

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 14-238

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Determination Regarding PSNH's Generation Assets

Order Denying Terry Cronin's Motions to Compel

ORDER NO. 25,837

November 3, 2015

In this order, we deny Mr. Cronin's motions to compel responses to data requests because they do not seek information that is relevant to this docket.

I. PROCEDURAL HISTORY

On June 10, 2015, Public Service Company of New Hampshire, d/b/a Eversource Energy (Eversource), filed with the Commission a "Restructuring and Rate Stabilization Agreement" (Settlement Agreement) and a motion seeking its expedited approval. Eversource and the other parties to the Settlement Agreement (together, the Settling Parties) assert that it resolves the issues in this docket and in Docket No. DE 11-250. The Commission issued a Supplemental Order of Notice indicating that the Settlement Agreement raises new issues, including "whether divestiture, either under the terms and conditions of the Agreement or otherwise, is in the public interest." Supplemental Order of Notice at 2-3. The Commission also granted several petitions to intervene, including that of Terry Cronin, an Eversource default service customer. Transcript of July 9, 2015, Prehearing Conference at 8, 10.

The Settling Parties filed testimony in support of the Settlement Agreement in June and July. The non-settling parties, including Mr. Cronin, filed data requests on that testimony and Mr. Cronin made an additional data request following an August 20 technical session.

Eversource objected to six of Mr. Cronin's data requests and, on behalf of the Settling Parties, Eversource refused to answer a seventh request. Mr. Cronin filed two motions to compel, to which Eversource objected.

II. POSITIONS OF THE PARTIES

A. Mr. Cronin

Mr. Cronin's August 20, 2015, Motion to Compel (First Motion to Compel) requests an order that Eversource respond to the following five data requests:

1. Please provide a detailed listing of all costs, together with a detailed description of the purpose of the costs, associated with the installation and operations of the wet flue desulphurization project (Scrubber) project ... that PSNH seeks to recover as stranded costs. Did these project costs that you identified increase the generating capacity of Merrimack Station and if yes, by how much? Please indicate the date and accounting entries for how these costs were booked to the PSNH balance sheet, income statement and cash flow statements by month.

Mr. Cronin argues this request "appropriately" asks Eversource "to quantify the costs it expects to recover as stranded costs for the" Scrubber because "the recovery of stranded costs is the essence of this docket." First Motion to Compel at 1-2. Mr. Cronin argues that evidence proving the Scrubber costs has "to be presented in this docket ... be subject to discovery ... and be subject to cross-examination." *Id.* at 2. Mr. Cronin alleges that the Eversource testimony "does not satisfy the burden of proof" because the Commission has not found the claimed \$422 million in Scrubber costs to be prudent nor has it found the Scrubber to be used and useful. *Id.* at 3.

2. Please provide a detailed listing of all costs associated, together with a detailed description of the purpose of the costs, with the Capitalized Projects as well as the Projects Charged to Operation and Maintenance for the Merrimack Unit 2 during the major unit inspection outage that began on April 1, 2008 and ended on May 22, 2008. *See* Docket No. DE 08-145, Data Request TS-01, Dated: 02/09/09, Q-STAFF-002. Did these project costs that you identified increase the generating capacity of Merrimack Station and if yes, by how much? Please explain whether PSNH seeks or sought to recover these expenses as stranded

costs. If considered stranded costs by PSNH, then please indicate the date and accounting entries for how these costs were booked to the PSNH balance sheet, income statement and cash flow statements by month.

6. Please provide the actual power consumption of the Scrubber in megawatts by year since 2009.

7. Please explain the changes in resource capabilities at Merrimack Station (1 and 2) by year since 2009 as detailed on the attached excel spreadsheet (TC-1).

Mr. Cronin argues that requests 2, 6, and 7 address whether Eversource “increased the generating capacity of Merrimack station beyond that authorized by RSA 125-O:13, IV in violation of RSA 369-B:3-a.”¹ First Motion to Compel at 4. If so, according to Mr. Cronin, Eversource “cannot recover the costs as stranded costs.” *Id.* Therefore, argues Mr. Cronin, he is “entitled to discover the facts regarding the increases in Merrimack station generating capacity between 2009 and 2014 and the [Scrubber’s] parasitic load ... during that period.” *Id.* at 5.

Mr. Cronin acknowledges that Request 2 “focuses on Docket No. DE 08-145 in which the Commission examined the installation of the new turbine at” Merrimack station, but that the Commission’s order in that docket “specifically noted that the turbine replacement and any increase in capacity is subject to [traditional retrospective] prudence review.” *Id.*; see *Freedom Logistics*, Order No. 25,008 at 12 (Sept. 1, 2009) (“The turbine replacement and the resulting increase in capacity is, however, a matter related to the prudence of PSNH’s operation and maintenance activities, which is the subject of Docket No. DE 09-091 and traditional retrospective review”).

3. Please provide a detailed listing of all legal costs associated with Docket No. DE 14- 238, Determination Regarding PSNH’s Generation Assets and Docket No. DE 11-250, Investigation of Scrubber Costs and for any civil actions related to the matters in these dockets that PSNH has recovered or seeks to recover from ratepayers.

¹ “Prior to any divestiture of its generation assets, PSNH may modify or retire such generation assets if the commission finds that it is in the economic interest of retail customers of PSNH to do so and provides for the cost recovery of such modification or retirement.” RSA 369-B:3-a, IV.

Mr. Cronin criticizes Eversource for “endlessly litigat[ing] critical issues at rate payer expense in critical dockets ... without accountability for the costs of the litigation to rate payers.” First Motion to Compel at 6. Mr. Cronin argues that he needs information on Eversource’s legal costs because the Commission “must critically examine those costs to determine which should be borne by Eversource Energy shareholders and which should be borne by rate payers.” *Id.* at 6-7.

Mr. Cronin’s First Motion to Compel also seeks an order compelling a response to the following question directed at all the Settling Parties, which Eversource refused to answer on their behalf:

1. Please provide a record by year of any settling party donations or in-kind contributions made to any other settling party involved in this case since Electric Utility Restructuring of 1999.

Mr. Cronin alleges the Settlement Agreement is a “political deal” that is “very favorable” to Eversource and that “ordinary rate payers are entitled to know what contributions were made by the ‘Settling Parties’ and to whom” First Motion to Compel at 7.

Mr. Cronin filed a second motion to compel further responses to a single supplemental data request that followed a technical session (Second Motion to Compel). The request is reproduced below, followed by the responses Eversource initially provided:

[Q:] When did Eversource Energy decide that it wanted to avoid final disposition of the prudence determination of the scrubber project in DE 11-250 by settlement?

[A:] Please see PSNH’s “Motion to Stay Proceedings” dated December 26, 2014, docketed in Docket No. DE 11-250.

[Q:] Who made the decision?

[A:] The decision to request the opportunity to seek a collaborative resolution to the myriad issues that are under consideration in the Dockets identified in PSNH’s referenced “Motion to Stay Proceeding” was made by PSNH management.

[Q:] Please provide the contact information for those parties.

[A:] PSNH's attorneys of record for this proceeding are Robert A. Bersak and Matthew J. Fossum. Any contact with the Company should be initiated through such counsel.

[Q:] Was the decision part of company planning processes?

[A:] The reference to "company planning processes" is vague. The bases for the Company's request to stay the proceedings are set forth in the referenced "Motion to Stay Proceedings."

[Q:] Please provide each and every document, including electronic documents, referring to the decision to ask the Commission to defer disposition of the prudence determination.

[A:] Please refer to the monthly updates filed with the Commission by PSNH pursuant to PUC Order No. 25,755 dated January 15, 2015, available from the NHPUC's web docket book for Docket Nos. DE 11-250.

[Q:] Please also provide all Merrimack station planning documents dating back to January 1, 2008, prior to the "Plan" filed in DE 10-261 or to the commencement of the construction of the scrubber project, whichever was earlier.

[A:] The reference to "planning documents" is vague. "Plan[s]" filed prior to the referenced DE 10-261 filing are available from the NHPUC web docket book. The Company's most recent filing prior to the one in DE 10-261 was made on September 28, 2007, and was docketed as DE 07-108.

A copy of Eversource's responses is attached to its September 22, 2015, objection to the Second Motion to Compel (Second Objection). Mr. Cronin argues this data request addresses "the critical issue that must be decided ... before the Commission can grant recovery of stranded costs for Merrimack Station: When did Merrimack station become uneconomic to operate in relation to the construction of the scrubber?" Second Motion to Compel at 2. Mr. Cronin argues Eversource's answers are insufficient.

B. Eversource

Eversource generally objects to all of the questions at issue in both motions to compel on the grounds of relevance and materiality. *See* August 3, 2015, letter to Mr. Cronin (August 3 letter), attached to Eversource's August 21, 2015, objection (First Objection); and Second Objection at 3. Eversource also raised the following specific objections and responses to Mr. Cronin's motions.

Regarding Mr. Cronin's requests related to the Scrubber and the turbine installed at Merrimack Station in 2008 (Cronin 1, 2, 6, and 7), Eversource states that:

Mr. Cronin seeks to up-end the settlement process that ... the Legislature expressly promoted by seeking to reopen myriad dockets to which he never sought intervenor status, *i.e.*, DE 08-145, "Investigation into Modifications to Merrimack Station" and Docket No. DE 11-250, "Investigation of Scrubber Costs and Cost Recovery."

Second Objection at 2. In response to the request for information about legal costs (Cronin 3), Eversource states that legal costs for this docket and for Docket DE 11-250 "will not be known" until those cases are finished and are thus speculative. August 3 letter at 2. Eversource objects to providing records "of any settling party donations ... to any other settling party" because the "information related to the question is publicly available." August 3 letter at 3.

Eversource objects to the Second Motion to Compel's request for an order that Eversource provide further answers to the six-part supplemental question because Eversource provided sufficient answers. Second Objection at 3. Eversource also argues that this request seeks irrelevant information ("Would the public interest impact of the 2015 Settlement Agreement change if employee A made the decision to engage in settlement discussions rather than employee B?"); that the Commission did not authorize a second round of discovery and the request is unrelated to questions Mr. Cronin posed during the first round; and that the request seeks information related to a confidential settlement process. Second Objection at 3-5.

Finally, Eversource challenges Mr. Cronin's assertion that the Commission must first rule on the underlying issues before addressing the Settlement Agreement, primarily the prudence of the Scrubber and whether it is used and useful. *See* First Motion to Compel at 3-4; First Objection at 2. Eversource first argues that the law generally does not require Commission resolution of a docket before considering a settlement agreement. First Objection at 3, (citing *Generic Investigation into Intralata Toll Competition Access Rates*, 78 NH PUC 283, 284 (1993) ("Rather than insisting that any stipulation match the relief that the Commission would have ordered had the matter proceeded to final decision, we will approve stipulated settlements so long as we are satisfied on balance that the settlement promotes the public interest.")). Eversource also argues that the recent legislation governing this case specifically contemplates a review of the Settlement Agreement without a final order on the merits in this docket or in Docket DE 11-250. For example, RSA 369-B:3-a, III, directs the Commission to address the Settlement Agreement first: "[i]f the commission rejects the 2015 settlement proposal or approves it with conditions that are not acceptable to the settling parties ... [then] the commission, as part of the pending expedited proceeding in Docket DE 14-238 ... shall order divestiture of all or some of PSNH's generation assets if the commission finds that it is in the economic interest of retail customers of PSNH to do so" (emphasis added).

C. Other Parties

No other parties took a position related to Mr. Cronin's motions to compel.

III. COMMISSION ANALYSIS

To prevail on his motions to compel, Mr. Cronin must demonstrate that his data requests sought facts that are relevant to this dispute, that is, facts that are admissible or are reasonably calculated to lead to discovery of admissible evidence. *Public Service Co. of N.H.*, Order No. 25,592 at 4 (Nov. 1, 2013) ("When deciding whether 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”). “[I]n general, discovery that seeks irrelevant or immaterial information is not something we should require a party to provide.”

City of Nashua, Order No. 24,681 at 2 (Oct. 23, 2006).

Mr. Cronin’s requests 1, 2, 6, and 7 seek information related to the Scrubber and the 2008 turbine replacement at Merrimack Station. The issue of the 2008 turbine is settled. In Docket No. DE 08-145 the Commission concluded the turbine was not a “modification” that required Eversource (then PSNH) to obtain prior Commission approval for its installation. Order No. 25,008 at 12 (Sept. 1, 2009). The Commission noted that the “turbine replacement and the resulting increase in capacity is, however, a matter related to the prudence of PSNH’s operation and maintenance activities, which is the subject of Docket No. DE 09-091 and traditional retrospective review.” *Id.* The Commission conducted that “traditional retrospective review” in Docket DE 09-091, a reconciliation docket. The record in DE 09-091 included costs related to “a planned outage at Merrimack Station Unit 2 to perform work including the replacement of the HP/IP turbine.” *Public Service Co. of N.H.*, Order No. 25,060 at 8 (Dec. 31, 2009). The Commission approved a settlement agreement that encompassed recovery of those turbine-related costs, implicitly finding the turbine replacement to be prudent, used and useful, and allowing Eversource to include its costs in rates. *Id.* at 15. Any dispute over Eversource’s recovery of the costs related to the 2008 turbine replacement has been resolved; Eversource was allowed to recover those costs in Order No. 25,060. Thus, evidence related to that event is not relevant here.

The prudence of the Scrubber construction and its costs are the subject of Docket No. DE 11-250. Although still pending, the evidentiary record in DE 11-250 is closed and there is no further opportunity for discovery and testimony on the prudence issues. *See Public Service*

Co. of N.H., Order No. 25,831 at (Oct. 28, 2015) (“Following more than three years of discovery and litigation, the underlying issues in this docket are well-developed and the evidentiary record related to the prudence of the Scrubber is closed.”). This docket (DE 14-238) addresses the Settlement Agreement and divestiture. Mr. Cronin cannot use this case to seek discovery of matters related to another docket where the evidentiary record is closed. His requests for information related to the prudence of the Scrubber are thus untimely and not relevant here.

Mr. Cronin’s requests for information on Eversource’s legal costs and donations among the Settling Parties are also irrelevant. The issue in this docket is whether divestiture is appropriate, either under the terms of the Settlement Agreement or otherwise. Eversource’s legal fees related to the Scrubber case, which Eversource did not seek to include in that case, have no bearing on whether divestiture is “in the public interest” or “is in the economic interest of retail customers of PSNH.” RSA 369-B:3-a, II and III. Eversource’s legal fees incurred in this case are similarly irrelevant to the divestiture issue. Such fees will become relevant only if and when Eversource seeks their recovery, which will likely occur, if at all, only near the end when Eversource has incurred the fees it seeks to recover. Thus, Mr. Cronin’s requests for information on fees in this docket are, at best, premature.

Evidence of political donations is also irrelevant. We are not charged with determining the parties’ respective motives in participating in, or objecting to, the Settlement Agreement. Each party signed for its own reasons. Rather, the Legislature directed us to measure the Settlement Agreement against the public interest standard, or to determine whether divestiture is best for Eversource’s retail customers. Whether one party made a contribution to another would not aid those analyses and thus the request seeks irrelevant information.

Finally, Mr. Cronin’s motion to compel further responses to its supplemental request is without merit. Mr. Cronin asked when Eversource decided to settle DE 11-250, who made that

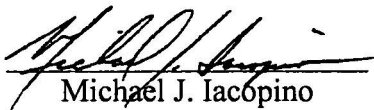
decision, and whether that decision was part of a planning process. Eversource provided answers to those requests, under objection, as quoted above. We find that the questions seek irrelevant information and will not lead to the discovery of any admissible evidence. We thus rule that Eversource need not supplement its responses.²


Based upon the foregoing, it is hereby

ORDERED, that Mr. Cronin's motions to compel filed August 20 and September 18, 2015, are DENIED.

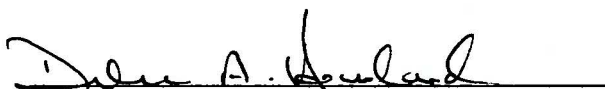
By order of the Public Utilities Commission of New Hampshire this third day of November, 2015.


Martin P. Honigberg
Chairman


Michael J. Iacopino
Special Commissioner


Kathryn M. Bailey
Commissioner

Attested by:


Debra A. Howland
Executive Director

² Because we have determined that Mr. Cronin's questions regarding settlement are outside the scope of discovery, we do not need to decide whether the questions were prohibited by the procedural schedule or whether they call for information that is confidential.

SERVICE LIST - EMAIL ADDRESSES - DOCKET RELATED

Pursuant to N.H. Admin Rule Puc 203.11 (a) (1): Serve an electronic copy on each person identified on the service list.

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