

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 10-195

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Petition for Approval of Power Purchase Agreement with Laidlaw Berlin BioPower, LLC

Order on Motion for Confidentiality and Motions to Compel

ORDER NO. 25,174

November 24, 2010

I. PROCEDURAL HISTORY

On July 27, 2010, Public Service Company of New Hampshire (PSNH or Company) filed a petition for approval of a power purchase agreement between PSNH and Laidlaw Berlin BioPower, LLC (Laidlaw). With its petition, PSNH filed a motion for confidential treatment of certain pricing terms and certain other information made with its filing. On October 14, 2010, the Commission issued a prehearing conference order (Order No. 25,158) which, among other things, denied PSNH's motion for confidential treatment except insofar as it related to the value of property to be protected by title insurance.

On October 22, 2010, PSNH filed a motion for rehearing of the ruling denying its motion for confidential treatment. With its motion, PSNH filed the supporting affidavit of Gary A. Long and an October 21, 2010 order of the New Hampshire Site Evaluation Committee in Docket No. 2009-02, the proceeding regarding Laidlaw's application for a Certificate of Site and Facility.

On October 29, 2010, Concord Steam Corporation (Concord Steam) filed an objection to PSNH's motion for rehearing. On the same day, Concord Steam filed motions to compel PSNH and Laidlaw to respond to certain data requests. Also on October 29th, six independent power producers that are fueled with biomass, Bridgewater Power Company, L.P., Pinetree Power, Inc.,

Pinetree Power-Tamworth, Inc., Springfield Power LLC, DG Whitefield Power & Light Company, and Indeck Energy-Alexandria, LLC (collectively, the Wood-Fired IPPs) filed an objection to PSNH's motion for rehearing. The Wood-Fired IPPs also filed motions to compel PSNH and Laidlaw to respond to certain of their data requests. The Commission issued Order No. 25,168 on (November 12, 2010) denying PSNH's motion for rehearing.

On October 21, 2010, Laidlaw filed a motion for confidential treatment of a business proforma provided to Staff in response to discovery. The Commission granted the motion for confidential treatment by secretarial letter dated October 27, 2010. The Commission also extended the schedule for discovery in response to filings by Concord Steam and the Wood-Fired IPPs requesting the continuance of the procedural schedule.

On October 28, 2010, Laidlaw submitted a letter notifying the Commission that it was withdrawing its participation in the proceeding. Concord Steam then filed an objection to Laidlaw's withdrawal from the docket and, in the alternative, a motion to strike from the record any documents provided by Laidlaw in discovery. On November 2, 2010, Concord Steam filed a motion to dismiss the petition. The Wood-Fired IPPs filed additional motions to compel PSNH to respond to data requests on November 2, 4, and 15, 2010. PSNH filed timely objections to each motion to compel.

The Commission issued Order No. 25,171 (November 17, 2010) which, among other things, accepted Laidlaw's notice of withdrawal, granted the motion to strike and denied the motion to dismiss. Also on November 17, 2010, the Commission issued a secretarial letter designating F. Anne Ross, the Commission's General Counsel, to hear argument on the various motions to compel and to recommend the disposition of outstanding motions to the Commission.

The secretarial letter scheduled a meeting among the parties on Friday, November 19, 2010. The letter also modified the procedural schedule for the docket. Attorney Ross filed a letter on November 17, 2010, directing PSNH to submit a motion for confidential treatment regarding the data responses for which it claimed confidentiality. PSNH filed the motion on Friday, November 19, 2010.

In addition, on November 17, 2010, the Wood-Fired IPPs filed a reply to PSNH's objections to the motion to compel, and on November 18, 2010, intervenor Clean Power Development (CPD) filed a letter stating that it had not decided whether to file testimony in this docket. Finally, on November 18, 2010, PSNH filed an objection to the Wood-Fired IPPs' November 15th motion to compel.

On November 22, 2010, Attorney Ross filed a report of the discovery conference describing the 35 discovery requests still in dispute. On November 23, 2010, Concord Steam and the Wood-Fired IPPs filed objections to PSNH's motion for confidential treatment. The motions to compel regarding discovery directed to Laidlaw were dismissed in Order No. 25,171 based on its withdrawal from the proceeding.¹

PSNH's objection to producing some of the data requests rests on its claims that the responses are confidential. In resolving those motions to compel we must also decide PSNH's related motion for confidential treatment filed November 19, 2010.

II. DISPUTED DATA REQUESTS

The Wood-Fired IPPs have moved to compel production of, and PSNH has objected to, the following data requests, which were not resolved during the discovery conference: Staff 1-17 (included in IPP 2-7 b and c); Staff 1-18 (included in IPP 2-39); Staff 5-4; Staff 5-6; IPP 2-10;

¹ See Order No. 25,171 (November 17, 2010), for a full recitation of the filings made in this docket to that date.

IPP 2-2; IPP 2-3; IPP 2-4; IPP 2-5; IPP 2-6g; IPP 2-6h; IPP 2-53; IPP 2-54; IPP 5-14; IPP 2-11; IPP 3-1 (same as IPP 5-1); IPP 3-2 (same as IPP 5-2); IPP 3-3 (same as IPP 5-3); IPP 3-5 (same as IPP 5-5); IPP 3-6 (same as IPP 5-6); IPP 3-7 (same as IPP 5-7); IPP 3-8 (same as IPP 5-8); IPP 3-13 (same as IPP 5-9); IPP 3-14a; IPP 2-6e; IPP 2-9; IPP 2-15; IPP 2-71 b and c; IPP 5-28; IPP 2-46; IPP 2-48; IPP 2-49; IPP 2-50; and IPP 2-58.

III. PSNH'S MOTION FOR CONFIDENTIAL TREATMENT REGARDING COMPETITIVE BIDS, TERMS AND PRICING

A. Positions of the Parties

1. Public Service Company of New Hampshire

PSNH stated that it had asserted need for confidential treatment when it provided confidential information to Staff, following the procedure set forth in New Hampshire Code Admin. Rule Puc 203.08 and accompanied the responses with a statement indicating that it intended to file a motion for confidential treatment as permitted by the rule. PSNH Motion at 3. In its November 19, 2010 motion, PSNH seeks confidential treatment for portions of four of PSNH's data requests that are subjects of various motions to compel. The data requests are Staff 1-17, 1-18, 5-4, and 5-6. The text of these data requests follows:

Staff 1-17: Please provide each and every offer, bid or proposal made by a renewable energy developer to sell renewable energy certificates, energy, or capacity to PSNH which was received after negotiations with Laidlaw began.

Staff 1-18: Has PSNH issued a competitive solicitation to purchase renewable energy certificates, energy, or capacity from renewable energy developers since negotiations with Laidlaw began? If the answer is yes, please provide copies of the solicitations, the list of potential suppliers that received each solicitation, the responses to each solicitation, and the identity of the winning bidder for each solicitation.

Staff 5-4: Please provide on a monthly basis: (i) the number of Class 1 RECs produced by Schiller Unit 5 in 2009 and 2010; (ii) the identity of each purchaser of those Class I RECs; and (iii) the amount bought by each purchaser.

Staff 5-6: Regarding the proposals provided to Staff by PSNH in response to Staff 1-17, please provide copies of all correspondence between PSNH and the developers concerning such proposals including PSNH's final response.

Although not included in PSNH's motion for confidential treatment, PSNH in its objection to a motion to compel asserted that information responsive to IPP Set 2-10 required material which is already subject to Commission orders on confidentiality and further claimed that IPP 2-10 has no time limitation and is therefore overly broad.

IPP Set 2-10: Please provide a list of all contracts, or other form of arrangement entered into by PSNH for a term in excess of three years for the purchase of energy, capacity (whether or not such energy or capacity is renewable generation) or RECs or any combination of the foregoing in said list please identify the following for each such contract or arrangement:

- a. The name of the contracting counterparty.
- b. The term of the contract or arrangement.
- c. The "products" and amount of products to be sold under the contract or arrangement and whether or not said products are renewable generation under any New England renewable portfolio standard law, and if so, identify which one or ones.
- d. The pricing terms of each product of each contract or arrangement.
- e. Provide a copy of each such contract or other form of arrangement.

PSNH asserted that the information in the responses provided to Staff included financially or commercially sensitive information which is protected from disclosure under the New Hampshire Right-to-Know law. *Id* at 5. PSNH stated that the Commission has previously granted confidential treatment for information substantially similar to that contained in PSNH's responses to Staff Questions 1-17, 1-18, 5-4, and 5-6 in dockets related to the procurement of power through a competitive bid process (*Granite State Electric Company d/b/a National Grid*, 92 NH PUC 215, 219 (2007)) and in other proceedings (additional citations omitted). *Id.* at 7-8.

According to PSNH, the documents provided in response to Staff 1-17 include offers, bids or proposals made by renewable energy developers which are similar to bids and offers that the Commission had held confidential in other proceedings. In support of its argument, PSNH

cited *Unitil Energy Systems, Inc.*, Order No. 25,082 (March 19, 2010), in which the Commission granted confidential treatment to the narrative discussion of bids received, the list of suppliers who responded to the request for proposals (RFP), a pricing summary consisting of all price bids and each bidder's final pricing. (additional citations omitted) *Id.* at 9.

By way of additional support, PSNH asserted that the Commission had granted confidential treatment to REC sales prices when a competitor was involved in a docket, citing Docket No. DE 10-121, *Public Service Company of New Hampshire*, Order No. 25,167 (November 9, 2010). In the cited Order, the Commission granted confidential treatment to REC sales prices. The Commission also denied access to that confidential information by an intervenor in the docket who is a competitor of PSNH, stating that such disclosure would be "particularly detrimental to PSNH in its negotiation of the highest price for its surplus RECs." Order No. 25,167 at 8. PSNH Motion at 9.

In further support of its claim for confidential treatment, PSNH said that in the two other proceedings brought under RSA 362-F:9 for approval of long-term agreements for the purchase of RECs and associated power and capacity, the Commission determined that confidential treatment of the terms and conditions of the power purchase agreements was necessary and proper, citing DE 07-125, *Public Service Company of New Hampshire*, Order No. 24,839 (April 4, 2008) and DE 08-077, *Public Service Company of New Hampshire*, Order No. 24,965 (May 1, 2009). Following the Commission's holding in these dockets, PSNH claimed that release of similar information in the instant proceeding would likely hamper PSNH's ability to engage suppliers in competitive bidding in the future. The result, according to PSNH, would make it

difficult for the Company to obtain supply needs at competitive prices and thereby increase rates to customers. *Id.* at 10.

Staff 1-18, the second data request subject to the motion for confidential treatment, asked for copies of competitive solicitations to purchase renewable energy certificates, energy or capacity from renewable energy developers since negotiations with Laidlaw began. PSNH said it provided copies of two such solicitations including the RFPs, bid distribution lists and blank agreements, omitting only the identification of the winning bidders and the associated amounts. PSNH said that the arguments it presented in support of the confidential treatment of the responses to Staff 1-17 applied to the responses to Staff 1-18 as well. *Id.* at 11. According to PSNH, the disclosure of the requested information would adversely affect the Company's ability to procure competitive bids in the future to the detriment of PSNH ratepayers.

Regarding Staff 5-4, which asked the Company to identify each purchaser of Class I RECs produced at Schiller Unit 5 and the amount bought by each purchaser, PSNH said that it had made a similar request for confidential treatment of such information in other proceedings and the Commission had granted the request, most recently in Docket No. DE 10-121 (Order No. 25,167 (other citations omitted)). *Id.* According to the Company, the disclosure of this information would impede PSNH's ability to negotiate competitive rates in contracts with supplemental power suppliers for energy and RECs, resulting in increased costs to ratepayers, and that the Commission had previously recognized the possibility of such harm (citations omitted). *Id.*

With respect to Staff 5-6, which requested copies of all correspondence between PSNH and developers concerning proposals to sell renewable energy certificates, energy or capacity,

PSNH said that the Commission had granted confidential treatment of such information in the past. According to the Company, the harm of disclosing the correspondence includes the harm to commercial bidders who would be concerned that the disclosure of the structure of the proposals would reveal sensitive aspects of their competitive market strategies. *Id.* at 12.

PSNH suggested that the Commission should follow precedent in its action on this motion. Specifically, PSNH referenced the Commission's decisions in *Kearsarge Telephone Company*, 92 NH PUC 441 (2007) and *Public Service Co. of N.H.*, Order No. 25,167 (November 9, 2010). In both cases, according to PSNH, the Commission blocked parties who are participants in competitive markets from receiving confidential market-related information. PSNH Motion at 13.

PSNH said that in this proceeding, similar to *Kearsarge* and PSNH's 2009 reconciliation of energy service and stranded cost charges docket, PSNH has provided competitively sensitive information to Commission Staff, but has withheld it from competitive intervenors. PSNH said that the Commission should follow its results in *Kearsarge* and Order No. 25,167 and deny these competitors attempts to access the confidential, competitively sensitive information. *Id.* at 13-14. PSNH also said it is not reasonable or necessary to provide the information to the intervenors' outside counsel because some of those individuals have been and continue to be significantly involved in the negotiation process for similar power purchase agreements on behalf of their clients, or are market participants themselves. Based on these arguments, PSNH requested that the Commission grant confidential treatment and issue a protective order for certain confidential, commercial or financial information contained in responses by PSNH to Staff 1-17, 1-18, 5-4 and 5-6. *Id.* at 14.

2. Wood-Fired IPPs

In their objection to PSNH's motion for confidential treatment, the Wood-Fired IPPs noted that the Commission has confirmed that its policies regarding discovery are consistent with Superior Court Rule 35(b) which requires 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, citing the Commission's decision in the *City of Nashua*, Order No. 24,681 (October 23, 2006).²

According to the Wood-Fired IPPs, the Commission's position reflects important due process considerations in litigated proceedings (citations omitted). Wood-Fired IPP Objection at 3. The Wood-Fired IPPs argued that proposals to deny parties confidential information have not been favored by the Commission because "whatever information we might reasonably rely upon in making a decision should be accessible to all Parties . . .", citing *North Atlantic Energy Corporation*, 87 NH PUC 396, 399 (2002) (other citations omitted). *Id.* The Wood-Fired IPPs said that the Commission's statements reflect concern about due process considerations in litigation that do not arise under standards applicable to Right-to-Know law requests.

Referring to PSNH's assertion that even outside counsel of intervenors in this docket should not be provided the information claimed as confidential, the Wood-Fired IPPs repeated that their counsel is willing to execute an appropriate confidentiality agreement covering the claimed information, and that Puc 203.08(j) contemplates the use of such agreement. *Id.* at 4. According to the IPPs, such a confidentiality agreement may include restrictions on disclosure of protected information to the Wood-Fired IPPs' competitive employees and limit distribution to their outside counsel and outside consultants, consistent with an approach supported by the

² See 91 NH PUC 452.

Commission in similar circumstances. The Wood-Fired IPPs cited *Public Service Co. of N. H.*, 89 PUC 226, 230 (2004) and *Kearsarge Telephone Co.*, 92 NH PUC 441, 444 (2007) in support of that assertion. *Id.*

In their objection, the Wood-Fired IPPs agreed that the responses to Staff 1-17, 1-18, and 5-6 could be provided to them “redacted to delete the names and other identifying information regarding the bidders, offerors or proponents, and that aggregated monthly sales information regarding the sales of RECs for use in and out of New Hampshire may be provided in response to Staff data request 5-4.” *Id.* at 5. Finally, the Wood-Fired IPPs refuted the suggestion by PSNH that giving the information to outside counsel is “tantamount to giving it to the competitors themselves.” The Wood-Fired IPPs said that PSNH offered no specific factual basis to support the suggestion that their outside counsel cannot be trusted to comply with restrictions on the disclosure and use of information contained in a binding confidentiality agreement. *Id.*

In conclusion, the Wood-Fired IPPs requested that the Commission order PSNH to disclose to all parties copies of the responses to Staff 1-17, 1-18, 5-4, and 5-6, redacted as described in their Objection, subject to any further restrictions on further disclosure as the Commission deems necessary under the circumstances pursuant to Puc 203.08 (j). *Id.* at 5 and 6. The Wood-Fired IPPs said that the relief would allow them to “prepare thoroughly and adequately for meaningful participation in this proceeding.” *Id.* at 5.

3. Concord Steam Corporation

In its objection, Concord Steam stated that it had offered PSNH to provide the requested information pursuant to a protective order to its legal counsel and experts and not Concord Steam’s principals or any other person that would use the information for competitive bidding.

In addition, Concord Steam said it had offered to allow PSNH to redact the names of entities making the bids proposals in the responses provided to Concord Steam. Concord Steam pointed out that the Commission's rules contemplate providing confidential information subject to a protective order as necessary to protect its confidentiality. According to Concord Steam, PSNH rejected the proposal and refused to provide the information to its outside counsel because that was "tantamount" to providing it directly to competitors. Concord Steam Objection at 2.

As relief, Concord Steam requested that the Commission deny PSNH's motion for confidential treatment and order PSNH to provide Concord Steam the information and documents being sought in Staff 1-17, 1-18, 5-4 and 5-6. In the alternative, Concord Steam requested that the Commission issue a Protective Order limiting disclosure of the information and documents to counsel for Concord Steam and its expert witnesses and providing for redaction of any names of competitors to Concord Steam contained in the documents. *Id.* at 3.

B. Commission Analysis

Following an *in camera* review of PSNH's four responses to Staff data requests, we analyze the need for public disclosure of those responses pursuant to RSA 91-A:4, I. The New Hampshire Right-to-Know Law provides each citizen with the right to inspect public information in the possession of the Commission. RSA 91-A:4, I. RSA 91-A:5, IV exempts from public disclosure any records that constitute confidential, commercial, or financial information. In *Lamy v. New Hampshire Public Utilities Commission*, 152 N.H. 106 (2005), the New Hampshire Supreme Court described a three-step analysis for determining whether information should be protected from public disclosure pursuant to the Right-to-Know law. We apply the three-step analysis in reviewing motions for confidential treatment filed with the Commission. *See, e.g.,*

Unitil Corporation and Northern Utilities, Inc., Order No. 25,014 (September 22, 2009) and *Public Service Co. of New Hampshire*, Order No. 25,037 (October 30, 2009).

First, the analysis requires an evaluation of whether there is a privacy interest at stake that would be invaded by the disclosure. If no such interest is at stake, the Right-to-Know Law requires disclosure. Second, when a privacy interest is at stake, the public's interest in disclosure is assessed. Disclosure should inform the public of the conduct and activities of its government; if the information does not serve that purpose, disclosure is not warranted. Finally, when there is a public interest in disclosure, that interest is balanced against any privacy interests in non-disclosure.

In furtherance of the Right-to-Know Law, the Commission's rule on requests for confidential treatment, Puc 203.08, is designed to facilitate the balancing test required by the relevant case law. The rule requires petitioners to: (1) provide the material for which confidential treatment is sought or a detailed description of the types of information for which confidentiality is sought; (2) reference specific statutory or common law authority favoring confidentiality; and (3) provide a detailed statement of the harm that would result from disclosure to be weighed against the benefits of disclosure to the public. Puc 203.08 (b).

Staff 1-17 requests copies of bids and proposals from competitive providers for RECs, energy or capacity. Based upon PSNH's assertions, we agree that such information is confidential and is competitively sensitive. On the other hand, the public has an interest in knowing how the Commission makes a determination that the Laidlaw PPA is in the public interest. Part of that determination may turn on what other supply options PSNH had when it was negotiating with Laidlaw and how those supply options compared to the terms of the

Laidlaw PPA. We also find that disclosing the terms of such offers and the parties' identities could hamper such negotiations in the future. As a result, we find that the balance tips against disclosure of *identities* of suppliers, but in favor of disclosing *pricing, product and length of contract terms*.

We direct PSNH to provide to the Wood-Fired IPPs an aggregated summary of proposals received, including the range of price and products offered, but without information identifying the suppliers. Such summary information will allow the Wood-Fired IPPs and other competitor intervenors to participate meaningfully in this docket by giving them a benchmark market price with which to compare the terms of the PPA. We do not find it necessary to allow the Wood Fired IPPs or their counsel access to supplier identities even under a non-disclosure arrangement to meaningfully participate in the proceeding.

Staff 1-18 requests copies of all RFPs for RECs, energy and capacity, lists of potential suppliers receiving the RFPs, the responses to the RFPs, and the names of winning bidders. PSNH claims that names of winning bidders and amounts to be purchased are confidential. Based upon the information provided by PSNH, we find that this information is confidential and commercially sensitive. The public, on the other hand, has an interest in knowing the basis of the Commission's determination of the public interest of the Laidlaw PPA. Pricing obtained by PSNH for similar products through competitive RFP's would be important market data for judging the reasonableness of the Laidlaw PPA.

In this case the public's right to know outweighs the interest in confidentiality with regard to the *pricing* resulting from the RFP's, but not as to the *identity* of the bidders. PSNH should disclose a summary of the pricing and products purchased giving a range of pricing

obtained, but should not disclose any information which would reveal the identity of the winning bidders. The Wood-Fired IPPs and other competitive intervenors will be able to participate meaningfully in this docket with the pricing and products information. Therefore we see no need to make the identities of responding bidders available to the Wood-Fired IPPs or their counsel under a non-disclosure arrangement.

Staff 5-4 requests on a monthly basis the number of Class I RECs sold by Schiller Unit 5 including the identity of the purchaser and the amount purchased. Based upon the information provided by PSNH we find this information to be confidential and commercially sensitive. The public has an interest in knowing the basis for the Commission's decision on the public interest of the Laidlaw PPA. As a result, the public may need to understand how the Commission assesses the market for New Hampshire Class I RECs, but does not need to know the identity of the specific REC purchasers. In this case the balance tips in favor of disclosure of aggregated data on New Hampshire Class I REC sales from Schiller Unit 5, but against disclosure of purchaser contracts. Following the discovery conference on November 19, 2010, PSNH agreed to provide the Wood-Fired IPPs and Concord Steam with aggregated data in response to Staff 5-4. PSNH will provide Class I REC sales data for Schiller Unit 5 broken into monthly New Hampshire RECs and monthly out of state RECs. Accordingly, the parties' resolution of this motion to compel purports with our findings on the need for disclosure of some of the aggregated Schiller Unit 5 REC sales data.

Staff 5-6 requests copies of all correspondence between PSNH and the competitive suppliers making offers to sell RECs energy and capacity to PSNH and identified in Staff 1-17. Based upon the information provided by PSNH we find this information to be confidential and

commercially sensitive. Although the public has a right to know the basis for the Commission's determination of the public interest of the Laidlaw PPA, such supplier correspondence does not appear to contribute materially to that determination. Further, disclosure of correspondence concerning such offers would clearly discourage open negotiation in the future. As a result, we find that the balance tips against disclosure of this correspondence. We do not find the correspondence central to the determination of a market price for RECs, energy and capacity, and therefore will not require PSNH to make it available to the Wood-Fired IPPs, or other competitive intervenors, or their counsel, subject to non-disclosure agreements. Such competitive intervenors can participate meaningfully in this docket without access to this correspondence.

IPP 2-10 requests copies of all contracts for energy, capacity or RECs entered into by PSNH with a duration of more than three years. At the discovery conference on November 19, 2010, the Wood-Fired IPPs agreed to limit this question to contracts entered into during 2008-2010. Based upon the information provided by PSNH, we find that these contracts are confidential and commercially sensitive. The terms of such contracts, if limited as agreed to by the Wood-Fired IPPs might provide market data with which to compare the terms of the Laidlaw PPA. As a result, information concerning such contracts would inform the public about the Commission's determination of the public interest of the Laidlaw PPA. Disclosure of these contracts might impair PSNH's ability to negotiate with competitive suppliers in the future. Balancing the public's right to know against the competitive harm to PSNH, we find that the balance tips in favor of disclosure of the *pricing and product terms*, but against disclosure of data identifying a specific supplier or facility. Thus, we will require PSNH to make pricing and

product terms available in aggregated or summary form without revealing any specific supplier or facility information. In this case we do not find it necessary to give the Wood-Fired IPPs or other competitive intervenors, or their counsel, access to supplier or facility identity under a non-disclosure agreement. Access to aggregated pricing and product information is sufficient for competitive intervenors to participate meaningfully in this docket.

IV. WOOD-FIRED IPPS MOTIONS TO COMPEL

Following the discovery conference on November 19, 2010, in addition to the five requests discussed above, the following data requests remain subject to pending motions to compel by the Wood-Fired IPPs and objections by PSNH: IPP 2-2; IPP 2-3; IPP 2-4; IPP 2-5; IPP 2-6g; IPP 2-6h; IPP 2-53; IPP 2-54; IPP 5-14; IPP 2-11; IPP 3-1 (same as IPP 5-1); IPP 3-2 (same as IPP 5-2); IPP 3-3 (same as IPP 5-3); IPP 3-5 (same as IPP 5-5); IPP 3-6 (same as IPP 5-6); IPP 3-7 (same as IPP 5-7); IPP 3-8 (same as IPP 5-8); IPP 3-13 (same as IPP 5-9); IPP 3-14a; IPP 2-6e; IPP 2-9; IPP 2-15; IPP 2-71 b and c; IPP 5-28; IPP 2-46; IPP 2-48; IPP 2-49; IPP 2-50; and IPP 2-58. In analyzing and deciding these motions we will group requests and combine our analysis with the parties' arguments.

In addressing a motion to compel discovery responses, we must 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*, 86 NH PUC 167, 168 (2001). RSA 541-A:33, II states in part:

The rules of evidence shall not apply to adjudicative proceedings. Any oral or documentary evidence may be received, but the presiding office may exclude irrelevant, immaterial or unduly repetitious evidence. Agencies shall give effect to the rules of privilege recognized by law.

Our rule on evidence incorporates this statutory standard. See N.H. Code Admin. R Puc 203.23. “[I]n general, discovery that seeks irrelevant or immaterial information is not something we should require a party to provide.” *City of Nashua*, 91 NH PUC 452, 454 (2006).

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.” *City of Nashua*, 91 NH PUC 452, 455 (2006).

PSNH objected to the following Wood-Fired IPPs data requests claiming irrelevance and relying upon the Commission’s past refusal to compel the production of documents related to negotiations:

IPP 2-2. Please provide all documents PSNH examined in evaluating or determining to choose to negotiate and execute the power sales arrangement with Seller.

IPP 2-3. Please provide all documents PSNH examined in evaluating or determining to choose to negotiate and execute an option agreement with PJPD Holdings, LLC.

IPP 2-4. Please provide all documents in PSNH’s possession or under its control pertaining to PJPD Holdings, LLC, Seller, and or NewCo Energy, Inc. (NEWCO), or any affiliate of any of the foregoing or any member, shareholder or employee of the foregoing pertaining to any of the Facility, Facility Site, the negotiation of the PPA and the PPA and the Option Agreement.

IPP 2-5. Please provide all drafts of the PPA inclusive of those marked-up or commented upon by any PSNH or PSNH affiliate or employee or consultant of either.

IPP 2-6g and h. Did PSNH or any of its consultants or any PSNH affiliates or its consultants evaluate, review, analyze, examine or report on any of the following or obtain any of the following for another person or entity:

g. Executed or draft term sheets, letters of intent, or similar documents pertaining to the PPA with Laidlaw or the Option Agreement with PJPD Holdings, LLC or any affiliate of either.

h. Any drafts of or the final to be executed version of the PPA.

IPP 2-53. Please provide a complete and detailed description of any and all specific price points in the negotiations and the basis for the changes in the proposed prices during the negotiations. If any price and non-price terms of the PPA were bundled by either party during the negotiations, please state which price and non-price terms were bundled together and identify the party requesting or offering same.

IPP 2-54. Please provide all materials exchanged between PSNH and Laidlaw in relation to the negotiation process. Include in this response all evaluations, studies, reports, correspondence, e-mails, notes, presentation materials, work papers, letters of intent, term sheets, draft contracts and the like.

IPP 5-14. Please provide any and all documents in the possession or under the control of PSNH regarding Laidlaw's announcement on September 29, 2008 that it had reached agreement on the material terms of a contemplated 20-year power purchase agreement with PSNH, including the material terms agreed to by such date and, if such terms are different than those contained in the PPA presented to the Commission for approval in this docket, please state how the terms differ, and describe the process pursuant to which the terms changed.

These questions request PSNH to provide information related to PSNH's negotiation of the PPA with Laidlaw. We are required to review the PPA to determine if it is in the public interest in its final form. We will not compel production of documents related to the negotiation of the PPA. Consistent with our order in Docket No. DE 03-166, *Public Service Co. of N.H.*, "[i]n contrast to the results of any such negotiations, we can conceive of no circumstances in which we would deem information about the negotiations themselves admissible." 89 NH PUC 226, 230 (2004). We deny the motion to compel responses to the referenced data requests.

Next, the Wood-Fired IPPs requested the Commission to compel responses to IPP 2-6e, 2-9, 2-15, 2-71b and c, and 5-28. PSNH objected to these data requests on the grounds that the

requests seek discovery of information regarding issues outside of the scope of the docket. The relevant data requests are as follows:

IPPs 2-6e. Did PSNH or any of its consultants or any PSNH affiliate or its consultants evaluate, review, analyze, examine, or report on any of the following or obtain any of the following for another person or entity:

- e. Whether Schiller Station Unit 5 biomass can comply with the proposed biomass eligibility requirements for efficiency and fuel harvesting practices as set forth in the draft proposed Massachusetts RPS Class I Regulations (225 CMR 14.00) released on or about September 17, 2010 prepared by the Massachusetts Department of Energy Resources.

IPPs 2-9. To the extent, in the possession of, or under the control of PSNH or its affiliates please provide the name and address of all proposed biomass suppliers to the Facility and identify any that are known to be also suppliers to Schiller Station Unit 5.

IPPs 2-15. Regarding Schiller Unit 5

- a. Regarding PPA Article 6.1.2(a)(ii), please state whether PSNH's Schiller Station Unit 5 biomass participated in the Biomass Crop Assistant Program (BCAP), and if so state or calculate the impact of such participation on the quarterly and monthly price of wood in \$/ton provided in response to staff Q. 1-22.
- b. If Schiller Unit 5 did not participate in the BCAP program, please explain why and provide PSNH's calculation and analysis of the increased amount paid for biomass fuel at Schiller Unit 5 in the absence of BCAP participation on the prices provided in response to staff Q. 1-22.
- c. Please explain, with reference to provisions of the PPA, whether PSNH can adjust the Schiller Unit 5 biomass "actual average \$/ton biomass fuel cost" under Section 6.1.2(a)(ii) for wood fuel prices paid by PSNH at Schiller Unit 5 that are found to be imprudent or which do not take advantage of available federal or state fuel subsidy or discount programs such as BCAP.

IPP 2-71.

- a. Please provide forecasts of annual MWh sales used to determine the forecast for Class I NH RECs noted in Q.2-20. (PSNH has provided this item)
- b. Please identify all assumptions in producing the forecast in (a) above
- c. Please provide all work papers, evaluations and analyses and sensitivities analyses pertaining to said forecasts.

IPP 5-28. If any question in this Set 5 to PSNH asks for any documents, studies, reports, workpapers, projections, analyses, reviews, evaluations, calculations, pro formas, spreadsheets, forecasts, estimates or the like in the possession or control of PSNH, and any of the foregoing

exist but are not in the possession or control of PSNH, please identify which of the foregoing exist and the name and address(es) of the person or entity who or which has possession or control of it or them.

We have reviewed these data requests and find that these questions are not designed to elicit admissible evidence or lead to evidence relevant to our assessment of the PPA. In addition, the production of information responsive to IPP 2-71b and c and IPP 5-28 is overly-burdensome. For those reasons, we deny the motion to compel PSNH to answer these data requests to the extent that PSNH has not provided responses.

The Wood-Fired IPPs claim that PSNH's response to IPP 2-46 is not complete. IPP 2-46 reads as follows:

IPP 2-46. For any purchased power resources that PSNH has under agreement, please indicate whether PSNH anticipates being entitled to any New Hampshire renewable energy certificates associated with such resource. For each such resource please list the number of certificates that PSNH expects to receive and the class of certificates pursuant to RSA 362-F.

Unlike IPP 2-10, which requested a list of all contracts with terms in excess of three years that the Company has entered into for the purchase of energy, capacity of RECs and specific detail for each such arrangement including the pricing terms for each product and a copy of each such contract, IPP 2-46 requests PSNH to provide the number and REC Class of certificates that it expects to receive and the facility associated with the REC production. The Company is asking for approval of the PPA pursuant to RSA 362-F and we find that the answers to this question could lead to admissible evidence relevant to our investigation. We therefore grant the motion to compel a response to IPP 2-46.

The Wood-Fired IPPs allege that PSNH's responses to a series of questions are incomplete. IPP 2-48, 2-49 and 2-50 ask what measures if any PSNH took to ensure that the PPA prices were the lowest, the 20-year contract was the shortest necessary for the Laidlaw

facility to receive financing and to operate and maintain with a reasonable return, and PSNH was not committing to purchase more of the facility's output than necessary for the facility to receive financing. PSNH responded to each of these three data requests by stating that "[t]he negotiation process between the parties resulted in an interrelated set of terms and conditions that reflect the best efforts of each party to provide for their unique interests." We have previously stated that the matter before us is the final contract and not the negotiation of the contract. We therefore deny the motion to compel PSNH to answer IPP 2-48, 2-49 and 2-50.

The next data request at issue is IPP 2-58 which asks as follows:

IPP 2-58. Please identify and explain each factor PSNH examined or otherwise took into account in concluding that Section 6.1.3 of the PPA and the cumulative reduction noted therein will protect PSNH ratepayers from unknown future market energy prices over the term of the PPA.

PSNH responded by stating that it considers the cumulative reduction, the right of first refusal, and the purchase option to be three unique features that allowed the successful negotiation of the PPA. We think the answer is responsive to the question and while the reply lacks detail we do not see the need to compel PSNH to provide further answer. We deny the motion to compel PSNH to respond to IPP 2-58.

The Wood-Fired IPPs also requested that the Commission compel PSNH to respond to IPP 2-11 which reads as follows:

IPP 2-11 Is it PSNH's position that once the NHPUC approves the PPA, the NHPUC could not subsequently order a revision to the PPA inclusive of its pricing terms, or order the termination of the PPA? If so, please provide the reference to the PPS provisions that so provide and the citation to the authority of the NHPUC to issue such an approval under the state law.

PSNH objected to this data request on the grounds that it seeks a legal conclusion and not facts subject to discovery. To the extent that PSNH has a position on the question, we require the Company to provide an answer. We will grant the motion to compel a response to IPP 2-11.

There are a series of data requests posited by the Wood-Fired IPPs in set three of discovery to which PSNH objected because the data requests seek "a legal opinion." These data requests are essentially restated in the Wood-Fired IPPs set five. These data requests include 3-1 (restated in IPP 5-1), 3-2 (restated in IPP 5-2), 3-3 (restated in IPP 5-3), 3-4 (restated in IPP 5-4), 3-5 (restated in IPP 5-5), 3-6 (restated in IPP 5-6), 3-7 (restated in IPP 5-7), 3-8 (restated in IPP 5-8), 3-13 (restated in IPP 5-9) and 3-14a. Our resolution of the discovery disputes on IPP set 3 shall also dispose of the corresponding questions in IPP set 5. The questions are as follows:

IPP 3-1. a. With reference to PPA Section 24.2 and the authority stated therein of the NHPUC to change the PP A please identify with specificity the authority that "applies when the Parties have irrevocably waived their right to seek to have the NHPUC change any term of this Agreement."

b. Please provide the citation or reference to the authority noted in Q. 3-1(a).

IPP 3-2 a. If the NHPUC approves the PPA as filed, please explain whether the NHPUC subsequently, on its own motion or that of a non-party to the PPA, could hold a hearing and issue an order modifying or eliminating the REC purchase price under the PPA.

b. Please explain the standard of review that would apply to the proceeding noted in Q 3-1(a) if the NHPUC were able to so act, and provide the citation or reference to any such standard in New Hampshire law.

IPP 3-3 Is it PSNH's position that the REC prices in the PPA, once approved by NHPUC order, cannot be subsequently modified by the NHPUC? If so, please identify with specificity the New Hampshire law that PSNH understands would provide the NHPUC with the authority to issue such an order. If it is PSNH's position that a NHPUC order approving the PPA long-term REC pricing can subsequently be modified by the NHPUC, please state and explain the New Hampshire law standard applicable to such modification, and identify the New Hampshire authority that allows such an order.

IPP 3-4 With reference to PPA Section 24.3 and its subparagraphs (which are misnumbered, but which will be referred to in this question by the numbers used in the PPA, i.e., 24.2.1, 24.1.2, 24.1.3 and 24.1.4) please explain:

- a. Whether the entirety of Section 24.3 only applies to FERC proceedings or whether it also applies to proceedings before the NHPUC pertaining to the PPA; and
- b. Whether the “public interest application of the just and reasonable standard review” stated in PPA Section 24.1.1 applies to the NHPUC, the Office of Consumer Advocate or intervenors in proceedings before the NHPUC regarding potential subsequent modification of the PPA.

IPP 3-5. Is it PSNH's position that the FERC has authority with respect to the REC pricing terms and conditions of the PPA? If so provide the specific citation or reference to such authority, and explain the scope of FERC's authority over the REC pricing terms and conditions of the PPA.

IPP 3-6. PPA Section 22. 1 (iv) provides that "interpretation and performance" of the PPA is controlled by "future laws."

a. Is PSNH bound to continue to pay for RECs, energy or capacity under the PPA if any such "future law" were to:

- i. preclude or otherwise limit full cost recovery of the amounts to be paid for any or all of RECs, energy, or capacity under the PPA?
- ii. eliminate or reduce the amounts of Class I NH RECs required to be purchased by PSNH under RSA 362-F?
- iii. reduce the alternative compliance payment ("ACP") schedule, amount, or its escalation or change over time for Class I NH RECs.

Please explain your answer to each subquestion in Q. 3-6(a) and in that explanation also provide the reference to the PPA sections that inform or direct your response.

b. If the NHPUC approves the PPA as filed and the "future laws" identified in Q 3-6(a) become effective during the PPA term, is it PSNH's position that the NHPUC, on its own motion, or otherwise could after notice and hearing issue an order to:

- i. reduce the amounts to be paid under the PPA that were affected by the future law to the amount allowed under the future law or limit the recovery from PSNH ratepayers to the amounts allowed under the future law?
- ii. reduce or eliminate the REC payment under the PPA?

- iii. adjust the REC payment under the PPA to utilize the ACP of the future law in lieu of the Renewable Products Payment under PPA Section 6.1.2(c), including cases where the future law reduces the ACP below the ACP in effect on June 8, 2010 or any subsequent date?

Please explain your answer to each subquestion in Q. 3-6(b) and in that explanation also provide the reference to the PPA sections that inform or direct your response.

IPP 3-7. Does the PPA provide that the amount of NH Class I RECs available to be purchased under the PPA during its term will: a. not be affected by a Change in Law? b. be determined under and by the term of RSA 362-F in effect as of June 8, 2010?

Please explain your answer and provide the references to the PPA sections that inform or direct your answer, inclusive of PPA Section 6.1.2(c).

IPP 3-8. Does the PPA provide that Renewable Products Payment (as that term is defined in the PPA) will never be less than that which would result under the ACP schedule and mechanism in RSA 362-F, as it exists on June 8, 2010, even if during the PPA term RSA 362-F's ACP schedule and mechanism were subsequently repealed or amended to produce a lower alternative compliance payment? Please explain your answer and provide the references to the PPA sections that inform or direct your answer, inclusive of PPA Section 6.1.2(c).

IPP 3-13. If the Facility and/or Facility Site is transferred in the process of the stock or Membership interest sale of the companies owning same, or of their respective parent companies, does PSNH take the position that PSNH may exercise its right of first refusal pursuant to Article 7 of the PPA? Please explain.

IPP 3-14. According to an October 21, 2010 article in the Boston Business Journal, Northeast Utilities ("NU") CEO Charles Shivery signaled that NU wants New England states to amend their laws so that large scale hydropower that NU intends to import from Canada will qualify in state RPS programs. Please:

- a. State whether PSNH or any of its affiliates has conducted any study, analysis, or evaluation of the effect on the market price for RECs in Massachusetts, Connecticut, Rhode Island, and New Hampshire if large scale hydro were to qualify for RPS eligibility in any or all of those states, and how changes in those market prices would affect the dollar value of PSNH's REC payments under the PPA. If so, please provide all documents pertaining to the study, analysis, or evaluation.
- b. State whether PSNH or any of its affiliates has conducted any study, analysis, or evaluation of the effect of the qualification of large scale hydro in the RPS programs of Massachusetts, Connecticut, Rhode Island, and New Hampshire on PSNH's need for the PPA over its 20 year term. If so, please provide all documents pertaining to the study, analysis, or evaluation.

c. Provide all documents in PSNH's or any of its affiliates' control regarding any plans, strategies, or discussions regarding the amendment of RPS programs in Massachusetts, Connecticut, Rhode Island, or New Hampshire with the purpose of qualifying large scale hydro for these states' RPS programs.

Despite its objection to IPP 3-1 and 3-4, PSNH provided responses and we will not compel them to augment their answer. Regarding IPP 3-2, 3-3 and 3-5, we agree with PSNH that the questions are not designed to elicit facts that may lead to relevant evidence admissible in this proceeding. IPP 3-2 asks PSNH to speculate on what authority the Commission may have to modify the PPA if it is approved; IPP 3-3 asks PSNH whether the REC prices can be modified at a later point; and IPP 3-5 asks for the extent of FERC's authority on REC pricing in the PPA. Such inquiries will not lead to admissible evidence and will not assist in our review of the PPA that is before us.

IPP 3-13 directly relates to a provision in the PPA and asks for PSNH's interpretation of the provision. As stated previously, our duty in this proceeding is to determine whether the PPA is in the public interest pursuant to RSA 362-F. PSNH agreed to the provision and presumably has a position on whether the future transaction scenarios posed in the data request have an effect on PSNH's ability to exercise its right to first refusal and its ability to recover the Cumulative Reduction which is funded by ratepayers. We consider the responses to this request to be relevant to our review of the proposed PPA and direct PSNH to respond to IPP 3-13.

IPP 3-6, 3-7 and 3-8 address the potential effect of future laws on PSNH's obligations under the PPA, including any future changes in REC procurement obligations, alternative compliance payment schedules and ratepayer cost recovery provisions. PSNH objected to each of these questions on the grounds that the responses called for speculation regarding unspecified future legislation. We disagree. The PPA Section 22.1(iv) provides that "interpretation and

performance” of the PPA is controlled by “future laws.” For PSNH to agree to this provision, the Company likely considered what those future laws might be. The scenarios outlined in the questions are reasonably foreseeable legal and regulatory changes that may well occur over the 20-year term of the PPA. Any such changes could have a material and substantial effect on the costs of the PPA, specifically the cost of RECs, passed through to ratepayers. We find responses to these data requests will likely lead to the discovery of admissible evidence and grant the motion to compel PSNH to respond to IPP 3-6, 3-7 and 3-8.

Data request IPP 3-14 concerns power imported from HydroQuebec, REC eligibility of such and any related analysis performed by PSNH. The responses to IPP 3-14 are not likely to produce relevant evidence admissible in this proceeding and we therefore deny the motion to compel responses to IPP 3-14.

At the discovery conference on November 19, 2010, the parties agreed to limit the scope of further discovery to, “(1) responses released by PSNH as a result of the Commission’s Order No. 25,168 on rehearing; (2) questions withdrawn to be restated as part of the November 19th discovery conference; and (3) PSNH responses to questions resulting from the upcoming Commission order on motions to compel.” The limited scope agreed upon appears appropriate to achieve an efficient process in this docket and we approve it.

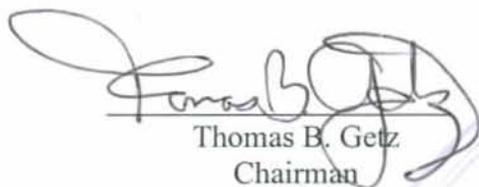
Based upon the foregoing, it is hereby

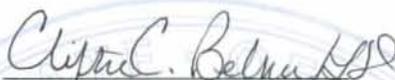
ORDERED, that PSNH’s Motion for Confidentiality is granted in part and denied in part, as explained herein; and it is

FURTHER ORDERED, that the Wood-Fired IPPs’ pending motions to compel are granted in part and denied in part, as explained herein; and it is

FURTHER ORDERED, that the scope of discovery shall be limited as agreed upon by the parties.

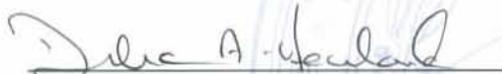
By order of the Public Utilities Commission of New Hampshire this twenty-fourth day of November, 2010.


Thomas B. Getz
Chairman


Clifton C. Below
Commissioner


Amy L. Ignatius
Commissioner

Attested by:


Debra A. Howland
Executive Director

