

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 13-108

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

**Reconciliation of Energy Service and Stranded Costs Expenses and Revenues
for Calendar Year 2012**

Order Denying Motion to Compel

ORDER NO. 25,595

November 15, 2013

I. PROCEDURAL HISTORY

On May 9, 2013, Public Service of New Hampshire (PSNH) filed its reconciliation of the revenues and expenses for its energy service and stranded cost recovery charges for calendar year 2012. The Commission issued an Order of Notice on May 15, 2013 scheduling a prehearing conference for June 13, 2013. The Office of Consumer Advocate filed a letter of participation on April 17, 2013. On June 10, 2013, Conservation Law Foundation (CLF) filed a petition to intervene which the Commission granted in Order No. 25,540 (July 9, 2013). Discovery ensued pursuant to a procedural schedule approved in Order No. 25,540.

On September 26, 2013, CLF filed a motion to compel PSNH to respond to data request CLF-1 to which PSNH had objected. PSNH filed an objection to CLF's motion to compel on October 7, 2013.

II. POSITIONS OF THE PARTIES AND STAFF

A. Conservation Law Foundation

CLF's motion requested that the Commission compel PSNH to respond to data request CLF-1 which reads as follows:

For each day during the calendar year 2012, please provide the dispatch/operating instructions, including without limitation: a) market offers, b) declaration of schedule and if applicable, the dispatchable range provided with any such instructions, provided by PSNH to ISO-NE for each unit at Merrimack and Schiller Stations. Please provide copies of PSNH's log and/or records for each submitted dispatch/operating instructions.

CLF claimed that the information requested by CLF-1 is relevant to this proceeding.

CLF argued that the price at which PSNH's generation was available for dispatch within the wholesale market, and the extent to which the energy payments PSNH received during such periods of operation were sufficient to cover its costs—the same costs for which it is seeking ratepayer recovery—are being reconciled in this docket. CLF stated that CLF-1 seeks information regarding the extent to which PSNH "self-scheduled" its units and collected the clearing market price regardless of whether the market price covered the costs of producing the power. CLF Motion at 3.

According to CLF, PSNH's market prices for each of its generating units directly bear on PSNH's market revenues and the extent to which it was more economic and prudent for PSNH to satisfy its default energy service customer needs with power generated by its owned units or through market purchases. CLF stated that PSNH has acknowledged that, in prior years, it frequently operates its units at a loss due to operational and other considerations. CLF asserted that because PSNH's above-market costs are generally recovered from its customers, during such times PSNH's customers "are essentially subsidizing ratepayers throughout New England through PSNH's provision of power into the grid at wholesale rates below its costs to generate said power." *Id.*

CLF noted that PSNH had objected to CLF-1 on a number of grounds, including the argument that it would be burdensome to provide the responsive information. CLF claimed that

PSNH's agreement to provide similar information in a separate docket¹ demonstrated that preparing the response would not be burdensome. *Id.* at 4-5. CLF also referred to a Commission Staff report in a separate proceeding² which included information compiled from the Environmental Protection Agency and Energy Information Administration, and said that the data requested by CLF would similarly be available. *Id.* at 4.

Finally, CLF observed that the Commission has previously adopted a broad view of discovery and that a response to CLF-1 is relevant in that it will reveal how PSNH "is effectuating the dispatch of its units and the economic impacts to ratepayers of its actions." *Id.*

B. Public Service of New Hampshire

PSNH originally objected to CLF-1 by stating as follows:

PSNH objects to the question on the basis that it is unduly burdensome because it would require the collection and compilation of voluminous detailed data. Moreover, the question is not relevant to the proceeding nor is it calculated to lead to the discovery of evidence admissible in the proceeding. Further, the requested information is confidential and proprietary, and disclosing the information could adversely affect PSNH's future ability to effectively participate in the marketplace.

PSNH noted that in discovery disputes before the Commission, the Commission applies by analogy the standard applicable to litigation in the Superior Court, that is, a party compelling discovery must demonstrate that the information being sought is relevant to the proceeding or is reasonably calculated to lead to the discovery of admissible evidence, citing *Public Service Company Of New Hampshire Investigation of Merrimack Station Scrubber Project and Cost Recovery*, Order No. 25,334 (March 12, 2012) at 9. Further, when considering motions to compel, the Commission balances such factors as the relevance of the requested information, the effort needed to gather it, the availability of the information from other sources, and other

¹ CLF referred to Docket DE 10-261, a docket reviewing PSNH's 2010 least cost integrated resource plan.

² Docket No. IR 13-020, Staff Investigation into PSNH Generation.

relevant criteria. *See Public Service Company of New Hampshire*, Order No. 20,216, 76 NHPUC 559 (1991).

In its objection to CLF's Motion, PSNH first addressed the burdensome nature of the request. PSNH took issue with CLF's argument that providing the response to CLF-1 would not be burdensome because PSNH had agreed to provide similar information in an unrelated docket (Docket No. DE 10-261, PSNH's 2010 least cost integrated resource plan), subject to the execution of a confidentiality agreement. PSNH stated that CLF did not execute a confidentiality agreement in Docket No. DE 10-261 and, consequently, no such information was ever compiled and the scope of the work required to compile it was never defined. PSNH Objection at 2.

PSNH claimed that, in order to respond to CLF-1, PSNH would be required to collect "at a minimum, 8,760 hours of 'dispatch/operating instructions', 'market offers', 'declaration[s] of schedule[s]', 'dispatchable range', and 'logs and/or records for each submitted dispatch/operating instruction' on at least 5 separate units." PSNH stated that such an undertaking would require significant time to compile because PSNH does not keep any such data in a specific file or set of files, and that PSNH would have to manually collect and compile the information and enter it into some format and provide it to others. *Id.* at 3.

PSNH also argued that information requested by CLF-1 was uncertain in that the question included the words "without limitation" thereby suggesting that CLF intends to request additional information in connection with the response, and that CLF may contend that any response PSNH provides to CLF-1 is insufficient as CLF may believe that other responsive data is available. PSNH said that it should not be required to undertake the burdensome production of

information based on CLF's belief that there may be some other useful information to be obtained. *Id.*

PSNH argued that CLF in its motion attempts to redefine the scope of CLF-1 by saying that CLF seeks information regarding the extent to which PSNH "self-scheduled" its units and operated them irrespective of whether the price it collected covered the costs. According to PSNH, if that refinement of CLF-1 represented what CLF was seeking, it could have asked a specific question soliciting that information, which it chose not to do. PSNH added that other parties in this docket have asked for similar information, although more targeted and meaningful, and PSNH has provided it. PSNH questioned whether the substantial amount of information requested would provide any information that is more meaningful than information that already has been provided in discovery. *Id.* at 3-4.

PSNH also questioned CLF's reliance on a PSNH response to a data request made in Docket DE 10-261. According to PSNH, by omitting the full response, CLF mischaracterized PSNH's answer to that question. In addition, PSNH pointed out that the response in the prior docket reflected a different time period and operational circumstances than those applicable to this reconciliation proceeding. .

PSNH dismissed CLF's reference to a Staff report in an unrelated docket as support for relevance of CLF-1. PSNH said that the relative costs of PSNH's units compared to other generating stations, information that Staff compiled from public sources, does not make the requested information relevant to the review of PSNH's generation operation in 2012. PSNH emphasized that the information presented by CLF in its data compilation does not provide any insights into the operational characteristics of any of the plants, other than their fuel source, and without information about the plants' fixed and variable costs, operating parameters and other

information, such information about PSNH's plants is meaningless and does not "inform the reasons for and costs to ratepayers of Merrimack's operations in 2012" as claimed by CLF, citing CLF's Motion at paragraphs 6. *Id.* at 4-5. PSNH further noted that the fact that the information in Staff's report was available from public sources suggests that the information CLF seeks is already publicly available. PSNH concluded by requesting that the Commission deny CLF's motion to compel as being unduly burdensome and irrelevant to the instant docket. *Id.* at 5.

III. COMMISSION ANALYSIS

When deciding whether to compel discovery responses, we consider the extent to which 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 (March 22, 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 (Oct. 23, 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 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.

In addition to these principles, we also consider whether the response would be unduly burdensome for the respondent to compile and whether the information is otherwise publicly available. *See, e.g., Electric Utility Customers*, Order No. 25,439 (December 7, 2012).

We have reviewed the Motion, the scope of the information requested by CLF-1, PSNH's objection and the scope of the docket as we determined in Order No. 25,540. The information

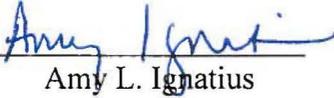
requested by CLF-1 is detailed—PSNH is asked to provide “for each day” during 2012, “without limitation,” dispatch or operating instructions or market offers, declaration of schedule and, if applicable, the dispatchable range provided with any such instructions regarding each unit at Merrimack and Schiller Stations, including “PSNH’s logs and/or records for each submitted dispatch/operating instructions.” CLF states that this information is necessary to determine whether PSNH’s revenues and expenses associated with the operation of its generation units during calendar year 2012 are reasonable. According to PSNH, it has already provided responsive information to similar, more targeted questions in this docket. PSNH also rightly observes that compiling the response to CLF-1 would be burdensome and would require the Company to create information logs and files not maintained by the Company in its normal course of business.

Having considered the Motion, we are not persuaded that the detailed data requested by CLF would enhance the parties’ or the Commission’s understanding of PSNH’s plant operations any more than can be discerned by the kind of information that is typically derived through other discovery and Staff’s review in similar reconciliation proceedings. Such information includes aggregate data regarding capacity and availability factors for plants, as compared with actual operation of those plants, as well as an analysis of the Company’s actual revenues and costs associated with sales of power produced by its generation units into the wholesale market, as compared with then-prevalent market prices. Based on the foregoing, we deny CLF’s motion to compel PSNH to respond to CLF-1 because alternative information is available on PSNH’s plant operations and ordering a response would impose an unreasonable burden on the Company.

Based upon the foregoing, it is hereby

ORDERED, CLF’s Motion to Compel is hereby DENIED.

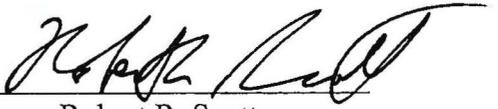
By order of the Public Utilities Commission of New Hampshire this fifteenth day of
November, 2013.



Amy L. Ignatius
Chairman

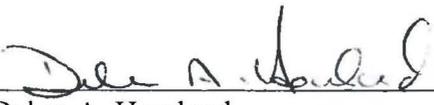


Michael D. Harrington
Commissioner



Robert R. Scott
Commissioner

Attested by:



Debra A. Howland
Executive Director