

STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

Docket No. DE 11-250

Public Service Company of New Hampshire
Investigation of Merrimack Station Scrubber Project and Cost Recovery

MOTION OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE TO
COMPEL ANSWERS TO PSNH DATA REQUESTS SERVED ON SIERRA CLUB

Pursuant to Rule Puc 203.09 (i), Public Service Company of New Hampshire (“PSNH”) hereby moves the Commission to compel the Sierra Club to respond to certain data requests submitted to it by PSNH in accordance with the procedural schedule for this proceeding.

In support of this Motion, PSNH states:

1. On November 15, 2011, the Commission issued a secretarial letter stating that it would open a separate docket for the purpose of considering the Scrubber Project, including the in-service status, PSNH’s prudence, the appropriate rate treatment and the costs of the Scrubber Project. By Order of Notice dated December 1, 2011, the Commission determined that the purpose of this docket was, *inter alia*, to determine whether the costs of the Scrubber Project were prudently incurred consistent with the requirements of RSA 125-O:11 *et seq.* and are eligible for recovery through default service rates as provided by RSA 125-O:18.

2. On December 8, 2011, Sierra Club filed its Petition for Intervention.

3. On December 23, 2011, by Secretarial Letter, the Commission granted Sierra Club’s Petition to Intervene even though Sierra Club did not demonstrate “affected rights, duties, or privileges that mandate their intervention, given the particular circumstances of this

docket....” Secretarial Letter of December 23, 2011; Order No. 25,346 dated April 10, 2012, at 2-3.

4. On January 16, 2014, PSNH timely submitted data requests to the Sierra Club.

5. On January 27, 2014, Sierra Club filed objections to those requests.

6. On February 14, 2014, Sierra Club filed answers to certain of PSNH’s data requests, together with its previous objections.

7. Earlier in this proceeding, the Commission received motions to compel filed on behalf of other party intervenors. *See* Motions to Compel filed by the Conservation Law Foundation dated February 10, 2012; TransCanada dated July 16, 2012, September 11, 2012, and October 9, 2012; as well as the motion seeking to compel the deposition of Gary Long, dated August 16, 2013.

8. In those earlier motions to compel, parties to this proceeding have argued the law regarding the obligation to respond to properly submitted discovery questions. For example, in its first Motion to Compel, TransCanada noted at ¶ 5:

The standard for discovery in Commission proceedings is broad and extends to information that is relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence. *Re Investigation into Whether Certain Calls are Local*, 86 NH PUC 167, 168 (2001). The Commission will typically allow “wide-ranging discovery” and will deny discovery requests only when it “can perceive of no circumstance in which the requested data would be relevant.” *Re Lower Bartlett Water Precinct*, 85 NH PUC 371, 372 (2000). 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 opponent, and whether the evidence is in the possession of his opponent or someone else.” *Scontsas v. Citizens Insurance Co.*, 109 N.H. 386, 388 (1969).

9. In response to the prior motions to compel, the Commission has stated:

In addressing motions to compel discovery responses, we consider whether the information being sought is relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence. *See, Investigation*

into Whether Certain Calls are Local, Order 23,658 (2001) at 5. “[I]n general, discovery that seeks irrelevant or immaterial information is not something we should require a party to provide.” *City of Nashua*, Order 24,681 (2006) at 2. In Order 24,681 we stated:

In the context of civil litigation, New Hampshire law favors liberal discovery, *see, e.g., Yancey v. Yancey*, 119 NH 197, 198 (1979), and 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.’” *Johnston v. Lynch*, 133 NH 79, 94 (1990) (citing *Hartford Accident etc., Co. v. Cutter*, 108 NH 112, 113 (1967)). Consistent with Superior Court Rule 35(b) regarding the scope of discovery, we require 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.

We review the Motion and the Objection in light of these principles and the statutory directive in RSA 125-O:18 that PSNH “shall be allowed to recover all prudent costs of complying with the requirements of the [mercury emissions] subdivision in a manner approved by the public utilities commission.” We will apply a liberal approach to discovery, as we consider the parties’ legal arguments concerning the application of RSA 125-O:11-18.

Order No. 25,445 dated December 24, 2012 at 22-23; Order No. 25,398 dated August 7, 2012 at 2-3.

10. PSNH seeks an order from the Commission compelling Sierra Club to respond to questions 6, 10, 11, 25, 29 – 39, 47, 51, 52 and 59. *See* Attachment A (the relevant questions together with Sierra Club’s response to each).

11. PSNH Question Number 6 asked the Sierra Club witness the following:

Page 4: You state that prudence would “in part” consider future costs and risks. Please provide the basis for your understanding of how prudence will be determined in this proceeding. Provide any and all documents you are relying upon to support your opinion.

Sierra Club objected, asserting that the question impermissibly calls for a legal conclusion.

However, Sierra Club’s witness, Dr. Ranajit Sahu, repeatedly opined about the nature and elements of prudence in his pre-filed testimony. *See generally* Sahu Pre-Filed Testimony. For example, in Dr. Sahu’s “Summary of Testimony” he lists the three points he intends to cover. In

each point he uses the phrase “prudent utility.” *Id.* at page 3. Moreover, on the first page of his testimony, he refers to the prudence concept multiple times. *Id.* at page 4. Sierra Club cannot have it both ways. Either the witness needs to answer this question, or, since much of the witness’s testimony is replete with so-called “legal conclusions” regarding prudence, all such testimony must be stricken.

12. Question Number 10 is similar to Question Number 6. PSNH is asking the witness to clarify specific testimony about how mercury reductions supposedly could have been achieved. Sierra Club objected to this Question, asserting that it also calls for an impermissible legal conclusion. However, this testimony, as well as other testimony of this witness, ties directly to the requirements of the Scrubber Law. This witness testifies at length about supposed legal requirements applicable to Merrimack Station, and he testifies about how scrubbers work, what they are “normally installed” to do and about alternative forms of mercury reduction at Merrimack and Schiller. *See e.g.*, Sahu Pre-Filed Testimony, page 4, footnote 1. PSNH is therefore entitled to test whether the witness understands how the very law that is driving this whole proceeding functions. Conversely, if Sierra Club is correct in that this question calls for a legal conclusion, and the witness cannot or will not answer, all such testimony dealing with similar issues must be stricken because the witness is plainly not qualified to offer such legal conclusions.

13. Question Number 11 is a simple question that asks the witness to explain what he means by the phrase “current argument.” The witness is implying that PSNH has made other arguments that somehow may affect the witness’s analysis and thought process. Sierra Club objected, essentially claiming that PSNH had the information, and that it is irrelevant and unduly burdensome for PSNH to seek such information. Assuming for the moment that Sierra Club is

correct and PSNH has the information, the question nevertheless asks for what the witness means, and how the witness interprets the phrase “current argument.” Moreover, it is still Sierra Club’s obligation to say exactly where that information is located and exactly how it supports the witness’s statement, rather than leaving PSNH to guess about these points. It is not PSNH’s burden to parse the entire record to try to figure out what the witness means here. And if Sierra Club is correct that the information is irrelevant, then the testimony on this point should be stricken.

14. Questions 25 and 59 seek information about internal and external positions Sierra Club has taken regarding the pollution control projects at the “affected sources.” Sierra Club objects as follows:

Sierra Club objects to question 25 on the grounds that it is vague and ambiguous as to the terms “positions,” “taken,” “development,” and “pollution control projects,” is not reasonably calculated to lead to the discovery of evidence relevant to any cause or claim in this docket, is overly broad in that it appears to seek information unrelated to any cause or claim in this docket, is unduly burdensome, fails to be limited as to time, fails to be limited as to relevant subject matter, and improperly calls for the production of attorney-client privileged and/or work product protected materials.

Sierra Club’s Objection to Question 59 is quite similar. As a threshold matter, Sierra Club’s objections lack the specificity required by the Commission’s recent Order and the rules of discovery. For example, why is Sierra Club claiming this question will not lead to admissible evidence when the question is so obviously designed to generate information that bears on specific positions Sierra Club has taken relevant to this docket? How, precisely, is this question unduly burdensome? Are there even documents in Sierra Club’s possession that are arguably responsive and if so, why, specifically, are they privileged? Is every responsive document privileged? Where is a privilege log? PSNH is seeking this information because it is entitled to know whether Sierra Club has taken inconsistent positions with respect to those asserted by

Sierra Club here; namely, that construction of a pollution control device on a coal power plant was imprudent, that the Scrubber was not mandated, and that PSNH could have sought variances from the mandate or could have retired or divested the plant. In fact, PSNH has reason to believe that Sierra Club has taken such contradictory positions. Likewise, PSNH is entitled to know whether information in Sierra Club's possession supports or contradicts positions taken here either by Sierra Club or its witness. That information may well serve as a basis for cross-examination and could have a significant impact on the credibility of Sierra Club and/or its witness.

15. Questions 29 and 37-39 deal with fuel price forecasts and economic issues relevant to this proceeding. Sierra Club objected to these questions, essentially arguing such the inquiries are overbroad, unduly burdensome and seek information that is irrelevant. In fact, this issue has already been addressed in this docket. TransCanada filed its "Motion to Compel Public Service Company of New Hampshire to Respond to Data Requests" on July 16, 2012, arguing the following:

8. ... Similarly, PSNH did not answer questions about economic analyses and fuel price forecasts, instead arguing that the questions are based on a "faulty premise." Because the Commission is tasked in this proceeding with evaluating the prudence of the Scrubber costs and PSNH's decisions before and during the course of the Scrubber construction, responses to these questions are relevant to this evaluation or will lead to the discovery of admissible evidence. Therefore, the Commission should direct PSNH to respond to the questions.

Indeed, the Commission agreed with TransCanada, granted its motion to compel, and ordered PSNH to respond to all questions about economic analyses and fuel price forecasts. Order No. 25,445 at 26-27. PSNH now seeks identical information in the possession of Sierra Club. Sierra Club cannot claim that such economic analyses and fuel price forecasts are irrelevant to this proceeding and will not lead to the discovery of admissible evidence.

16. PSNH Questions 30 through 36 to Sierra Club are substantially the same as questions TC 1-6, 1-7, 1-9, 1-10, 2-2, and 2-3 asked of PSNH by TransCanada. Those questions were included in TransCanada's first Motion to Compel. In Order No. 25,398 at pages 11-18, the Commission discussed these questions and determined that responses from PSNH were required. As the Commission has already ruled on these questions, PSNH seeks a similar order compelling responses from Sierra Club.

17. Question Number 47 deals with the Sierra Club argument that PSNH had other options rather than building the Scrubber, including divestiture. Since Sierra Club has maintained that position, PSNH is entitled to explore whether Sierra Club has any evidence or information concerning those alternatives, the extent to which those other alternatives were in fact real and viable, and what the consequences of implementing such alternatives might have been.

18. Question Number 51 requested Sierra Club's views on the potential public interest benefits of the Scrubber. Sierra Club has questioned the benefits of pursuing the construction of the Scrubber. The underlying legislation contained a number of public interest findings, including that the installation of the Scrubber was in the public interest and that the requirement for such installation represented a careful, thoughtful balancing of cost, benefits, and technological feasibility. RSA 125-O:11. Question 51 seeks responses regarding potential public interest benefits that are relevant to the testimony submitted by Dr. Sahu on behalf of Sierra Club.

19. Question Number 52 asked whether Sierra Club is intending to challenge in any manner the final reports produced by Jacobs Consultancy Inc., which was retained by the NHPUC to monitor and report on PSNH's Clean Air Project at Merrimack Station, and if so,

Sierra Club was asked to specify the basis for any such challenge. Sierra Club objected on the basis that the question is vague and ambiguous, impermissibly calls for legal conclusions, and that it calls for the production of attorney work product or attorney-client protected materials. The Jacobs Report addresses an issue that must be resolved in this proceeding; namely, the prudence of the costs incurred in actually constructing the Scrubber. While the Sierra Club and others raise a different issue; that is, whether it was prudent to incur any costs, if that issue is resolved in PSNH's favor, then the prudence of the costs incurred in complying with the mandate to construct is the sole remaining issue. The Jacobs Report addresses that issue, and PSNH is entitled to know whether Sierra Club has any basis to challenge the report by the Commission's expert consultant. PSNH is entitled to a response to this question as it is directly relevant to this proceeding.


20. Pursuant to Rule Puc 203.09(i)(4), PSNH certifies that it made a good-faith effort to resolve the discovery matters discussed herein informally. PSNH and Sierra Club are continuing these efforts and hope to resolve a portion of this dispute in the near-term. If those efforts are successful, PSNH will amend this motion accordingly.

WHEREFORE, PSNH respectfully requests that the Commission order Sierra Club to provide complete and responsive answers to Question Numbers 6, 10, 11, 25, 29–39, 47, 51, 52 and 59.

Respectfully submitted,

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Dated: February 21, 2014

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Certificate of Service

I hereby certify that a copy of this Motion has been served electronically on the persons on the Commission's service list in this docket in accordance with Puc 203.11 this 21st day of February, 2014.

A handwritten signature in black ink, appearing to read "Robert A. Bersak", written in a cursive style.

Robert A. Bersak