STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DE 11-250

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Investigation of Scrubber Costs and Cost Recovery

Order on TransCanada's Motion to Reconsider

O R D E R N O. 25,671

May 29, 2014

In this order we deny TransCanada's motion to reconsider that part of Order No. 25,663 which compelled TransCanada to produce information in the possession of its nonparty affiliates. TransCanada must produce the affiliate information by June 6, 2014.

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.

PSNH issued data requests in January 2014 to intervenors TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast, Inc. (TransCanada), and to other parties. TransCanada and the other parties objected to many of those requests. PSNH's subsequent motions to compel resulted in *Public Service Co. of N.H.*, Order No. 25,646 (April 8, 2014) (the April 8 Order). As to TransCanada, the April 8 Order directed PSNH and TransCanada to informally resolve their pending disputes using the standards set forth in that order. April 8 Order at 35. Although PSNH and TransCanada resolved most of their disagreements, PSNH filed a second motion to compel supplemental answers to seven data requests.

In *Public Service Co. of N.H.*, Order No. 25,663 (May 8, 2014) (the May 8 Order), we granted PSNH's motion to compel responses to four of the disputed data requests. The requests sought fuel price forecasts and statements by TransCanada regarding the predicted effects on natural gas prices of horizontal drilling and hydraulic fracturing. May 8 Order at 2. The May 8 Order required TransCanada to produce information that is in the possession of nonparty TransCanada affiliates (hereinafter "affiliate information").

TransCanada filed a timely motion to reconsider pursuant to RSA 541:3.

II. POSITIONS OF THE PARTIES

A. TransCanada

TransCanada argued, first, that the May 8 Order overlooked that the affiliate information is irrelevant because Mr. Hachey limited his testimony to information available to PSNH and did not rely on the affiliate information. Second, TransCanada argued its affiliates are not parties and are thus immune from Commission discovery orders. Third, TransCanada argued that the affiliate information contains "confidential, proprietary and commercially sensitive information about a competitive market." Motion at 2. Fourth, TransCanada argued that it cannot comply with the May 8 Order because TransCanada "is a very large company" and compliance would be a "major undertaking." *Id.* at 4. TransCanada summarized by arguing that the May 8 Order went "beyond the powers granted to [the Commission] by law" in ordering production of the affiliate information, which "will have a chilling effect on participation in future dockets." *Id.* at 7, 9.

B. PSNH

PSNH objected to the motion to reconsider. PSNH argued that TransCanada did not offer new arguments nor did it point to facts that the Commission overlooked in the May 8

Order. PSNH recounted the reasons given in the May 8 Order for production of the specific affiliate information in dispute. PSNH argued that TransCanada's voluntary participation in this docket as an intervenor gave the Commission authority to compel production of the affiliate information.

III. COMMISSION ANALYSIS

The Commission may grant rehearing or reconsideration for "good reason" when the moving party demonstrates that the decision is "unlawful or unreasonable." RSA 541:3, RSA 541:4; *see Rural Telephone Companies*, Order No. 25,291 at 9 (Nov. 21, 2011). Good reason may exist if there are matters that the Commission "overlooked or mistakenly conceived in the original decision," *Dumais v. State*, 118 N.H. 309, 311 (1978) (quotation and citation omitted), or if the movant presents new evidence not previously available, *Hollis Telephone, Inc.*, Order No. 25,088 at 14 (Apr. 2, 2010). A motion for rehearing that merely restates prior arguments and asks for a different outcome will fail. *Public Service Co. of N.H.*, Order No. 25,168 at 10 (Nov. 12, 2010). We find that TransCanada did not present new evidence and did not identify specific matters that we overlooked or mistakenly conceived.

TransCanada wrote that Mr. Hachey's testimony concerned only PSNH's price assumptions, not the forecasts of Mr. Hachey or TransCanada. Motion at 2-3. TransCanada argued that the affiliate information is "irrelevant to the issue of whether PSNH acted prudently." *Id.* at 3. TransCanada also argued that Mr. Hachey "was very careful to examine only the information available to PSNH." *Id.* The Commission understood these arguments. In the May 8 Order we summarized TransCanada's position:

> TransCanada objected, claiming that the requested information is irrelevant. TransCanada argued that the point of Mr. Hachey's testimony was to stand in PSNH's shoes in the 2008-2009 timeframe and examine only the information then available to PSNH. TransCanada argued that

> Mr. Hachey purposely did not rely on information that was unavailable to PSNH and thus did not rely on information available only to TransCanada affiliates. Based on his review of information available to PSNH, Mr. Hachey opined that PSNH acted imprudently in building the Scrubber. Because Mr. Hachey did not rely on information unavailable to PSNH, regardless of whether that information would support or undermine his opinion, TransCanada argued such outside information is irrelevant.
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> TransCanada also objected because some of the affiliate information is publicly available, contrary to the requirement that PSNH prove it is "not otherwise available." TransCanada argued certain codes of conduct prohibited disclosure of some responsive information from its affiliates, although TransCanada did not develop this argument. Finally, TransCanada objected to each of the seven requests on grounds of being overbroad, irrelevant, or involving improper time periods.

May 8 Order at 4-5 (citations omitted). TransCanada's motion for reconsideration did not present new evidence or arguments that we overlooked. Although we deny TransCanada's motion on that basis alone, we briefly address TransCanada's other arguments.

TransCanada generally argued that the affiliate information is outside the scope of permissible discovery and that the April 8 and May 8 Orders exceeded our authority to compel its production. We disagree. The April 8 and May 8 Orders reflect a substantial narrowing of our general rule of liberal discovery. *See Hampton Water Works*, Order No. 22,812, 82 NHPUC 866, 867 (Dec. 31, 1997) ("We generally grant broad leeway in the discovery phase of our proceedings"). The April 8 Order imposed five standards that limited PSNH's data requests and imposed a heightened burden on PSNH before we would consider ordering production of documents from TransCanada affiliates.[1] April 8 Order at 3-7; 35-36. The May 8 Order concluded that PSNH met that burden, but further limited the scope of PSNH's requests. May 8 Order at 7-8. We reaffirm the general principle of broad discovery, but this case illustrates that

[1] "[I]f PSNH can make a particularized showing that it has a substantial need for specific information from a non-party TransCanada entity, which information is necessary to this docket and not otherwise available, we will consider … a request" for affiliate reports. April 8 Order at 35-36.

we will impose reasonable and common sense limits in our efforts to balance the competing rights of the litigants.

TransCanada argued the affiliate information contains "highly sensitive, commercial and proprietary information about competitive markets." Motion at 4. That argument is unavailing for two reasons. First, the affiliate information is not likely sensitive given its age. The documents in question are fuel forecasts prepared between 2005 and 2008 and documents "in the 2008/2009 timeframe" regarding the predicted effects on prices of horizontal drilling and hydraulic fracturing. May 8 Order at 7-8. The age of these documents almost certainly eliminates their sensitive nature. Moreover, if there remain valid reasons for confidentiality, TransCanada has the option to provide confidential responses under the normal discovery practices.

TransCanada argued the Commission lacks authority to compel discovery from nonparty affiliates. We disagree.

> [T]he standard we apply in discovery matters is that parties are entitled to obtain information in discovery if the information is relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence. Information meeting this standard is discoverable regardless of whether it was prepared by and/or relates to an affiliate or affiliates of the recipient of the request, and regardless of whether any such affiliate falls within the Commission's regulatory jurisdiction.

Verizon New England, Inc., Order No. 24,767 at 7 (June 22, 2007). Here, TransCanada subjected itself to thorough discovery by its voluntary intervention and filing of testimony. TransCanada moved to intervene citing, in part, the value that its affiliates may add to this docket. "TransCanada and its affiliates are involved in the transportation of natural gas and the power generation business in North America." They "collectively own approximately 567 MW of hydroelectric generation capacity [mostly] in New Hampshire." They have "gained

knowledge of this [Scrubber] Project and PSNH that could be of value to the parties and to the Commission." Petition to Intervene at 2-3. TransCanada also stated that it "has knowledge and experience and expertise that [will] contribute to the process." Transcript of 12/13/11 Prehearing Conference at 45. While the Commission may not have jurisdiction over the TransCanada affiliates directly, the Commission has authority to compel the intervening TransCanada entities to produce the affiliate information at issue.

TransCanada argued the May 8 Order will have a chilling effect on its participation in this docket. We disagree. TransCanada and PSNH are evenly matched in terms of sophistication and quality of representation. Although we remain mindful of potential discovery abuse and its effect on less experienced intervenors, we do not find any such problem here. TransCanada entered this case knowing PSNH would fully litigate its claim to recover the Scrubber's costs, including the likelihood that PSNH would seek discovery from TransCanada.

TransCanada also argued that it should not be required to produce affiliate information because TransCanada "is a very large company" and obtaining the documents will be a "major undertaking." Motion to Reconsider at 4. We are unmoved by this argument. Large companies often face thorough discovery requests and presumably have the necessary systems in place. TransCanada knew of these discovery requests in January 2014, and we compelled production of the affiliate information in the May 8 Order.

Based upon the foregoing, it is hereby

ORDERED, that TransCanada shall provide supplemental responses to PSNH data requests 34a, 52, 74b, and 75c, including responsive documents from TransCanada affiliates, on or before June 6, 2014.

By order of the Public Utilities Commission of New Hampshire this twenty-ninth day of May, 2014.

Amy L. Ignatius
Chairman

Martin P. Honigberg
Commissioner

Michael J. Iacopino
Special Commissioner

Attested by:

Debra A. Howland
Executive Director