Transcript of Hearing, March 12, 2012, page 63, line 16-24; page 64, line 1-17.

5. As the Commission has itself held, discovery requests should be denied only when the Commission “can perceive of no circumstance in which the requested data will be relevant.” *Petition for Authority to Modify Schiller Station Order on Pre-Hearing Motions*, 2004 N.H. PUC LEXIS 38, DE03-166, Order No. 24,310 (2004) (emphasis added). Moreover, the purpose of discovery is “to narrow the issues of the litigation ... and prevent unfair surprise by making evidence available in time for both parties to evaluate it and adequately prepare for trial.” *Kearsarge Computer, Inc. v. Acme Staple Co.*, 116 N.H. 705 (1976)(citations omitted). A party is entitled to “be fully informed and have access to all evidence favorable to his[/her] side of the issue.” *Scontsas v. Citizens Insurance Co.*, 109 N.H. 386 (1969). The extent to which PSNH has previously withheld relevant information regarding wastewater disposal costs in this proceeding is already a matter of record and is discussed in some detail in CLF’s Motion to Compel dated February 10, 2012.² The document production sought by CLF and addressed in the Commission’s Order Granting in Part Motion to Compel (Order No. 25,334) is clearly calculated to lead to the discovery of admissible evidence.

6. PSNH’s Motion does not even attempt to demonstrate that the documents which the Commission ordered it to produce are outside the legally permitted scope of discovery in this docket and thus the Motion falls woefully short of meeting the requirements of RSA 541:4. RSA 541:4 requires that a motion for rehearing “shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable.” *In Re Public*

² For example, CLF’s Motion to Compel discusses how PSNH designed and constructed the Merrimack Station FGD wastewater treatment system without first discussing with EPA whether it would satisfy Clean Water Act requirements resulting in EPA refusing to approve any such discharge. Indeed it took cross examination and a data request from the Commission during the hearing of March 12, 2012 before PSNH more fully disclosed the permits and approvals it obtained to dispose of wastewater.

Service Company of New Hampshire, 88 NHPUC 52, 54 (2003), citing to *Appeal of Coffey*, 144 N.H. 531, 534 (1999), (noting that “ambiguous and unfocussed references in a rehearing motion are insufficient to preserve these issues for appeal.”) That PSNH finds it “hard to imagine how truck manifests and bills of lading” (Motion at Par. 5) relate to the discovery of admissible evidence is not only willfully nearsighted on its part but is a far less than adequate legal basis for a finding that the Commission’s order is unlawful and unreasonable.

7. By filing the instant Motion, PSNH once again appears to be seeking to withhold relevant evidence regarding the manner by which it is disposing of wastewater and thus, the prudence of costs incurred in constructing and operating the FGD System. The relief requested by PSNH would hide from view information showing that PSNH has contracted with Enpro Services, Inc., which specializes in management and treatment of hazardous wastes,³ to remove, treat and dispose of the FGD system wastewater. In fact, Enpro sought and obtained one or more municipal permits to dispose of PSNH’s wastewater, is listed as the entity discharging the wastewater to the various municipal and state wastewater treatment facilities and is the entity being billed for such disposal. Attached as Exhibit 1 is a copy of the Discharge Permit Application, dated December 22, 2011, filed by Enpro Services, Inc. to discharge FGD System wastewater at the Allenstown Wastewater Treatment Facility and a recent invoice for such disposal, dated January 31, 2012, billed to Enpro.⁴

8. PSNH’s Motion attempts to prevent disclosure that would allow the parties to better understand the means by which PSNH is treating and disposing of wastewater, why PSNH has chosen such means and the relative merits/prudence of such PSNH decisions as they result in

³ See, www.enpro.com.

⁴ CLF provides this information as an example to demonstrate that there are circumstances whereby invoices, bills of lading, manifests, contracts, transit arrangements will bear directly on the costs and manner by which the scrubber wastewater is being disposed and thus the prudence of such costs.

ratepayer costs. Rather, PSNH seeks to limit disclosure only to a list that “reflects” the final disposal point, the volume disposed of and the costs. The Motion would have the Commission sanction such limited disclosure not only as it relates to disposal of FGD wastewater but also to other costs associated with the FGD System construction and operation. *See, e.g.,* Motion at Par. 5 (stating, “[t]o require any further level of detail regarding any and every cost associated with the Scrubber’s construction and operation will be a diversion from the purpose of this docket”). The law, however, mandates the opposite result. The information sought by CLF and which the Commission compelled in Order No. 25,334 is plainly calculated to lead to the discovery of admissible evidence. The failure to allow the parties to inquire and review documents regarding costs for which PSNH is seeking ratepayer cost recovery would contravene the rules and longstanding precedent of the Commission and would raise fundamental due process considerations.

9. In sum, PSNH’s Motion provide no legal basis for the Commission to revise its legal conclusion regarding the need for PSNH to disclose detailed information concerning installation and operation of the FGD System and disposal of FGD System wastewater. For the reasons set forth in its original decision in Order No. 25334, the Commission should deny PSNH’s Motion for Rehearing and/or Reconsideration.

WHEREFORE, CLF respectfully requests that the Commission:

- A. Deny PSNH’s Motion for Rehearing and/or Reconsideration of Order 25,334;
and
- B. Grant such further relief as it deems appropriate.

Respectfully submitted,

CONSERVATION LAW FOUNDATION

By: 

N. Jonathan Peress
New Hampshire Advocacy Center
Conservation Law Foundation
27 North Main Street
Concord, New Hampshire 03301-4930
Tel.: (603) 225-3060
Fax: (603) 225-3059
njperess@clf.org

Dated: April 16, 2012

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of April 2012, a copy of the foregoing Objection was sent electronically to the persons on the service list in this docket.



N. Jonathan Peress