

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 08-077

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

**Petition for Approval of Power Purchase Agreement and Renewable Energy Certificate
Option Agreement with Lempster Wind, LLC**

Order on Motion to Compel Discovery Responses and Motion to Substitute Witnesses

ORDER NO. 24,918

December 5, 2008

I. BACKGROUND

On May 29, 2008, Public Service Company of New Hampshire (PSNH) filed a petition requesting approval of a power purchase agreement and a renewable energy certificate (REC) option agreement with Lempster Wind, LLC (Lempster) pursuant to RSA 362-F:9.¹ Constellation NewEnergy, Inc. and Constellation Energy Commodities Group, Inc. (Constellation) filed a joint petition to intervene on June 19, 2008, which was granted at the prehearing conference held on June 27, 2008.

Consistent with the procedural schedule, Constellation filed the testimony of Daniel W. Allegretti on November 1, 2008. Following the receipt of responses to the ensuing discovery requests, PSNH, on November 6, 2008, filed a motion to compel, pursuant to N.H. Code of Admin. Rule Puc 203.09(i), requesting that the Commission order Constellation to respond to certain data requests (Numbers 12, 14, 20 and 30(b)). In its motion, PSNH stated that Constellation had objected to the data requests because it claimed the information requested is not relevant or is confidential. PSNH asserted that the subject data requests elicit information relevant to this proceeding. PSNH further suggested that Constellation could request

¹ For the procedural history of DE 08-077, see Order No. 24,895 (September 17, 2008) slip op. at 1-2.

confidential treatment, redact its responses to PSNH, and provide full unredacted responses to the Staff and the Office of Consumer Advocate (OCA) consistent with Order No. 24,895 (September 17, 2008) in this proceeding.

The data requests at issue are the following:²

Request No. 12: What price has Constellation paid suppliers for power in conjunction with the purchase of RECs in New Hampshire?

Request No. 14: Is Constellation required to comply with New Hampshire's renewable portfolio standard? If yes, has it acquired RECs to be used for New Hampshire compliance purposes? If so, please detail how the number of RECs Constellation needed was determined, how such RECs were acquired, and the price paid for such RECs.

Request No. 20: Please provide the pricing and terms for power and/or RECs for any and all RFPs in which Constellation has participated as either a purchaser or bidder since 2004. Please provide all documents which study, report on, analyze, evaluate, examine, project, forecast, summarize, or refer to any RFPs for RECs, including Constellation's bid preparation in response to any RFPs and any analysis Constellation performed on bids received for which Constellation was the issuer of the RFP.

Request No. 30(b): Regarding the recent examples of long-term bilateral purchase agreements entered into by Constellation or its peers, please provide the following: b. The pricing terms for power and RECs, by amount and year.

Constellation filed an objection to PSNH's motion on November 14, 2008. Constellation claimed that the information sought by PSNH was not reasonably calculated to lead to the discovery of admissible evidence. In addition, Constellation argued that the data requests, asked for confidential information, were overly broad and unduly burdensome, or requested information that is irrelevant to this proceeding and would not be of probative value due to differences in timing and other circumstances. Constellation stated that, in reviewing the merits of PSNH's motion to compel, the Commission should determine whether the requested information is relevant to the proceeding. In addition, Constellation urged the Commission to

² From the 11/6/08 PSNH Motion to Compel.

consider the “chilling effect” that requiring its production would have on intervention by competitive suppliers in Commission proceedings.

On November 25, 2008, Constellation filed the Direct Testimony of Thomas E. Bessette and Bruce McLeish accompanied by a Motion to Substitute Witnesses. In its motion, Constellation explained that Mr. Allegretti was no longer in the employ of, nor affiliated with Constellation. Therefore, Constellation sought to substitute Mr. Bessette and Mr. McLeish who would adopt the substantive portion of Mr. Allegretti’s testimony.

II. COMMISSION ANALYSIS

In deciding a motion to compel discovery responses, we must 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 No. 23,658, 86 NH PUC 167, 168 (2001). New Hampshire RSA 541-A:33, II states in part:

The rules of evidence shall not apply to adjudicative proceedings. Any oral or documentary evidence may be received, but the presiding officer may exclude irrelevant, immaterial or unduly repetitious evidence. Agencies shall give effect to the rules of privilege recognized by law.

Our rule on evidence incorporates this statutory standard. *See*, N.H. Code Admin. Rule Puc 203.23 “[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, 91 NH PUC 452, 454 (2006).³

³ We note that we have previously determined the disposition of a Motion to Compel brought by Constellation with respect to data requests Constellation served on PSNH. *See* Order No. 24,895 (September 17, 2008).

The issue in this proceeding is whether the agreements between PSNH and Lempster (Lempster agreements) meet the public interest standard set forth in RSA 362-F:9, which allows distribution utilities to enter into multi-year agreements with renewable energy sources for the purchase of RECs. Distribution utilities may purchase RECs in conjunction with, or independent of, purchase power agreements from renewable energy sources, to meet reasonably projected renewable portfolio requirements.

Data Request 12 asks that Constellation provide the price it has paid for power in conjunction with the purchase of RECs in New Hampshire. Constellation declined to answer the question because the requested information is confidential and, Constellation explained, it does not procure RECs specifically for use in New Hampshire.

One of the issues in this docket is the reasonableness of the price of power in the Lempster agreements, and the response to data request 12 will better inform the Commission, Staff and the OCA, concerning the reasonableness of the agreed-upon power prices. While we acknowledge Constellation's statement that it does not acquire New Hampshire-specific RECs, we note that Constellation does acquire RECs that may ultimately be used for compliance with New Hampshire's Renewable Portfolio Standard (RPS) requirements (see discussion of data request 14 below). To the extent that Constellation is purchasing power along with those RECs, similar to what PSNH is proposing to do in the Lempster agreements, we find that the request for power prices may lead to admissible evidence concerning the reasonableness of the power prices in the Lempster agreements. Therefore, we will direct Constellation to respond to data request 12.

Data request 14 contains three questions. Constellation has answered the first question by stating that it is required to comply with New Hampshire's renewable portfolio standard. The

second question asks whether Constellation has acquired RECs for New Hampshire RPS compliance. In its response, Constellation explained that it has acquired RECs as part of an overall portfolio intended to comply with all of its company-wide RPS requirements. Constellation stated that it has not yet decided how to allocate RECs to the various states' RPS requirements. The third question asks Constellation to provide detail as to how Constellation determined how many RECs it needed, how those RECs were acquired, and the price of such RECs. We find that the process Constellation used to determine the number of RECs it needs is not relevant to the issues before us in this docket. Nonetheless, similar to our analysis concerning data request 12, information related to the price of RECs that Constellation has acquired may be useful in helping to evaluate the REC prices in the Lempster agreements. In addition, since the method used to obtain RECs (i.e, long-term contracts, Requests for Proposals (RFPs), etc.) is an issue in this proceeding, we believe that obtaining such information from Constellation will be informative. Therefore, we direct Constellation to answer the pricing and acquisition portions of the last question in data request 14.

Data request 20 asks Constellation to provide a variety of information regarding RFPs it may have participated in, as purchaser or bidder, since 2004. We do not find the requested information relevant to our determination of whether the Lempster agreements comply with the requirements for long term contracts under RSA 362-F:9. Therefore, we deny the motion to compel a response to data request 20.

Data request 30(b) asks that Constellation provide pricing terms for power and RECs, by amount and year, associated with "recent examples of long-term bilateral purchase agreements entered into by Constellation or its peers." In his prefiled testimony, Mr. Allegretti listed four long-term bilateral purchase agreements in support of his position that it may not be necessary to

enter into a long-term power purchase agreement to procure RECs. Constellation states in its objection to PSNH's motion to compel that the timing and circumstances of those agreements differ sufficiently from the transaction at issue in this proceeding and therefore have no probative value. In his testimony Mr. Allegretti referred to those agreements as "recent." Therefore, we will direct Constellation to supply the requested pricing information. Only upon review of the information can we determine how much weight it should be given in the current investigation.

We recognize that some of the information responsive to data requests 12, 14 and 30, may be confidential, commercial or financial information that is exempt from public disclosure under RSA 91-A, 5, IV, New Hampshire's Right to Know law. To the extent Constellation seeks such protection, it should file a motion for confidential treatment pursuant to Puc 203.08 with its responses. We further direct Constellation to provide an unredacted version of the responses to Commission staff and OCA.

Regarding Constellation's Motion to Substitute Witnesses, we find that since Constellation is not seeking to enter any new substantive testimony, the orderly conduct of the proceeding will not be affected. Therefore, we grant Constellation's motion.

Finally, we recognize that the timing of this order does not allow for Constellation to produce and other parties to analyze the data responses compelled by this order before the hearing scheduled for December 9, 2008. We will continue the December 9, 2008, hearing and ask the parties to confer and propose a new hearing date for our consideration.

Based upon the foregoing, it is hereby

ORDERED, that Public Service Company of New Hampshire's Motion to Compel is **GRANTED IN PART** and **DENIED IN PART** as set out in this order; and it is

FURTHER ORDERED, that Constellation shall file responses pursuant to this Order no later than December 12, 2008; and it is

FURTHER ORDERED, that Constellation's Motion to Substitute Witnesses is GRANTED, and it is

FURTHER ORDERED, that the December 9, 2008, hearing is continued to a date to be determined.

By order of the Public Utilities Commission of New Hampshire this fifth day of December, 2008.

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Clifton C. Below
Commissioner

Attested by:

ChristiAne G. Mason
Assistant Executive Director