

DE 03-166

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Petition for Authority to Modify Schiller Station

Order on Pre-Hearing Motions

ORDER NO. 24,310

April 16, 2004

APPEARANCES: Linda T. Landis, Esq. and Gerald M. Eaton, Esq. for Public Service Company of New Hampshire; Jack Ruderman, Esq. for the Office of Energy and Planning; Jasen Stock for New Hampshire Timberland Owners Association; Brown, Olson and Wilson, P.A. by Bryan K. Gould, Esq. and Robert A. Olson, Esq. for Pinetree Power, Inc., Pinetree Power-Tamworth, Inc., Bridgewater Power Company L.P. and Hemphill Power & Light Company; F. Anne Ross, Esq. and Susan Weiss Alexant, Esq. for Office of Consumer Advocate on behalf of residential ratepayers; and Donald M. Kreis, Esq. of the Staff of the New Hampshire Public Utilities Commission.

I. INTRODUCTION

Four jointly appearing intervenors consisting of independent producers of electricity from wood fuel -- Pinetree Power, Inc., Pinetree Power-Tamworth, Inc., Bridgewater Power Company L.P. and Hemphill Power & Light Company (collectively, the Existing Wood-Fired Plants) – filed a motion with the New Hampshire Public Utilities Commission (Commission) on April 8, 2004 to compel petitioner Public Service Company of New Hampshire (PSNH) to respond to certain discovery requests pursuant to Puc 204.04. The motion also sought an expedited review and determination of the motion, in light of an impending merits hearing. This order grants the discovery motion in part and denies it in part.

II. BACKGROUND

The discovery dispute arises at a late stage of the proceeding. On February 6, 2004, the Commission issued Order No. 24,276 denying PSNH's petition pursuant to RSA 369-B:3-a for authority to modify Unit No. 5 of its coal- and oil-fired Schiller Station in Portsmouth

so as to permit the unit to burn wood fuel. The Order went on to specify certain conditions under which it would grant PSNH the requisite RSA 369-B:3-a authority. Extensive discovery and evidentiary hearings preceded the entry of the order.

Thereafter, PSNH and three intervenors – the Office of Energy and Planning (OEP), the Office of Consumer Advocate (OCA) and the New Hampshire Timberland Owners' Association (collectively, the Joint Movants) – filed a motion for reconsideration that, in essence, proposed new conditions under which PSNH would move forward with the Schiller project upon Commission approval pursuant to RSA 369-B:3-a. Commission Staff submitted a letter in support of the reconsideration motion. The Existing Wood-Fired Plants filed a motion for rehearing of Order No. 24,276 as well as a pleading in opposition to the reconsideration motion. PSNH submitted a pleading in opposition to the rehearing motion.

On March 12, 2004, the Commission advised the parties by secretarial letter that it would conduct additional evidentiary proceedings to consider the reconsideration motion and would hold the rehearing motion in abeyance pending decision of the reconsideration motion. The Commission specified that it would receive pre-filed direct testimony on March 19, 2004, limited to three issues: (1) the specifics of the alternative risk- and reward-sharing mechanism contained in the reconsideration motion and details of how it would work, (2) the basis for the Joint Movants' proposed upward revision in allowable capital costs associated with the project, and (3) how the Joint Movants propose to identify and quantify potential revenue or cost savings from any premium paid for renewable energy from the modified Schiller unit and any fuel cost savings when wood is not used by the new boiler. The Commission scheduled a technical session for March 22, 2004, established March 25, 2004 as the deadline for any testimony in response to the March 19 submissions and scheduled an evidentiary hearing for March 25, 2004.

The Existing Wood-Fired Plants submitted a letter on March 15, 2004 inquiring whether the Commission would be taking a stenographic record of the March 22 technical session. Informed that the taking of no such record was planned, the Existing Wood-Fired Plants on March 17, 2004 filed a pleading captioned "Motion for Clarification and Motion to Modify Procedural Schedule and Motion for Expedited Review." The March 17 motion requested that the Commission (1) modify the procedural schedule to provide the same time for discovery and preparation as was allowed in the proceedings that led to the entry of Order No. 24,276, and (2) clarify the legal standard it intends to employ in evaluating the reconsideration motion.

PSNH submitted pre-filed testimony on March 19, 2004. The Commission's General Counsel convened a telephone conference of the parties on that date, at which there was agreement to cancel the March 22 technical session and seek rescheduling of the March 25 hearing to April 15, 2004. The Existing Wood-Fired Plants agreed to submit data requests on PSNH's testimony by March 30, 2004 with responses from PSNH due on April 6, 2004.

Consistent with the foregoing, on March 25, 2004 the Existing Wood-Fired Plants filed a letter indicating that (1) they had sent a letter to PSNH on March 18, 2004, requesting that PSNH produce various witnesses, documents and records for examination at the subsequently canceled March 22 technical session, (2) that PSNH had objected to some of these discovery requests, (3) that the Existing Wood-Fired Plants were withdrawing their requests of PSNH, and (4) that the withdrawal of those requests was without prejudice to their reassertion at a later date. By secretarial letter on March 25, 2004, the Commission approved the scheduling recommendations developed by the parties in their telephone conference as reported by the General Counsel.

The Commission issued a secretarial letter on April 7, 2004 noting that Staff was aware of a discovery dispute between the Existing Wood-Fired Plants and PSNH, arising out of objections interposed by PSNH to certain data requests submitted by the Existing Wood-Fired Plants in anticipation of the scheduled April 15 hearing. Accordingly, and in an effort to avoid further procedural delays, the Commission directed that any motions to compel discovery would be required to be filed by April 8, 2004. The Commission indicated that if it received any such motions, it would consider them at a hearing to be conducted on April 9, 2004.

The Existing Wood-Fired Plants submitted a motion to compel discovery on April 8, 2004. The Commission conducted a hearing on the motion on April 9, 2004. At the hearing, the Commission heard argument on the pending discovery issues.

III. MOTION TO COMPEL DISCOVERY

The discovery motion submitted by the Existing Wood-Fired Plants concerns the 48 data requests they tendered to PSNH on March 30, 2004. PSNH interposed certain general objections to these requests and specific objections to eight of them on April 5, 2004. The resulting Existing Wood Plants' motion to compel addressed each question specifically but, in general, raised four issues: (1) their entitlement to certain discovery responses notwithstanding PSNH's contention that the questions were beyond the scope of the matters to be considered at the hearing scheduled for April 15, (2) their entitlement to certain discovery responses notwithstanding PSNH's assertion of attorney-client privilege, the attorney work-product doctrine and the principle that evidence relating to settlement negotiations is protected in Commission proceedings, (3) their entitlement to certain requested hypothetical calculations, and (4) their contention that certain of PSNH's discovery responses were unresponsive to the question posed.

At our request, the parties made their arguments at hearing by addressing each of these broad issues separately. Accordingly, it is likewise appropriate to decide the motion by discussing each of these four over-arching contentions by the Existing Wood-Fired Plants. We begin, however, by laying out the general rule with respect to discovery in Commission proceedings. As we most recently articulated it, “[d]iscovery should be relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence. Therefore, we will deny a motion to compel discovery only when we can perceive of no circumstance in which the requested data will be relevant.” *Public Service Company of New Hampshire*, 86 NH PUC 730, 731-32 (2001) (citations and internal quotation marks omitted).

A. Scope

The Existing Wood-Fired Plants contend that PSNH may not resist data requests Nos. 8, 14, 16 and 48(h)¹ on the ground that they seek information that is beyond the scope of the issues we indicated were to be taken up at the evidentiary hearing on the reconsideration motion. As noted, *supra*, those issues concern the proposed method for allocating between ratepayers and shareholders the financial risks and rewards of the Schiller modification project, the basis for PSNH’s revised estimate of the capital costs associated with the project and how PSNH would identify and quantify revenues and/or cost savings associated with use of a renewable fuel (wood) by the new boiler as well as any fuel cost savings when wood is not used by the new boiler. According to the Existing Wood-Fired Plants, the Commission limited the scope of the pre-filed testimony to be submitted by PSNH as opposed to the issues to be considered at the

¹ Request No. 8 concerns PSNH’s requests for proposals and related documents with respect to construction of the wood yard at Schiller Station. Request No. 14 seeks information and documents related to PSNH’s efforts to obtain permits necessary for the project. Request No. 16 seeks any media releases by PSNH related to the project. Request No. 48(h) seeks any studies, analyses, evaluations or assessments that in any way modify PSNH’s prior evidence in this docket concerning the potential for revenue from the sale of Renewable Energy Credits (RECs) associated with the project.

evidentiary hearing. The Existing Wood-Fired Plants contend that data requests 8, 14, 16 and 48(h) are reasonably calculated to lead to the discovery of admissible evidence because they all relate to the underlying issue of whether the Schiller modification project as revised by the reconsideration motion meets the RSA 369-B:3-a standard.

In response, PSNH indicated that it had already supplied a complete response to Request No. 16 (seeking the Company's media releases concerning the project). The Existing Wood-Fired Plants indicated that they were satisfied with PSNH's representation to that effect. Accordingly, we deny as moot the motion to compel any further response to Request No. 16.

We are unable to agree with PSNH that Question No. 8, which concerns its requests for proposals to construct the wood yard that would be part of the Schiller project, is not reasonably calculated to lead to the discovery of evidence that would be admissible at the hearing on the reconsideration motion. Specifically, it is reasonable to expect that admissible evidence -- by which we mean evidence that relates to the three issues identified in the March 19 secretarial letter -- could arise out of PSNH's calculation of the total cost it expects to incur with respect to this aspect of the project and any contracts arising out of the proposals and all documents relating to concerns expressed by contractors submitting bids on the wood yards. We therefore direct PSNH to submit responses to subsections A, E, F and G of Request No. 8, which seek this information.

We acknowledge that the responses to these subsections of Request No. 8 will contain data that is confidential within the meaning of RSA 91-A:5, IV. Therefore, we will treat these responses as confidential. We further conclude that disclosing the terms of any contract or contracts actually entered into by PSNH could cause competitive harm to the Company if the terms were disclosed to the Existing Wood-Fired Plants. Therefore, PSNH may condition its

provision of executed contract documents to counsel for the Existing Wood-Fired Plants subject to counsel's agreement not to disclose the documents to their clients.

The remainder of the motion to compel discovery as it relates to Request No. 8 is denied. The remaining subsections of Question No. 8 seek information arising out of the negotiation of contracts associated with the wood yard. These negotiations are presumably confidential and competitively sensitive. In contrast to the results of any such negotiations, we can conceive of no circumstances in which we would deem information about the negotiations themselves admissible.

Requests No. 14 and 48(h), which involve permitting and revised estimates of Renewable Energy Credit (REC) revenues, are reasonably calculated to lead to the discovery of admissible evidence with respect to the three issues to be considered at hearing. Accordingly, we grant the motion as it relates to these two requests.

B. Privilege

The Existing Wood Fired Plants' efforts to compel PSNH to provide responses to Request Nos. 17, 19, 20, 41(A)(iv) and 48(a through g) turn on whether PSNH is entitled to withhold this information on privilege or policy grounds. Request No. 17 concerns consideration by PSNH's governing body concerning the revised proposal described in the reconsideration motion. Request No. 19 concerns what PSNH characterizes in its pre-filed testimony as confidential settlement negotiations that led to the reconsideration motion. Request No. 41(A)(iv) involves analyses relating to statements by the Joint Movants to the effect that certain aspects of the decision in Order No. 24,276 are complex, administratively burdensome and potential causes of future disagreements concerning methodology. Request No. 47 relates to communications among the Joint Movants with respect to the upcoming hearing on the

reconsideration motion. Subsections (a) through (g) of Request No. 48 involves information about communications among PSNH employees and the other Joint Movants concerning the substance of the reconsideration motion.

In support of this aspect of its motion, the Existing Wood Fired Plants contend that (1) they are entitled to a privilege log to allow them to evaluate the meritoriousness of PSNH's objections, (2) there is no recognized privilege that covers settlement negotiations, and (3) the Existing Wood Fired Plants are entitled to "get behind" these negotiations because there are legitimate questions about them, particularly because the reconsideration motion is not explicitly identified as or attached to a settlement agreement. According to the Existing Wood Fired Plants, these discussions may not truly have been "settlement negotiations," notwithstanding the assertions or even the actual beliefs of the Joint Movants.

In furtherance of the policy of favoring settlements in contested cases, we will not compel responses to questions designed to penetrate settlement negotiations. It is clear that the reconsideration motion sets forth what is, in essence, a settlement agreement among parties that had disagreements at the commencement of the proceeding that have now been resolved through compromise. In these circumstances, requiring PSNH to produce such information in discovery would have the effect of chilling future settlement negotiations by undermining frank and candid exchange among the participating parties. Accordingly, the motion to compel discovery is granted only insofar as it seeks a response to subsection (a) of Request No. 19 (which seeks the date on which the settlement negotiations began) and is otherwise denied as to Request No. 19 and Request No. 20 because these questions all relate to the substance of the settlement negotiations. Likewise, we deny the motions to compel responses to Request No. 41(A)(iv) (concerning evaluations and other forms of review with respect to the Joint Movants' stated

bases for seeking rehearing) and subsections (a), (b), (c), (d), and (f) of Request No. 48 (relating to discussions among the Joint Movants with respect to risk-sharing mechanisms). The motion to compel as it relates to subsections (b) and (e) of Request No. 48 is denied because they seek documents protected by the work-product doctrine.

Although PSNH objected to Request No. 17, which concerns approvals obtained within the Company and its affiliates, it provided a response. Accordingly, we deny as moot the discovery motion to the extent it seeks to compel a response to this request.

To the extent we are denying the Existing Wood Plants' discovery motion on grounds of privilege or policy, we are relying with two exceptions on the principle that settlement negotiations in Commission proceedings are absolutely protected and not on claims relating to attorney-client privilege or the work-product doctrine. With respect to our decision concerning subsections (b) and (e) of Request No. 48, however, we rely on the work-product doctrine. As a result, we do not reach the issue regarding the necessity for a privilege log in relation to the sustainability of the attorney-client privilege for our decision in any respect.

C. Calculations

The next issue we take up involves Request Nos. 32 through 37 and 43-44, which call for PSNH to perform certain calculations. We agree that requiring a party to perform such calculations are beyond the ambit of what would traditionally be considered as valid discovery, nonetheless some of the information requested could conceivably be elicited on cross-examination or requested by the Commission itself as an aid to deliberations. Accordingly, on our own motion, we direct that PSNH re-run the financial model it used to provide its response to Set No. 1, Request No. 11 of the OCA, using the various in-service dates and capital cost figures set forth in the Existing Wood-Fired Plants' request nos. 32 through 37. In our view, the

resulting information will provide an adequate response to these data requests, as well as nos. 43 and 44.

D. Responsiveness

Finally, we take up the Existing Wood-Fired Plants' arguments with respect to request nos. 5, 15, 21, 22, 29, 40 and 41(B). According to the Existing Wood-Fired Plants, the answers provided to these questions by PSNH are unresponsive to the requests as posed. We disagree, except with respect to Request No. 21. This request makes reference to two tables in the March 19, 2004 pre-filed testimony comparing the reconciliation of PSNH's Transition and Default Service under PSNH's original filing in this docket with the same reconciliation pursuant to the revised terms in the reconsideration motion. The question asks PSNH to prepare similar tables comparing the terms in the reconsideration motion to those approved in Order No. 24,276. We believe that a response to this question will be of assistance to us in our deliberations and, accordingly, we direct PSNH to prepare a response.

We note, for the record, that at the conclusion of the hearing on the Existing Wood-Fired Plants' discovery motion, PSNH raised the question of the extent of the existing Wood-Fired Plants' participation in this case in light of the relatively small impact on them. PSNH referenced an affidavit from rate analyst Rhonda Bisson that it attached to the Company's objection to the Existing Wood-Fired Plants' rehearing motion. According to Ms. Bisson, the maximum annual effect of the Schiller proposal on the total PSNH bill of all four Existing Wood-Fired Plants under a worst-case scenario is \$752. PSNH compared this figure to what it estimated to be \$80 million in payments from PSNH to the Existing Wood-Fired Plants for energy in 2002. According to PSNH, it is inappropriate to allow the Existing Wood-Fired Plants, as the sole remaining intervenors in opposition to the Schiller proposal, to continue to litigate

aggressively in an effort to prevent the project from going forward. PSNH suggested the Commission consider limiting the Existing Wood Fired Plants intervention, pursuant to RSA 541-A:32, III. Though PSNH raised the issue, it did not appear to pursue it as a formal motion. We therefore interpret the remarks as further argument from PSNH as to why the Motion to Compel should be denied. Consequently we make no specific ruling on this issue.

IV. CONCLUSION

For the foregoing reasons, and in accordance with our oral deliberations at our public meeting on April 12, 2004, we grant in part and deny in part the motion to compel discovery submitted by the Existing Wood-Fired Plants. To the extent we grant the motion, we have directed PSNH to provide responses by April 15, 2004. An evidentiary hearing on the Joint Movants Motion for Reconsideration shall be held April 20, 2004, commencing at 9:00 a.m.

Based upon the forgoing, it is hereby

ORDERED, that the motion to compel discovery submitted by Pinetree Power, Inc., Pinetree Power-Tamworth, Inc., Bridgewater Power Company L.P. and Hemphill Power & Light Company is hereby GRANTED IN PART and DENIED IN PART, as set forth more fully herein; and it is

FURTHER ORDERED, that the evidentiary hearing on the Joint Movants Motion for Reconsideration will commence April 20, 2004 at 9:00 a.m.

By order of the Public Utilities Commission of New Hampshire this sixteenth day
of April, 2004.

Thomas B. Getz
Chairman

Susan S. Geiger
Commissioner

Graham J. Morrison
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary