

**THE STATE OF NEW HAMPSHIRE  
BEFORE THE  
NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION**

**DE 11-250**

**PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE**

**Investigation of Merrimack Station Scrubber Project and Cost Recovery**

**Motion Regarding Outstanding Discovery**

NOW COMES TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast Inc. (together, “TransCanada”), and respectfully requests that the Public Utilities Commission (“Commission”) take the steps outlined below to obtain additional information about Public Service Company of New Hampshire’s (“PSNH”) responses to data requests in this docket. In support of this Motion, TransCanada states as follows:

1. In this case, PSNH seeks recovery of a \$422 million expenditure. The Commission ruled that certain forecasting information held by PSNH *as well as its parents and affiliates* was relevant to this proceeding. The Commission required PSNH to provide the same. *See* Order 25,445 (Dec. 24, 2012) and Order No. 25,718 (Sept. 17, 2014). During the course of the hearing on the merits, PSNH referenced responsive documents in exhibits it placed into the record but did not produce in discovery. While some additional information related to forecasts was provided during the hearings, it remains unclear whether all relevant information has been produced to date, even though the hearing has closed. At this juncture, TransCanada asks that the Commission take steps to determine whether PSNH met its discovery obligations during the pendency of this proceeding.

**A. Summary of PSNH Production Associated with Forecasting Information**

2. In December 2012, the Commission ordered PSNH to respond to a number of data requests, including TC 1-2, which requested “all fuel price forecasts available to PSNH at the time of its initial decision to construct the flue gas scrubber at Merrimack Station.” Order No. 25,445 (Dec. 24, 2012). PSNH’s response included several unlabeled, undated charts. *See* Tr. Ex. 20-16, bates page 159-226. The discovery response included *five pages of natural gas forecasts* at bates pages 167, 169, 170, 171, and 172 (the only other reference to natural gas prices was a page regarding NYMEX futures). During his deposition, Mr. Long was asked about PSNH’s response to Data Request TC 1-2, but he was unable to provide any information about those documents. *See* Tr. Ex. 27 at 73:10-76:22.

3. Energy Ventures Analysis (“EVA”), a consulting firm<sup>1</sup> was also referenced by PSNH in one data response, TC 3-6. That response shows “EVA” in the far right hand column of a gas price comparison chart and indicates, in notes, “Used EVA (Feb 2008 forecast) for 2014-2018 delivered gas” and “Used EVA growth rate to derive 2019-2020 delivered gas (Boston citygate).” *See* Tr. Ex. 23-15 at bates page 668. The data in TC 3-6 and the data in TC 1-2 appear to be correlated even though the charts in TC 1-2 are not labeled or dated.<sup>2</sup>

4. On September 17, 2014, the Commission ordered PSNH to respond to similar data requests associated with its rebuttal testimony. Order No. 25,718 (Sept. 17, 2014). These requests included production of: “price forecasts ... produced by or

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<sup>1</sup> *See* <http://evainc.com> (last visited Oct. 28, 2014). It should be noted that these five pages did not reference EVA or Energy Ventures Analysis.

<sup>2</sup> The “annual” value in TC 1-2, at trial exhibit 20-16, bates page 172 is the same as the “NE Gas (EVA)” value at trial exhibit 23-15, bates page 668.

available to PSNH, its affiliates, or parent company from 2005 through 2011” (TC 6-38 and TC 6-208) and documents “in PSNH’s possession, or in the possession of PSNH’s affiliates or parent company regarding the forward market for natural gas delivered to New England in the 2008 – 2011 timeframe.” (TC 6-39 and TC 6-209). *See* Tr. Ex. 35.

5. In response to these requests, PSNH indicated as follows:

During the recent technical session, this response was updated to reflect a period through 2011. With that, PSNH and its parent company do not produce fuel forecasts. Please see TC01-002 SP-01 which provided the fuel price forecasts available to PSNH in 2008 including NYMEX (natural gas) and broker (coal) forward fuel price quotations from June, 2008, and fuel price forecasts (various) received from industry consultants in February, March, July, and August, 2008.

The company has subscribed to industry consultants over the period requested; however as part of a record retention process does not have files prior to 2007. J.D. Energy provided coal price forecasts for the period 2005 to 2011. Attached below is J.D. Energy information for years 2007 through 2011. ICAP provided daily pricing which is not retained. CERA had provided natural gas and power pricing forecasts until 2007. Oil and natural gas forecast pricing available to the company was NYMEX, publically available, which is updated daily.

*See* Tr. Ex. 35. The Company provided **only coal** forecasts in response to this request.

*Id.*; *Transcript of Hearing on the Merits in DE 11-250*, Day 1 AM at 94:10-98:15

[hereinafter “Tr. Day \_ AM/PM”]. On October 10, 2014, PSNH also produced a group of documents which included a 2013 EVA report that included text and a variety of charts and predictions and that looks substantially different from the tables that PSNH represented were from EVA. Tr. Ex. 36.

6. Therefore, as of the beginning of the merits hearing, PSNH had produced only five pages of natural gas forecasts referencing the time frame that the Commission deemed relevant to this proceeding. *See* Tr. Ex. 20-16, bates page 159-226.

**B. Public Information Regarding PSNH and Affiliate Reliance on Forecasting Comes to Light**

7. Despite the fact that it produced only one EVA forecast prior to the hearing (the unlabeled forecast that we now know is from February 2008), PSNH relied on documents referencing those forecasts during the hearing on the merits.

8. First, Mr. Large attached to his rebuttal testimony a PSNH October 15, 2010 filing in Docket DE 08-103 that clearly relies on EVA data. Tr. Ex. 23-13, bates page 663. The attachment further references “PSNH’s most recent 5 year forecast (2011-2015).”<sup>3</sup> Mr. Large’s testimony expressly references the sections of the October 15 filing that concern the EVA forecasts. Tr. Ex. 23 at 5:25-30 (concerning project impacts on rates); *see also* Tr. Ex. 23-13 at 8-9. The attachment itself was provided to the Commission in 2010. *See Correspondence from Robert A. Bersak to Debra A. Howland* (Oct. 15, 2010) in Docket DE 08-103.

9. In addition, at the merits hearing in this docket, PSNH itself introduced Exhibit 73, which is PSNH’s 2007 Least Cost Integrated Resource Plan (“LCIRP”). Page 160 of the LCIRP indicates “PSNH contracts with a consultant (Energy Ventures Analysis or “EVA”) to provide a *quarterly* long-term forecast of commodity market prices which PSNH converts into forecasted energy prices.” Tr. Ex. 73 at 160 (emphasis added). The LCIRP explicitly relies on EVA forecasts to draw conclusions relied upon in the Plan. *See, e.g., id.* at 162-163. The LCIRP was submitted to the Commission in Docket DE 07-108 under the signature of Mr. Large, and Mr. Large testified in support of the LCIRP in Docket DE 07-108. *See Docketbook for DE 07-108.*

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<sup>3</sup> Undersigned counsel has no further information regarding this forecast, or what is meant by the phrase “PSNH’s most recent five-year forecast.” If there is a “most recent 5 year forecast” it seems likely that there is also a less-recent 5 year forecast. In its response to TC 6-38, PSNH indicated that “PSNH and its parent company do not produce fuel forecasts.” Tr. Ex. 35.

10. During the instant proceeding, it also became clear that at least one PSNH affiliate, Yankee Gas, referenced EVA forecasts and market changes during 2008 and 2009 directly in one of its public documents. Counsel for TransCanada found that document on the Connecticut Public Utilities Regulatory Authority website the day before hearings began and introduced it on day one of the hearing. This document indicates that “The Company uses Energy Ventures Analysis, Inc. (or ‘EVA’) forecasts of retail and wholesale energy prices in its forecasting process,” and references low gas prices as well as unconventional (shale) gas as impacting natural gas prices. Tr. Ex. 37. The Yankee Gas documents at Trial Exhibit 37 provide commodity forecasting information, would have been responsive to Data Requests 6-38 and 6-39, and indicate on their face that PSNH’s affiliates had knowledge of the market changes that are at issue in this case. However, those documents were not produced in the course of discovery.

11. Except for the five pages of natural gas forecasts produced with TC 1-2 (that we now know are February 2008 EVA forecasts), no natural gas forecasts were produced by PSNH before the beginning of the merits hearing.

**C. Supplemental Discovery Provided During the Proceeding**

12. The above-referenced public document citations to particular forecasting information led to requests for PSNH to revisit the discovery process. On Wednesday, October 15 (day two of the merits hearing), after TransCanada’s counsel had introduced the Yankee Gas document referenced above and requested that PSNH comply with its obligation to provide discovery associated with PUC Rule 203.09(k), PSNH’s counsel indicated that he did not know whether PSNH had called its various affiliates to determine whether it had obtained all of the relevant information. Tr. Day 2 AM at 5:21-

6:8. PSNH's counsel then indicated on the record that PSNH had already produced the "Energy Venture [sic] documents" that were requested. On Friday, October 17th (day four of the merits hearing and three days after the Yankee Gas document was provided to PSNH and after PSNH had introduced the LCIRP document noted above and TransCanada's counsel had pointed out the reference to PSNH contracting with EVA for a "quarterly long term forecast"), PSNH's counsel again indicated that it had already provided the 2008 EVA forecasts. Tr. Day 4 AM at 10:7-8 ("Mr. Hachey had the EVA forecast for 2008"). Later that day, a different attorney representing PSNH indicated that they had found additional documents and apologized for not providing them sooner. Tr. Day 4 PM at 4:17-5:6.

13. On the evening of October 17<sup>th</sup>, after the fourth full day of the merits hearing, PSNH's counsel sent the parties scanned copies of some EVA forecasts that were responsive to TC 6-38 and 6-39.<sup>4</sup> Despite the LCIRP reference to a contract for quarterly forecasts, the parties received a number of hand-labeled tables purporting to be from 2007 through 2011 (with no narrative resembling Tr. Ex. 36 noted above). Included in this information was one set of tables labeled in handwriting as February 2008 and another set labeled in handwriting as November 2008. In other words, the information provided for 2008, a critical year in this docket, was not quarterly. On the afternoon of Monday, October 20, PSNH produced additional forecasts which were apparently included in presentations at Northeast Utilities and Yankee Gas. Those presentations were dated October 22, 2009, November 24, 2009, January 21, 2010, and July 15, 2011. No presentations from before October 2009 were produced.

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<sup>4</sup> These included some forecasting information from March 2005, August 2005, March 2006, September 2006, March 2007, August 2007, February 2008, November 2008, March 2009, August 2009, October 2009, March 2010, July 2010, September 2010, February 2011, and August 2011.

14. From the above, it appears that PSNH knew or should have known that it had EVA forecasting information for the time frame in question. Three separate public documents referenced that information, including two that PSNH itself entered into the record in this edocket, and PSNH's own witness submitted one of those documents as an attachment to his testimony. PSNH's counsel has indicated that the reference in the 2007 LCIRP is what permitted it to find the relevant forecasts. Tr. Day 4 PM at 4:17-5:6. PSNH also indicated that its document retention policy would have required it to maintain the forecasts from 2007 to present. Tr. Ex. 35.

15. Further, even though the fuel forecasts were referenced in public documents that are electronically available on the New Hampshire PUC and Connecticut DPUC websites, PSNH's counsel indicated that the forecasts could not be found via electronic searches. Tr. Day 4 AM at 10:20-24 ("[T]here's no way to look for them electronically. So, there's no way that we could do a word search that would pull these up in an electronic format . . . ."); Day 4 PM at 7:4-12 ("These are not things we could have found through electronic discovery. As everyone who's been through electronic discovery knows, it has its advantages and disadvantages. You can see where you've been and haven't been, and you can probably find things easier. This is finding something in a file, like Mr. Bersak said."). It is unclear whether PSNH performed *any* electronic searches for the documents or electronic mail referencing the documents at issue.

#### **D. Continuing Unknowns & Next Steps**

16. To be clear, TransCanada is asking that the Commission consider whether PSNH properly undertook to meet its discovery obligations. At its heart, this case is about PSNH's request for recovery of \$422 million expenditure from ratepayers. As this

Commission has ruled, PSNH had an obligation to produce the forecasts that it, its parent, and its affiliates had during the relevant time period. *See* Order 25,718 (Sept. 17, 2014).

17. As a result of the references to forecasts that PSNH itself made in public documents and were then brought to PSNH's attention, PSNH has produced some information available to it and at least one of its affiliates. It is unclear whether the information that was produced is complete and includes responsive documents held by all PSNH affiliates during the relevant time periods, including not only PSNH and Yankee Gas, but also Connecticut Light and Power, NSTAR Electric, Western Massachusetts Electric Company, and NSTAR Gas. This is particularly uncertain because NSTAR and Northeast Utilities merged in 2012, so NSTAR affiliates may have had different forecasts. As described above, it appears that PSNH did not undertake an electronic search to aid it in finding relevant documents.

18. While its October 21, 2014 letter in this docket purports to respond to questions raised about discovery, PSNH does not directly respond to the process-related issues concerning what steps it took to find relevant documents during the discovery process. It remains the case that in the course of normal discovery PSNH failed to produce documents that are clearly referenced in Docket DE 08-103 and the LCIRP sponsored by Mr. Large – documents that PSNH itself sought to introduce in this docket. We know that Yankee Gas also referenced forecasts in its public pleadings.



19. As such, TransCanada asks that the Commission consider what steps PSNH took to meet its discovery obligations, given the above-referenced facts, circumstances, and questions. This request includes consideration of:

- A. A full and clear description of each step PSNH took to respond to the data requests at issue, including the names and titles of all individuals involved in reviewing the data requests, gathering information to respond to the requests, providing answers to questions relating to the data requests, and developing responses to the data requests at issue. In addition, PSNH should provide a summary of each person's involvement in development of discovery responses and/or the search for and production of relevant materials;
- B. A full and clear description of the electronic document search that was conducted for forecasts held by PSNH, Northeast Utilities, and PSNH's affiliates, and, if an electronic document search was not conducted, an explanation of why that did not occur;
- C. Produce cop(ies) of any contract that PSNH, Northeast Utilities, or any PSNH affiliate held with EVA or any other vendor for energy forecasting information;
- D. If in fact the contract calls for quarterly forecasts to be provided to PSNH as indicated in the LCIRP an explanation of why PSNH has only produced two sets of tables for 2008;
- E. An explanation of why the information that was produced does not resemble Tr. Ex. 36;
- F. Produce a copy of any document retention policy that would apply to PSNH, Northeast Utilities, and any PSNH affiliate; and
- G. If PSNH claims that the relevant documents were destroyed, a full and clear explanation of what documents were destroyed, who destroyed them, and when they were destroyed.

Once these questions, and perhaps others, are answered, the Commission can determine whether any further steps are required.

20. Although Staff does not at this time take a position on the facts as recited in TransCanada's motion or on the specific questions that should be addressed, Staff supports TransCanada's request that the Commission conduct further inquiry into the issues raised.

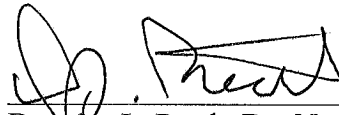
21. The Office of Consumer Advocate supports this motion.

WHEREFORE, TransCanada respectfully requests that this honorable  
Commission:

- A. Take the steps it deems appropriate to obtain responses to the questions enunciated above; and
- B. Grant such further relief as it deems appropriate.

Respectfully submitted,

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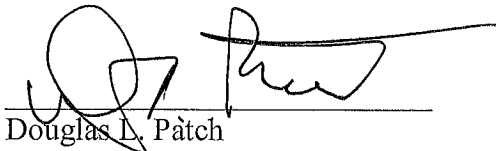


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October 31, 2014

Certificate of Service

I hereby certify that on this 31st day of October, 2014 a copy of the foregoing motion was sent by electronic mail to the Service List.

  
Douglas L. Patch