

**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 Motions to Compel Discovery Regarding PSNH Rebuttal Testimony

ORDER NO. 25,718

September 17, 2014

In this order we grant in part and deny in part the TransCanada Intervenors' motion to compel PSNH to respond to data requests regarding PSNH's rebuttal testimony.

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.

TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast Inc. (the TransCanada Intervenors) served data requests on PSNH related to its rebuttal testimony. After PSNH objected to a number of requests, the TransCanada Intervenors filed two motions to compel. Both motions appear at Tab 215 in Docketbook and will be referred to as the First Motion to Compel and the Second Motion to Compel. PSNH responded to the motions and the Commission designated General Counsel F. Anne Ross to lead a technical session in which the parties discussed the contested data requests. The parties resolved all disputes except for the 21 data requests addressed herein.

One group of contested data requests sought market information, including gas price forecasts in PSNH's possession, a description of other available forecasts, when the effects of

shale gas on prices became known and accepted, and studies of coal plant viability in New England. First Motion to Compel at 9-10, 19-21, and 23 (requests 38, 39, 40, 125, 149, 153, 157, 160, 171, 172, 183, 208, 209, and 210). Request 96 sought a particular study of a coal plant in Ohio by Mr. Reed's employer, Concentric Energy Advisors. *Id.* at 18. Requests 47 and 50 asked for information supporting Mr. Smagula's testimony of current operations at Merrimack Station and his claims of customer savings last winter. *Id.* at 25. In addition, the TransCanada Intervenors moved to compel responses that explored PSNH's options before the Legislature. Second Motion to Compel at 9-10 (requests 12, 14, 105, and 252).

We announced our rulings on these disputed requests at the September 8, 2014, prehearing conference. With one exception, this order repeats those rulings and provides our analysis.

II. POSITIONS OF THE PARTIES

A. TransCanada Intervenors

The TransCanada Intervenors argued first that the requested market information (price forecasts, knowledge regarding the shale gas revolution, and studies of coal plant viability) is relevant. They noted that we previously compelled responses to similar questions even when the information was not related to the witness's testimony and when the request was directed at the sponsoring party rather than the witness. First Motion to Compel at 5; *see* Order No. 25,646 at 15 (April 8, 2014)¹ ("They are directed at Sierra Club but are not related to Dr. Sahu's testimony. They nonetheless seek relevant information because the parties argue that PSNH should have been aware of the New England forward market price for natural gas."); Order No. 25,663 at 7-8 (May 8, 2014)

¹ All orders cited here are styled *Public Service Co. of N.H.* References to those orders will be to the order number and date only.

(ordering the TransCanada Intervenors to answer requests for “any studies or statements made by TransCanada in the 2008/2009 timeframe on the effects of horizontal drilling and hydraulic fracturing on future gas supply and prices,” and when TransCanada “first acknowledge[d] the impact of Marcellus gas on gas prices”).

Regarding the Ohio coal plant, the TransCanada Intervenors argued that Concentric’s 2008 study could help prove the industry’s understanding of shale gas and may provide impeachment evidence of Mr. Reed. First Motion to Compel at 19; *see* Order No. 25,663 at 8 (“it may shed light on how industry thought the new drilling technologies would impact prices and on whether PSNH’s interpretation was reasonable”).

Regarding Mr. Smagula’s testimony that Merrimack Station saved customers money last winter, the TransCanada intervenors argued its data requests regarding the calculation of those savings are relevant, although subject to our ruling on the OCA’s motions to strike.

Regarding PSNH’s options before the Legislature, although the TransCanada Intervenors acknowledged our limits on evidence related to legislative activities, they argued that “the Commission should consider the complete range of management options that were available to PSNH.” Second Motion to Compel at 9.

The TransCanada Intervenors also addressed PSNH’s objection to more than half of the contested data requests based on the TransCanada Intervenors’ failure to respond to similar requests. *See* First Motion to Compel at 7-8 (citing PSNH Objection to Motion to Compel at 7; *see* Order No. 25,687 (July 28, 2014) (imposing sanctions on the TransCanada Intervenors for their failure to comply with a prior order compelling data

responses from TransCanada affiliates)). The TransCanada Intervenors argued that they have been penalized for their failure to produce the information and that their conduct is not a basis for PSNH to object to otherwise relevant data requests. First Motion to Compel at 7-8.

B. PSNH

PSNH raised three objections to the challenged requests. PSNH Objection at 3.² PSNH argued that some data requests are “unrelated to the testimony sponsored by the particular witness” in violation of discovery standard 2 from Order No. 25,646 at 5. PSNH Objection at 3. PSNH refused to answer a number of data requests because they sought information “identical to that which TransCanada was twice ordered by the Commission to provide, but which in contempt of those Orders TransCanada has refused to provide.” *Id.* PSNH also argued that a group of data requests involves legislative matters “deemed irrelevant by the Commission.” *Id.*

C. Other Parties

No other party took positions on TransCanada’s motion.

III. COMMISSION ANALYSIS

We first reject PSNH’s objections based on the TransCanada Intervenors’ refusal to provide similar documents. PSNH claimed that this is a due process issue because it is “unfair” that PSNH may have to produce what TransCanada refused to provide. PSNH Objection at 7-8. We agree that “fundamental fairness” is “a primary consideration” of due process before the Commission. *Appeal of Pub. Serv. Co. of N.H.*, 122 N.H. 1062, 1072 (1982). We disagree that PSNH has been treated unfairly. We ordered the TransCanada Intervenors to produce discoverable information, and in this order we compel PSNH to produce similar information for the same reasons. We compel information because we have determined it may be relevant to our

² Although PSNH initially listed four reasons, it withdrew its “affiliate/non-party” objection. PSNH Objection at 5.

decisions, not because another party did or did not comply with our orders. We sanctioned the TransCanada Intervenors for their failure to respond as ordered. We will consider sanctioning PSNH if it similarly refuses to comply with our orders compelling production. Treating all parties alike is a hallmark of due process. *Id.* We have done so here. We overrule PSNH's objections that are based on the TransCanada Intervenors' refusal to answer similar questions.

A. First Motion to Compel

Request 38 and the identical request 208 sought "price forecasts ... produced by or available to PSNH, its affiliates, or parent company from 2005 through 2011." Request 39 and the identical request 209 asked for documents "in PSNH's possession, or in the possession of PSNH's affiliates or parent company regarding the forward market for natural gas delivered to New England in the 2008 – 2011 timeframe." These requests seek the same information we found relevant in Order No. 25,663 at 7 ("Natural gas price forecasts during critical times may be necessary to resolve issues in this docket"). We thus GRANT TransCanada's motion to compel responses to requests 38, 39, 208, and 209.

Request 40 and the identical request 210 asked for studies regarding the economic viability of coal plants in the ISO-NE region. PSNH represented at the hearing that it answered the requests as to PSNH and as to its affiliates. Based on those representations, we DENY the motion to compel responses to requests 40 and 210.

Requests 47 and 50 sought discovery regarding Mr. Smagula's testimony that Merrimack Station generated savings over market rates during the winter of 2013-2014. In Order No. 25,714 at 11 (Sept. 8, 2014) we granted the OCA's motion to strike this testimony because "events that occurred after the Scrubber became operational in September 2011 [are] not relevant to PSNH's decisions concerning whether and how to build the scrubber" At the September 8

hearing we orally denied the motion to compel answers to these two requests. In light of issues raised in PSNH's motion for rehearing of Order No. 25,714 and other pretrial motions, however, we reconsider and withdraw our oral ruling as to requests 47 and 50. We will defer a decision on these two requests until we consider the pending motions and objections.

Request 96 asked Mr. Reed for a 2008 Concentric study regarding a coal plant in Ohio. This study may contain evidence of the industry's view of the shale gas revolution during a relevant time period and, to the extent the study conflicts with Mr. Reed's testimony in this docket, may also provide impeachment material. *See* Order No. 25,663 at 8 ("The requested information is necessary because it may shed light on how industry thought the new drilling technologies would impact prices and on whether PSNH's interpretation was reasonable."). Therefore, the motion to compel a response to request 96 is GRANTED.

Request 125 asked Mr. Reed what he knew about fracking in 2008-2009 and, during 2008 through 2010, whether he or any Concentric employee "refer[red] to the impact of fracking on gas prices in any testimony, report, or study." For the reasons quoted from Order No. 25,663 regarding request 96 above, the motion to compel a response to request 125 is GRANTED.

Request 149 asked Drs. Harrison and Kaufman for copies of forecasts "produced by or available to NERA ... in 2008 and 2009." We construe "available to" to mean "in the possession of" and GRANT the motion to compel because such forecasts may be relevant.

Request 153 referenced testimony about the "supply effects" of fracking and asked Drs. Harrison and Kaufman for "all sources of information available in 2008-2009 that informed your statements regarding this statement." This question falls within discovery standard 5: "we will compel production of the facts, data, and supporting exhibits the witnesses considered in

preparing their testimony.” Order No. 25,646 at 7. We thus GRANT the motion to compel a response to request 153.

Request 157 asked Drs. Harrison and Kaufman for gas forecasts that would have been available to PSNH in 2006-2009. Their response described the forecasts on which they relied and then stated: “We do not know what access PSNH had to particular projections between 2006 and 2009.” We find the answer adequately responded to the question and thus DENY the motion to compel 157.

Request 160 referenced Harrison/Kaufman testimony about the natural gas “revolution” in 2008 and 2009 and asked: “How much was known about the shale gas revolution in 2008 and 2009? Please provide all documents you reviewed to draw your conclusion.” The first question is unanswerable. The second question properly seeks the “facts and data” considered by the witnesses. Therefore, the motion to compel an answer to request 160 is DENIED as to the first question and GRANTED as to the second question.

Request 171 asked Drs. Harrison and Kaufman for “all information available to you or NERA relative to the topics of shale gas, fracking, and unconventional gas between 2006 and 2010?” For the reasons stated with respect to requests 96 and 125 above, the motion to compel a response to request 171 is GRANTED as to such information that is “in your possession” addressing the stated time frame.

Request 172 asked if “any NERA consultant advise[d] a client that U.S. natural gas reserves had increased significantly due to development of shale gas between 2006 and 2010?” An answer to this question may provide impeachment evidence and we thus GRANT the motion to compel a response to request 172.

Request 183 asked Drs. Harrison and Kaufman if they are “aware of any studies regarding natural gas prices that would have been available in mid-2008 that were not listed by Mr. Hachey?” We find this question may yield relevant information and thus GRANT the motion to compel a response to request 183.

B. Second Motion to Compel

Request 12 asked Mr. Smagula if “supporting SB 152 in 2009 [was] a practical option for PSNH.” Request 14 similarly asked: “What were the options that PSNH had in terms of the position that it took and the information it provided on SB 152 in 2009?” We DENY the motion to compel responses to requests 12 and 14 as not likely to yield relevant evidence. Even if supporting or providing information relative to proposed legislation were an option, the result of such conduct – how the legislature would have acted in light of PSNH’s support or information – is speculative.

Request 105 asked Mr. Reed if he believed that “a prudent utility in PSNH’s position in 2009 would have identified these uncertainties [from the Harrison/Kaufman testimony] for the Legislature ...?” We GRANT the motion to compel a response to 105 to the extent it seeks a “yes” or “no” answer, with a reasonable explanation. Mr. Reed is PSNH’s prudency expert. If the question is within the scope of his expertise, he can say whether such a disclosure would be prudent and explain his answer. He cannot be required to delve further into what the legislative response might have been because that would call for speculation as discussed with regard to requests 12 and 14 above.

Request 252 asked Dr. Shapiro if she was “aware of any efforts to change the Scrubber law so that all customers, rather than just default service customers, would have to pay for the Scrubber?” We DENY the motion to compel a response to request 252 based on Order

No. 25,566 at 5 (Aug. 27, 2013) (“evidence that proves whether a party was ‘cooperating with’ or ‘attempt[ing] to block’ legislation is irrelevant”).

Based upon the foregoing, it is hereby

ORDERED, that TransCanada’s motion to compel is granted as to requests 38, 39, 96, 105, 125, 149, 153, 160 (second question), 171, 172, 183, 208, and 209, as discussed above, and denied as to requests 12, 14, 40, 125, 157, 160 (first question), 210, and 252, and it is

FURTHER ORDERED, that the oral order denying the motion to compel responses to requests 47 and 50 is withdrawn and a decision as to these two requests is deferred.

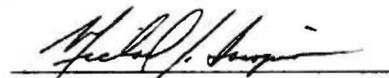
By order of the Public Utilities Commission of New Hampshire this seventeenth day of September, 2014.



Amy D. Ignatius
Chairman

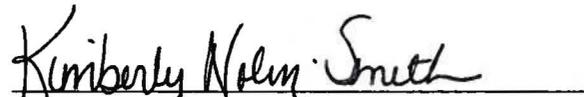


Martin P. Honigberg
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Attested by:



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