

THE STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

Docket No. DE 11-250

Public Service Company of New Hampshire
Investigation of Merrimack Station Scrubber Project and Cost Recovery

OBJECTION OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
TO TRANSCANADA’S MOTION FOR RECONSIDERATION
AND/OR CLARIFICATION OF ORDER NO. 25,663

Public Service Company of New Hampshire (hereinafter “PSNH” or “the Company”) hereby objects to the “Motion for Reconsideration and/or Clarification of Order No. 25,663” submitted by TransCanada Power Marketing, Ltd. and TransCanada Northeast Inc. (“TransCanada”) dated May 19, 2014.

1. TransCanada offers no new arguments for reconsideration, nor does it, or can it, argue that the Commission overlooked facts that would require reconsideration. Instead, TransCanada boldly states that it “is unwilling to provide” and “will not provide” the information that this Commission has ordered it to provide. It also contends that it would be “unfair” to require it to answer those data requests which the Commission has already determined are relevant and appropriate inquiries.

2. Pursuant to RSA 541:3, the Commission may grant rehearing when the motion states good reason for such relief. Good reason may be shown by identifying specific matters that were either “overlooked or mistakenly conceived” by the deciding tribunal. *Dumais v. State*, 118 N.H. 309, 311 (1978). A successful motion does not merely reassert prior arguments and request a different outcome. *See Campaign for Ratepayers Rights*, 145 N.H. 671, 674 (2001); *Connecticut Valley Electric Co.*, 88 NH PUC 355, 356 (2003); *Public Service Company of New*

Hampshire, Docket No. 07-108, Order No. 24,966, *slip op.* at 5 (May 1, 2009). TransCanada acknowledges these restrictions in its Motion (at 1), yet it adds nothing beyond what it included in its prior discovery objections. On this basis alone, the Commission should reject TransCanada’s Motion. But TransCanada’s conduct in this proceeding necessitates a closer examination.

3. TransCanada is quite direct in its defiance of the Commission’s Order and authority. For questions 34a and 52:

TransCanada wants to make it clear to the Commission, however, that it will not provide forecasts that were produced by or that are in the possession of affiliates that are not parties to this docket for the reasons explained above.

TransCanada Motion to Reconsider (“Motion”) at 6 (emphasis added). Likewise, for questions 74b and 75c, TransCanada states:

TransCanada is unwilling to provide any internal studies that non-party affiliates may have done on the effects of horizontal drilling and hydraulic fracturing on future gas supply and prices. To the extent public information exists, PSNH should conduct its own search.

Id. at 7.

4. These are remarkable statements in response to Commission orders requiring the production of this information. In sum, this is not a Motion for Reconsideration, but rather it is TransCanada telling the Commission that it should modify its prior order because TransCanada has not complied, and does not intend to comply with it.

5. TransCanada’s reasons for its rejection of the Commission’s Order include its contention that it is a “very large company,”¹ that the information sought is “highly sensitive

¹ TransCanada essentially claims that it should be immune from discovery requirements because it is “very large.” Earlier in this proceeding, another intervenor claimed that it should be immune from discovery requirements because it was too small: “CLF will suffer undue hardship and inconvenience if forced to answer the 187 pending data requests. CLF is a non-profit environmental advocacy organization with limited resources.” Conservation Law Foundation’s Motion to Extend Time to Respond to Data Requests, January 30, 2014, at ¶ 5.

and confidential,” and further re-arguments of the relevance of this information that the Commission rejected in Order 25,663. *Id.* at 4-6.

6. TransCanada’s position boils down to this: We intervened as a competitor of PSNH and because we are experienced in the natural gas industry, and have information about the industry that would be helpful to the Commission. But we refuse to produce any information in our possession that might provide assistance to the Commission, support PSNH’s arguments, or contradict the testimony of our witness. Put simply, when it serves our purpose to intervene in this Docket to attempt to prevent a competitor from recovering on an investment, we’ll offer information; when it does not, we will hide behind a claim of confidentiality and assert it is unfair and burdensome for us to have to produce relevant information. And we can and will do so notwithstanding that the Commission has ordered us to produce the information.

7. TransCanada has no standing to be in this Docket but was permitted to intervene on a discretionary basis² after stating that its intervention would “be of value to the parties and the Commission” and “would not impair the orderly and prompt conduct of the proceeding.” TransCanada Motion to Intervene, December 7, 2011 at 3.³ However, this is the ninth pleading or Order relating to TransCanada’s Objections to PSNH’s attempt to obtain discovery from it. These include:

- TransCanada’s January 24, 2014, Objection to PSNH’s data requests as asking too many questions;

² Secretarial Letter dated December 23, 2011. “The Commission has determined that although NEPGA, TransCanada, Sierra Club and CLF have not demonstrated affected rights, duties, or privileges that mandate their intervention, given the particular circumstances of this docket their intervention requests will be granted pursuant to RSA 541:32, II.”

³ It based this representation, in part, on its statement that, “TransCanada and its affiliates are involved in the transportation of natural gas and the power generation business in North America. TransCanada and its affiliates collectively own approximately 567 MW of hydroelectric generation capacity on the Connecticut and Deerfield rivers, with the bulk of it being in New Hampshire.” *Id.*

- The Secretarial Letter of January 31, 2014, denying TransCanada’s Objections and requiring answers to the requests;
- PSNH’s Motion to Rescind TransCanada’s Intervenor Status or Alternatively to Strike TransCanada’s Objections to PSNH’s Data Requests and Compel Further Answers, February 21, 2014;
- TransCanada’s Objection to PSNH’s Motion to Rescind, March 3, 2014;
- Commission Order No. 25,646 ruling on PSNH’s Motion to Rescind and Compel and requiring PSNH and TransCanada to attempt to resolve their disagreements, April 8, 2014;
- PSNH’s further Motion to Compel TransCanada to Respond to Data Requests, April 18, 2014;
- TransCanada’s Objection to PSNH’s Motion to Compel, April 18, 2014;
- Commission Order No. 25,663 compelling TransCanada to answer specific questions, May 8, 2014; and
- TransCanada’s current Motion for Reconsideration.

8. Thus, for now more than four months, this Commission has been unable to advance this docket because of continued disputes over what discovery TransCanada will answer, or refuse to answer. And now, despite an order requiring answers to specific questions, TransCanada indicates that it will not comply with the Commission’s orders.

9. TransCanada contends that if the Commission orders the production of information from a party that has chosen to voluntarily intervene (even when it has no standing to do so), this will have a “chilling effect” on other intervenors, each of which presumably is free to choose to intervene. This Commission has previously held that due process requires providing parties with an opportunity to conduct discovery. *Re Public Service Company of New Hampshire*, 81 NH PUC 766, 772 (1996). Such constitutional due process considerations tip the balance in favor of discovery rights over any “chilling effect” concerning parties with no demonstrated affected rights, duties, or privileges at stake, such as TransCanada.

10. Intervenors such as TransCanada must not be allowed to continually delay this proceeding by quibbling over discovery – especially after they enjoyed an extensive discovery period during which PSNH provided tens of thousands of pages of information in response to many hundreds of questions. The delays being caused by these extended discovery complaints come at a very high cost – carrying costs (interest) on the unrecovered deferred balance of PSNH’s investment in the scrubber are accruing at over \$100,000 per week, and increasing. These costs may ultimately be borne by consumers.

Specific Questions That TransCanada Refuses to Answer

11. As the Commission noted in Order No. 25,663, following Order No. 25,646 PSNH narrowed its Motion to Compel to seven questions and the Commission ordered answers to four of those questions.

12. Questions 34a and 52 requested information about “fuel price forecasts for natural gas and coal (not oil) that were either produced by or were in the possession of a TransCanada affiliate from January 1, 2005, through December 31, 2008 and that were long-term forecasts that included prices for 2012 and beyond,” and for “all fuel price forecasts relating to the price of coal, oil and natural gas produced by or available to TransCanada from 2005-2012.” Order 25,663 at 7. The Commission granted PSNH’s Motion to Compel as to both questions. *Id.*

13. TransCanada contends that the Commission erred because:

a. It overlooked the fact that the testimony of its witness Mr. Hachey was limited only to information publicly available to PSNH. Motion at 3-4. But TransCanada already made this argument to the Commission and it was rejected. Order 25,663 at 5.

b. PSNH’s question was addressed only to Hachey’s testimony. Motion at 3. The very language of the question proves otherwise.

c. The information sought is irrelevant and beyond the scope of Hachey's testimony. Motion at 3-4. The Commission expressly considered this issue and found not only that the information was relevant but that PSNH had made a showing of "particularized need" for it. TransCanada simply wants to reargue the relevance of information the Commission has already found to be relevant. In Order No. 25,646, the Commission's statement of Standard 2 stated that where requests were "related to the witnesses' testimony we do not find dispositive the distinction between a party and its sponsored witness for purposes of discovery" and thus that it would compel answers to requests "directed toward the party if the requests are related to the testimony of the sponsored witness." Order No. 25,646 at 5. Applying that standard, the Commission ordered TransCanada to answer these requests – that is, the Commission compelled answers to these particular questions under that standard and thus found that these questions sought information that is both relevant and related to Hachey's testimony. It is too late in a Motion for Reconsideration for TransCanada to re-argue relevance, particularly where, as here, it offers no new basis for doing so.

d. The information sought is "highly sensitive, commercial and proprietary information about competitive markets" and its release would "place TransCanada at a competitive disadvantage versus other market participants." Motion at 4-5. TransCanada's inconsistency in this Docket illustrates the weakness of its arguments.⁴ It argues both that it is

⁴ TransCanada's views on the scope of discovery have changed 180 degrees. Earlier in this docket, when it was seeking discovery, TransCanada took the position that access to information was broad, and that discovery responses must be provided "whether the evidence is in the possession of his opponent or someone else." Joint Motion for Deposition of Gary Long, July 29, 2013, at 1; *see also*, Order No. 25,566, August 27, 2013, at 1. It then stated: "As intervenors in this docket the Moving Parties have the right to conduct discovery pursuant to N.H. Admin. R. Puc 203.09. See N.H. Admin. R. Puc 203.09(a). See *Scotsas v. Citizens Insurance Co.*, 109 N.H. 386, 388 (1969) (a party to a New Hampshire legal proceeding is entitled to "be fully informed and have access to all evidence favorable to his side of the issue ... whether the evidence is in the possession of his opponent or someone else"). Similarly, TransCanada has argued that, "The Commission will typically allow 'wide-ranging discovery' and will deny discovery requests only when it 'can perceive of no circumstances in which the requested data would be relevant.' *Re Lower Bartlett Water Precinct*, 85 NH PUC 371, 372 (2000)." Trans Canada's Second Motion to

and is not a competitor of PSNH when it suits its purpose to do so.⁵ But regardless of whether TransCanada is a competitor of PSNH, the Commission can require that any confidential documents be produced pursuant to a protective or confidentiality order – exactly what PSNH and the parties have done with respect to confidential PSNH information in this proceeding.⁶ Moreover, the information which TransCanada claims is confidential is circa 2005 to 2009 – five to nine years old. In light of the volatility of the energy market, how price forecasts and shale gas reports prepared nearly a decade ago can be deemed “confidential” because “it could be used to undermine the competitive position of TransCanada” (Motion at 5) is inexplicable.

e. TransCanada is a “very large company” and production of this information would be burdensome. Motion at 4. TransCanada made the Commission fully aware of the number of its affiliates in its Objection to PSNH’s Motion to Compel and the Commission nonetheless ordered it to answer. And, can it seriously be argued that because a company is “very large,” it need not comply with Commission orders? Likewise, can it seriously be argued that because compliance with a Commission Order requires “a major undertaking,” the party need not comply?

Compel Public Service Company of New Hampshire to Respond to Data Requests, September 11, 2012, at 2. Now, when the shoe is on the other foot, TransCanada asserts that the rules of discovery are very narrow, and that discovery is limited only to information in the possession of narrow specific special purpose entities that it chose to intervene. The Commission has noted that due process considerations must be accorded to the discovery process. (“We find that the Joint Movant’s request for Mr. Long’s deposition is timely and has no due process implications for PSNH.” Order No. 25,566 at 5; *Re PSNH*, 81 NH PUC 766, *supra*.) Due process is a two-way street – TransCanada may not assert that the rules it must follow are different from the rules it claims apply to others.

⁵ In response to the following question asked by PSNH in this docket, TransCanada responded as follows:
Q: Would TransCanada’s competitive position relative to PSNH be harmed or aided if the full costs of the Scrubber were allowed to be included in PSNH’s default service rate? Please provide the detailed basis for your response.
Answer: *I do not regard PSNH as a competitor.* Provided by: Michael Hachey.” (Emphasis added.) Yet TransCanada argues here that it is a “competitive energy supplier” (Motion at 8) and that PSNH is seeking information that “could be used to undermine the competitive position of TransCanada. (*Id.* at 5).

⁶ See Order No. 25,332 dated February 6, 2012, at 5.

14. TransCanada’s Motion with respect to Questions 74b and 75c repeat the same arguments raised above with one additional claim. TransCanada asserts that its “non-party affiliates are not producers of natural gas,” and therefore are not “the entities that would have the best handle on the impacts that horizontal drilling and hydraulic fracturing would have on future gas supply and prices.” Motion at 7. This is a new objection never raised before, and therefore has been waived; moreover, it is irrelevant. If the affiliates have the information despite not “having the best handle,” they should produce it. If they do not, they can say so.⁷

15. Finally, TransCanada contends that the Commission has no jurisdiction over it because it is not a utility and therefore, the Commission cannot order this discovery. TransCanada apparently forgets that it is in this Docket voluntarily and thus voluntarily submitted to the Commission’s jurisdiction. Likewise, TransCanada ignores the standards for intervention established by the Legislature and thus giving the Commission authority over intervenors in RSA 541-A: 32, III. (“If a petitioner qualifies for intervention, the presiding officer may impose conditions on the intervenor’s participation in the proceedings either at the time that intervention is granted or at any subsequent time.”) TransCanada acts as if the Commission reached out and attempted to assert jurisdiction over it without any voluntary act on its part. This claim is just plain wrong.

16. Likewise, because TransCanada’s involvement is entirely voluntary, its contention that somehow imposing conditions – such as requiring a party to answer discovery – will have a “chilling effect” on future intervention has no merit. TransCanada is in this Docket at the Commission’s discretion and because of its own voluntary decision to intervene. Any intervenor must weigh the cost of intervention against the perceived benefits. Nor is this an instance in

⁷ And, if none of TransCanada’s affiliates are producers of natural gas, how would TransCanada suffer the “competitive harm” which it alleges it would suffer by complying with the Commission’s Order?

which the Commission has imposed requirements on a party that had independent standing to be in the Docket. TransCanada chose to participate in this Docket and is free to continue to do so or not to do so. What it cannot do is continue to participate while refusing to comply with Commission Orders – RSA 541-A:32, II makes that clear. As a matter of law, a grant of intervention on a discretionary basis is conditioned on the requirement that such intervention “would not impair the orderly and prompt conduct of the proceedings.” If TransCanada’s express outright refusal to comply with the Commission’s Order No. 25,663 does not violate this statutory proscription, nothing ever will.

17. TransCanada contends that unless the Commission reconsiders Order No. 25,663, it will refuse to comply with that Order. That remarkable position does not constitute a valid basis for reconsideration.

18. As a matter of fact and law, TransCanada has already violated Order No. 25,663. In Order No. 25,663 at 8, the Commission expressly, “**FURTHER ORDERED**, that TransCanada shall provide the supplemental responses by May 19, 2014.” May 19 has come and gone – and TransCanada has refused and therefor failed to comply with the Commission’s mandate. RSA 541:18 makes it clear that the filing of a Motion for Rehearing does *not* suspend the operation of the underlying order: “No appeal or other proceedings taken from an order of the commission shall suspend the operation of such order;” Nor has TransCanada sought an extension of time under Rule Puc 202.04 of the May 19 deadline imposed on it by Order No. 25,663. (“[A] party requesting an extension of time shall make such request in writing to the executive director before the expiration of the period originally prescribed.”) TransCanada has clearly decided that it can choose whether – and when – it will comply with the Commission’s Orders.

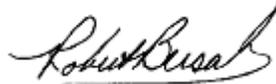
WHEREFORE, PSNH respectfully requests that the Commission:

- i. deny TransCanada's Motion for Reconsideration;
- ii. given TransCanada's indication that it will not comply with Commission orders, reconsider TransCanada's intervenor status in this proceeding; and
- iii. grant such further relief as may be just, equitable and appropriate.

Respectfully submitted,

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Dated: May 22, 2014

By: 

Robert A. Bersak, Bar No. 10480
Assistant Secretary and Chief Regulatory Counsel
Linda Landis, Bar No. 10557
Senior Counsel
Public Service Company of New Hampshire
780 N. Commercial Street
Post Office Box 330
Manchester, New Hampshire 03105-0330
(603) 634-3355
Robert.Bersak@PSNH.com
Linda.Landis@PSNH.com

**McLANE, GRAF, RAULERSON & MIDDLETON,
PROFESSIONAL ASSOCIATION**

Wilbur A. Glahn, III, Bar No. 937
Barry Needleman, Bar No. 9446
900 Elm Street, P.O. Box 326
Manchester, NH 03105
(603) 625-6464
bill.glahn@mclane.com
barry.needleman@mclane.com

CERTIFICATE OF SERVICE

I certify that on this 22nd day of May, 2014, I caused a copy of this pleading to be served pursuant to N.H. Code Admin. Rule Puc 203.11 (c) on the parties listed on the service list for this proceeding.



Robert A. Bersak
Assistant Secretary and Chief Regulatory Counsel
Public Service Company of New Hampshire
780 N. Commercial Street
Post Office Box 330
Manchester, New Hampshire 03105-0330
(603) 634-3355
Robert.Bersak@PSNH.com