

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 11-250

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Investigation of Scrubber Costs and Cost Recovery

Order Compelling Deposition

ORDER NO. 25,566

August 27, 2013

I. PROCEDURAL HISTORY

This docket considers the prudence of the costs and cost recovery for the wet flue gas desulfurization system (Scrubber) installed by Public Service Company of New Hampshire (PSNH) at its coal-fired generation plant known as Merrimack Station. On July 29, 2013, TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast, Inc. (collectively, TransCanada), the Office of Consumer Advocate (OCA), Sierra Club, and Conservation Law Foundation (CLF) (collectively, Joint Movants) moved the Commission to require Gary Long, former president of PSNH, to appear for deposition (Joint Motion). PSNH filed an objection on August 8, 2013 (Objection).

II. POSITIONS OF THE PARTIES

A. TransCanada, OCA, Sierra Club, and CLF

The Joint Movants argue that N.H. Admin R. Puc 203.09(j) requires the Commission to authorize depositions when necessary to acquire admissible evidence, and that they have a right to be fully informed and to have access to evidence favorable to their position even when that evidence is in the possession of PSNH or someone else. Because Mr. Long was president of PSNH during the time periods relevant to the Commission's prudence inquiry, the Joint Movants

assert that Mr. Long possesses knowledge of the decisions relating to what they claim are the central issues in this docket: the prudence of proceeding with the project, the prudence of resisting efforts to study the project once the costs had almost doubled, whether PSNH prudently managed construction of the Scrubber, and the prudence of PSNH's management decisions not to divest or retire Merrimack Station. The Joint Movants cite to documents that they claim show that Mr. Long's involvement in the Scrubber project was extensive and unique, which they argue demonstrate that Mr. Long has knowledge, information, and opinions on these issues that cannot be provided by any other witness, including the witnesses that have pre-filed testimony. Finally, the Joint Movants argue that, because Mr. Long did not pre-file testimony or appear at technical sessions, they have not been able to avail themselves of the discovery methods typically employed in Commission proceedings.

B. Public Service Company of New Hampshire

PSNH objects to the Joint Motion, arguing that the motion is untimely, inconsistent with Commission policy, and seeks information which is not relevant to the proceeding. PSNH recites a history of proceedings in Docket DE 08-103 and of suspended and changing procedural schedules in this docket. PSNH argues that the procedural schedules in the two dockets (DE 08-103 and DE 11-250) provided the Joint Movants with ample opportunities to engage in discovery regarding the Scrubber project, and that the Joint Movants fully utilized those opportunities by submitting data requests from December 30, 2011 through the most recent technical session on July 24, 2013. PSNH states that the Joint Movants never used the standard discovery process and waited until the last technical session to request Mr. Long's deposition. PSNH argues that this history demonstrates that the Joint Motion was filed too late in the process of this docket.

III. COMMISSION ANALYSIS

Our decisions on whether to permit a particular type of discovery are guided by a desire to seek the truth upon which our decisions must rest, a sense of procedural fairness, procedural efficiency, and prior practice. Accordingly, our rule governing discovery grants a right to conduct discovery in adjudicative proceedings to every petitioner, every person granted intervenor status, Staff, and OCA. N.H. Admin R. Puc 203.09(a). Our rule contemplates that the exchange of paper discovery will be adequate in most cases (*cf.* Puc 203.09 (b)-(i) and (k)), and will be the standard discovery process typically employed in Commission proceedings. Our rule also provides that:

The commission shall authorize other forms of discovery, including technical sessions, depositions and any other discovery method permissible in civil judicial proceedings before a state court when such discovery is necessary to enable the parties to acquire evidence admissible in a proceeding.

N.H. Admin R. Puc 203.09(j).

Parties do not have an absolute right to conduct depositions under Puc 203.09(j). Unless agreed-to by the parties, the use of depositions as a discovery tool must first be authorized by the Commission, and the Commission will only authorize a discovery deposition upon a finding that one is necessary to enable a party to acquire evidence that would be admissible in the proceeding. We construe “necessary” to impose a stringent standard. Accordingly, we have previously stated that, “We do not intend to issue subpoenas to compel deposition testimony unless a party can establish that the Commission’s standard discovery procedures are inadequate.” *Statewide Electric Utility Restructuring Plan*, 82 NH PUC 325, 327 (1997). We add here that to satisfy the “necessary” standard, the party seeking the deposition must demonstrate a substantial need for the information that is the subject of the deponent’s testimony and that the party could not, without undue hardship, obtain the information by other means. In

the administrative cases that are tried in this forum, depositions are the exception, and not the rule.

We conclude that the Joint Movants have demonstrated that our standard discovery process is inadequate in this case and that Mr. Long's testimony is necessary to obtain admissible evidence. Through documents obtained in our standard discovery process of propounding data requests based on pre-filed testimony, the Joint Movants have demonstrated that Mr. Long, as the president of PSNH, was directly and significantly involved in obtaining internal approval for the Scrubber project, including making presentations to the Northeast Utilities Risk and Capital Committee and Board of Trustees, and that his involvement in the project was extensive and unique.

The Joint Movants have been limited in probing Mr. Long's apparent responsibility for and intimate knowledge of PSNH's decision making process regarding the Scrubber project because Mr. Long did not sponsor pre-filed testimony and has not appeared at any technical sessions. To date, only Robert Baumann and William Smagula have provided testimony. PSNH would not commit as to the witnesses it would be calling to testify at hearing. Additionally, the Joint Movants state that, based upon responses to standard discovery, neither Mr. Baumann nor Mr. Smagula "were directly or indirectly involved in internal presentations and reviews of financial sensitivities and studies critical to PSNH's decisions" regarding whether to proceed with the Scrubber project or instead to divest or retire Merrimack Station. Joint Motion at 4. We find that there is a substantial need for information that may have informed PSNH's decision whether to proceed with the Scrubber project or divest or retire Merrimack Station, and that this information is relevant and likely admissible on the issues of PSNH's prudence and cost recovery. The Joint Movants allege that no other PSNH witness could provide the information

that Mr. Long possesses. We agree, and we find that his deposition is necessary to obtain that information.

We find that the Joint Movant's request for Mr. Long's deposition is timely and has no due process implications for PSNH. While the Joint Movants could have, and perhaps should have, identified Mr. Long as a potential deponent earlier in this docket, our standard of requiring a demonstration that the standard discovery process is inadequate and that the information sought could not be otherwise obtained, may at times require the paper discovery process to run its course. Had the Joint Movants not participated fully in discovery, or asked the types of questions that would lead to discovery of forecasting, financial sensitivities, and decision making, we likely would not have granted their motion. PSNH did not identify any particular harm that would result from allowing Mr. Long's deposition at this time.

We also find that the Joint Movants made a good faith effort to resolve whether Mr. Long's deposition would be taken without the need for a subpoena. PSNH was non-committal regarding who would eventually sponsor testimony, and refused upon request to voluntarily produce Mr. Long for deposition, after which PSNH filed a forceful and well-crafted objection.

This is not, however, an open-ended authorization to query Mr. Long on all matters. In fact, we agree with PSNH that much of the information that the Joint Movants cite as important is not relevant to this docket. We see no relevance to PSNH's, or Mr. Long's involvement in cooperating with the Legislature to pass the Scrubber law, or to Mr. Long's alleged attempts to block the Legislature or this Commission from looking further into whether PSNH should have proceeded with the Scrubber project. PSNH is not responsible for the Legislature's actions, nor for ours.

PSNH was only responsible for prudently exercising the management discretion that it had under the law over its continued ownership and operation of Merrimack Station, given the escalating costs of the Scrubber, changes in the marketplace, and any other financial and environmental issues that might have affected the prudence of PSNH's continued ownership and operation. We expect Mr. Long to answer questions that are relevant to, or reasonably calculated to lead to the production of evidence bearing on these central issues, without objections that are based upon legal arguments that this Commission has rejected. The scope of questions posed in this deposition shall be governed by our prior orders as well as the order issued today denying rehearing of Order No. 25,546 (July 15, 2013).

We recognize, however, the contentious nature of this case. Consequently, we will authorize a Commission employee to attend Mr. Long's deposition to address any objections or requests to compel an answer. In order to streamline the process we will require the Joint Movants to designate a single questioner for each segment of the deposition. The depositions shall be conducted in four segments, two before lunch and two in the afternoon.

Based on our review of the pleadings and accompanying exhibits, we order PSNH to present Mr. Long for deposition. We will also issue a subpoena for his attendance, as we recognize that PSNH may not be able to obtain Mr. Long's voluntary attendance on PSNH's behalf. We direct that the deposition take place at the law offices of Orr and Reno on September 9, 2013, beginning at 9:00 a.m. Parties to this docket may attend the deposition, however, only the Joint Movants, through their designated questioners, may question Mr. Long. The Joint Movants shall be responsible for providing a reporter and for all costs of the deposition, including witness and travel fees, which must be paid at the commencement of the deposition. The Joint Movants must provide electronic copies of the deposition transcript with index to all

parties and Staff at the same time that the original is presented to the Joint Movants, at no cost to the other parties and Staff.

Based upon the foregoing, it is hereby


ORDERED, the joint motion for deposition of Mr. Long is GRANTED, subject to the conditions stated herein; and it is

FURTHER ORDERED, that PSNH shall produce Mr. Long for deposition at the law offices of Orr and Reno, One Eagle Square, Concord New Hampshire on September 9, 2013, beginning at 9:00 a.m.; and it is

FURTHER ORDERED, that a subpoena shall issue compelling Mr. Long's deposition; and it is

FURTHER ORDERED, that F. Anne Ross is appointed hearing examiner to attend the deposition of Mr. Long and to address any and all disputes regarding the scope of questioning and whether to compel an answer.

By order of the Public Utilities Commission of New Hampshire this twenty-seventh day of August, 2013.




Amy L. Ignatius
Chairman



Michael D. Harrington
Commissioner

Attested by:



Debra A. Howland
Executive Director