

**STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION**

**DE 11-250**

**PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE**

**Investigation of Merrimack Station Scrubber Costs and Cost Recovery  
Order Affirming Hearing Examiner's Deposition Report and  
Suspending Procedural Schedule**

**ORDER NO. 25,592**

**November 1, 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. The Scrubber was installed pursuant to the requirements of RSA 125-O:13 (Scrubber Law).

On August 27, 2013, in Order No. 25,566, the Commission granted the motion of 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) to require Gary Long, former president of PSNH, to appear for a deposition. The deposition was conducted on September 16, 2013, with Commission General Counsel F. Anne Ross acting as Hearing Examiner, pursuant to Commission direction. On September 18, 2013, TransCanada informed the Commission that the parties had agreed to a schedule for finalizing Mr. Long's deposition transcript and requested that the docket be suspended to accommodate the proposed schedule. On September 26, 2013, the Commission issued a Secretarial Letter that adopted the schedule for finalizing Mr. Long's deposition transcript and suspended the remainder of the procedural schedule. On October 8,

2013, the Hearing Examiner assigned to the deposition filed a report of rulings she made regarding objections to deposition questions and requests for the production of documents. On October 18, 2013, TransCanada filed “Exceptions to Hearing Examiner’s Rulings during Deposition” and PSNH filed a “Response to Hearing Examiners’ Deposition Report and Objection.”

In a Secretarial Letter issued September 26, 2013, the Commission also ordered the parties to confer and, if possible, develop an agreed-upon procedural schedule for the remainder of the docket. The OCA filed a letter with a proposed procedural schedule on October 11, 2013. Pursuant to the September 26, 2013 Secretarial Letter, Staff filed a letter on October 15, 2013 expressing the view of all parties other than the OCA that a further procedural schedule should be developed following action on a notice of appeal filed by PSNH, now pending before the Supreme Court.

## **I. POSITIONS OF THE PARTIES AND STAFF**

### **A. TransCanada**

TransCanada takes exception to the Hearing Examiner’s decision not to compel Mr. Long to answer two questions. In Ruling 5 of her report, the Hearing Examiner sustained an objection to the following question:

So, I mean, I just find that hard to believe, given all the times that I know PSNH has gone to the legislature otherwise. You’re telling me under no circumstances would you have approached the legislature to change the mandate and the law, regardless of what the cost had risen to. Is that what you are saying?

Likewise, in Ruling 7 of her report, the Hearing Examiner sustained an objection to a question asking:

I’m talking about before the legislature, the PUC, anybody else, any and all times PSNH has made any efforts to try to change the effect of that provision. Again, it’s part of the mandate that says you can only recover from default service

customers. Have you made any efforts to change that? You suggested that to the legislature. Have you suggested it to the PUC?

TransCanada argues that Mr. Long should be required to respond to these questions because they seek information consistent with the Commission's characterization of PSNH's responsibility for exercising prudent management discretion and that the information being sought is relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence. TransCanada states that it is overly restrictive and inconsistent with the Commission's discovery standards to allow PSNH to argue that the Scrubber Law is a mandate while also disallowing discovery and follow-up regarding what PSNH could have done in within its management discretion to change the mandate, such as alerting lawmakers to escalated costs, changes in the marketplace, the price of natural gas, the effect on customers, or accepting a study of the economics of the project. TransCanada asserts that by arguing that the Scrubber Law is a legislative mandate, PSNH opened the door to the type of discovery disallowed by the Hearing Examiner in rulings 5 and 7. TransCanada also raises a credibility issue in that PSNH understood that it was within its management discretion to seek a legislative change to or repeal of the mandate and PSNH may have taken inconsistent positions by seeking to change the Scrubber Law's cost recovery mechanism, while never considering seeking to change the law's mandates.

TransCanada asks the Commission to direct PSNH to respond to the two questions above, or to make it clear that the parties are free to submit evidence and make inquiries about these issues during the remainder of the proceeding.

## **B. PSNH**

PSNH raises three disagreements with the Hearing Examiner's rulings regarding record requests. First, PSNH argues that Record Request 6 and Record Request 7 identified in Section

III of the Hearing Examiner's Report should be just one question limited to production of copies of reports on fuel markets received by Mr. Long in the summer and through the fall of 2008 from PSNH or Northeast Utilities, PSNH's parent company. PSNH requests that Record Request 7 be deleted and that Record Request 6 be revised to read "Requests for reports to Gary Long on fuel markets beginning in the summer of 2008 through the fall of 2008."

Second, PSNH argues that Record Request 8 does not accurately capture the request made. PSNH asserts that TransCanada's request for "those reports and any other reports that you might have used in preparation for today's deposition" is limited by a colloquy on page 97 of the transcript to "copies of all materials from or related to TransCanada used by Mr. Long in preparation for the deposition."

Third, PSNH objects to Record Request 10 which seeks production of any writing describing specific goals regarding completion of the Scrubber relating to Gary Long's or John MacDonald's compensation package. PSNH asserts that matters relating to the compensation of these officers will not lead to the discovery of admissible evidence. PSNH argues that knowledge of officer compensation, like knowledge of lobbyist compensation, will not lead to relevant information that could be admitted as evidence in this proceeding.

## **II. COMMISSION ANALYSIS**

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. *See, Investigation into Whether Certain Calls are Local*, Order No. 23,658 (2001) at 5. "[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 (2006) at 2. In Order No. 24,681 we stated:

In the context of civil litigation, New Hampshire law favors liberal discovery, *see, e.g., Yancey v. Yancey*, 119 NH 197, 198 (1979), and discovery is regarded as “an important procedure ‘for probing in advance of trial the adversary’s claims and his possession or knowledge of information pertaining to the controversy between the parties.’” *Johnston v. Lynch*, 133 NH 79, 94 (1990) (citing *Hartford Accident etc., Co. v. Cutter*, 108 NH 112, 113 (1967)). Consistent with Superior Court Rule 35(b) regarding the scope of discovery, we require parties to show that the information being sought in discovery is relevant to the proceeding or is reasonably calculated to lead to the discovery of admissible evidence.

We have reviewed the parties exceptions and objections in light of these principles of discovery and the statutory directive in RSA 125-O:18 that PSNH “shall be allowed to recover all prudent costs of complying with the requirements of the [mercury emissions] subdivision in a manner approved by the public utilities commission.”

We have previously addressed the relevance of whether PSNH pursued or blocked legislation when we ordered Mr. Long to appear for deposition. We stated:

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.

Order No. 25,566 at 5. We have also determined that it is irrelevant to our statutory analysis that the legislature considered and did not alter, amend, or study the Scrubber law in the 2008 legislative session, following an increase in projected costs, and we have found that PSNH’s lobbying expenditures with regard to Scrubber-related legislation would not lead to admissible evidence. *See* Order No. 25,398 (Aug. 7, 2012) at 12 and 15. While we recognize that PSNH had the discretion to request legislative changes or to support or oppose legislation, it is the legislature itself, and not PSNH, that is responsible for enacting law. We would be hard pressed

to second guess the legislature and determine what the law would have become if PSNH had made a particular showing before a legislative committee. Instead we will determine what PSNH's management options were under existing law. Accordingly, we overrule TransCanada's exceptions.

TransCanada has requested, in the alternative, that we rule at this point that parties are free to submit evidence and make inquiries about these issues during the remainder of the proceeding. We have already determined that whether PSNH supported or opposed enactment of the Scrubber Law and related legislation is irrelevant to our statutory analysis, and we will not allow further inquiry or submission of evidence that goes solely to that issue. We are cognizant, however, that information presented by PSNH and others before the legislature may be relevant to our determination of other facts in issue. We do not believe it appropriate to decide the relevance of such evidence in the abstract as TransCanada asks us to do here. We will make these determinations when presented with particular evidence and justification for its admissibility. Accordingly, we deny TransCanada's request in part.

We now address the issues raised by PSNH. We have reviewed the transcript of the deposition and agree with PSNH that Record Request 6 and Record Request 7 are duplicative, but we disagree with PSNH's characterization of the request. After review of the transcript, we find that Record Request 6 and Record Request 7 should be combined into one request that reads: "Requests for reports to Gary Long on fuel markets, and/or fuel markets and their effect on generation at Merrimack Station, beginning in the summer of 2008 through the fall of 2008."

With regard to Record Request 8, we do not find the limitation on the request argued for by PSNH. The request was for all reports used by Mr. Long to prepare for the deposition. We

find the request to be limited in scope and calculated to lead to the production of admissible evidence. We affirm the Hearing Examiner's determination regarding Record Request 8.

Finally, we find that any portions of Mr. Long's and Mr. MacDonald's compensation packages that were tied to specific goals for completing the Scrubber are directly relevant to the exercise of management discretion regarding completing the Scrubber. Accordingly, we overrule PSNH's objection to Record Request 10.

### **III. SUSPENSION OF THE PROCEDURAL SCHEDULE**

On September 26, 2013, PSNH filed a notice of appeal of Order No. 25,445, Order No. 25,506, Order No. 25,546, and Order No. 25,565, all of which relate to the scope of discovery in this docket. On October 11, 2013, OCA requested that the Commission save specific dates in its adjudication calendar so that this docket could go forward as soon as possible in the event the New Hampshire Supreme Court rejects PSNH's appeal. OCA argued that three factors, combined with delay in these proceedings, would work to the disadvantage of PSNH residential ratepayers: (1) there has been no ruling on the prudence of Scrubber costs while PSNH default service customers remain obligated to pay all costs of PSNH owned generation, (2) PSNH continues to lose customers to competitive suppliers increasing the cost shift to default ratepayers, and (3) uncollected Scrubber costs and carrying costs continue to accrue, and will be paid primarily by PSNH residential default service customers.

On October 15, 2013, as directed by the Commission, Staff reported that it conferred with the parties to the docket and all parties other than OCA agreed that it would not be productive to set a procedural schedule at this juncture given the uncertainty regarding the scope of this docket. In its October 18, 2013 response and objection to the Hearing Examiner's Report, PSNH

reminded the Commission that the procedural schedule has been suspended and that the parties agreed that it should remain suspended.

The Commission finds that uncertainty regarding whether the New Hampshire Supreme Court will accept PSNH's appeal makes it unproductive to set a new procedural schedule at this time. Nonetheless, the Commission is mindful that the delays in this case caused by complex legal issues, discovery disputes, and PSNH's appeal will increase carrying costs should cost recovery be allowed. Accordingly, PSNH is instructed to notify the Commission of the New Hampshire Supreme Court's decision whether to accept PSNH's appeal no later than the next business day following the court's decision. PSNH is also instructed to assemble the information requested by TransCanada at this time, and to be prepared to deliver the information to the service list for discovery materials within five business days of the court's decision if that decision is to decline PSNH's appeal. Further, if the court declines PSNH's appeal, then the Commission will establish on its own motion a procedural schedule for prompt resolution of this docket.

**Based upon the foregoing, it is hereby**

**ORDERED**, TransCanada's exceptions to Ruling 5 and Ruling 7 of the Hearing Examiner's Report are overruled; and it is

**FURTHER ORDERED**, that TransCanada's request for an evidentiary ruling is denied in part as described herein; and it is

**FURTHER ORDERED**, that Record Request 6 and Record Request 7 listed in the Hearing Examiner's Report shall be combined into one question as stated above; and it is

**FURTHER ORDERED**, that PSNH's objections to Record Request 8 and Record Request 10 are overruled; and it is

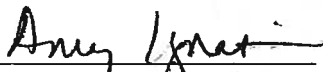



**FURTHER ORDERED**, that PSNH shall prepare responses to the record requests detailed in the Hearing Examiner's report and modified as above and shall distribute those responses to the service list for discovery materials within 5 business days following a decision by the New Hampshire Supreme Court to reject PSNH's appeal filed September 26, 2013, if so decided, and it is

**FURTHER ORDERED**, that PSNH notify the Commission of any decision by the New Hampshire Supreme Court whether to accept or reject PSNH's appeal filed September 26, 2013 no later than one business day after the court issues its decision; and it is


**FURTHER ORDERED**, that the procedural schedule in this docket shall be suspended until further order of the Commission.

By order of the Public Utilities Commission of New Hampshire this first day of November, 2013.

  
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Amy L. Ignatius  
Chairman

  
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Michael D. Harrington  
Commissioner

Attested by:

  
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Debra A. Howland  
Executive Director