

THE STATE OF NEW HAMPSHIRE
BEFORE THE
NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DE 14-238

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Determination Regarding PSNH's Generation Assets

Motion to Compel Public Service Company of New Hampshire
to Respond to Data Requests

NOW COMES Granite State Hydropower Association, Inc. ("GSHA"), an intervenor in the above-captioned docket, and respectfully moves the New Hampshire Public Utilities Commission ("the Commission"), pursuant to Admin. Rule Puc 203.09(i), to compel Public Service Company of New Hampshire ("PSNH" or "Eversource") to respond to data requests submitted by GSHA to PSNH, and to which PSNH has objected. In support of this Motion, GSHA states as follows:

1. The Order of Notice dated September 16, 2014 in this docket indicates that, among other issues, this docket may address "the status of the 1999 restructuring settlement agreement with PSNH in docket DE 99-099 and its application in this docket; and other issues identified by the parties." Order of Notice (Sept. 16, 2014), p. 2.

2. The Supplemental Order of Notice dated June 26, 2015 in this docket states that in addition to the previously-noticed issues, the currently pending Joint Motion for Expedited Approval of Settlement Agreement and Rate Adjustments raises issues related to whether

divestiture, either under the terms and conditions of the 2015 Settlement Agreement¹, or otherwise, is in the public interest...” Supplemental Order of Notice (June 26, 2015), pp. 2-3.

3. In its order granting GSHA’s petition to intervene in this docket, the Commission recognized that GSHA’s members primarily sell power at wholesale to distribution utilities, including some sales under the 1999 Settlement Agreement. Order No. 25, 733 (Nov. 16, 2014), p. 6.

4. In its preliminary statement of position at the prehearing conference held July 9, 2015 in this docket, GSHA asserted that certain provisions of the 2015 Settlement Agreement are not consistent with New Hampshire or federal law relating to distribution companies’ energy purchases from independent power producers (“IPPs”). More specifically, GSHA argued that the definition of avoided cost contained in paragraph III.C. of the 2015 Settlement Agreement², *i.e.*, “avoided cost rates for purchases of IPP power pursuant to PURPA³ and LEEPA⁴ shall be equal to the market price for sales into the ISO-NE power exchange, adjusted for line losses, wheeling costs, and administrative costs”, is improper because it conflicts with New Hampshire case law stating that “avoided cost” under LEEPA is “the marginal cost that the utility would incur to generate or purchase the energy from another source.” *Appeal of Marmac*, 130 N.H. 53, 55 (1987). GSHA asserts that the proper avoided cost rate PSNH should pay to IPPs until PSNH divests its generation assets is a rate that reflects PSNH’s cost of producing energy and any additional energy purchases to serve PSNH’s default service load. Post divestiture, assuming that PSNH procures all of its default service energy through a competitive bid process similar to

¹ “2015 Settlement Agreement” refers to the document entitled “2015 Public Service Company of New Hampshire Restructuring and Rate Stabilization Agreement.”

² This is the same as the definition appearing in the 1999 Settlement Agreement at lines 1048-1052 regarding “short-term purchases” from IPPs.

³ Public Utilities Regulatory Policies Act of 1978 – 16 U.S.C. §2601.

⁴ Limited Electrical Energy Producers Act – N.H. RSA 362-A.

the manner employed by other New Hampshire distribution companies, PSNH's avoided cost rate paid to IPPs will be based upon the cost PSNH incurs to purchase energy to meet its default service obligations. Inasmuch as the provisions of the 2015 Settlement Agreement provide otherwise, GSHA opposes those provisions.

5. In accordance with the procedural schedule in this docket, on July 29, 2015, GSHA submitted data requests (attached) to PSNH. By letter dated August 3, 2015 ("the Objection") (attached), PSNH objected to all of GSHA's data requests "on both general and specific bases." Objection, p.1. PSNH argues that the avoided costs standard in the 2015 Settlement Agreements is substantially identical to the same provision included in the 1999 Settlement Agreement and is also consistent with that contained in the Commission's net metering rules (Puc 903.02). *Id.* PSNH argues that a Commission determination "that changes existing regulations must be considered in a properly-notice rulemaking proceeding, not an adjudicative proceeding..." Objection, p. 2. PSNH's general objection also argues that changing the existing avoided cost standard is a generic issue that is "beyond the scope of this proceeding" and that GSHA is attempting "to hijack this proceeding to deal with this generic issue." *Id.* For the reasons discussed below, PSNH's general objections must fail.

A. First, the fact that the avoided cost language in the 1999 Settlement Agreement is similar to that contained in the 2015 Agreement does not preclude parties from examining the propriety of that language, especially given that approximately 15 years have passed since the first Settlement Agreement was approved, and circumstances have changed. The 1999 Agreement, at lines 1048-1049, specifies "short term" IPP purchases while the 2015 Agreement, at line 305, speaks of "purchases of IPP power" without regard to whether those purchases are long term or short term. Many if not most of

PSNH's IPP purchases in 1999 were made pursuant to long term rate orders or contracts which are no longer in effect. Thus, the IPP purchase language in the 1999 Agreement is of greater significance now than it was 15 years ago. In addition, although both Agreements define avoided costs as "the market price for sales into the ISO-NE power exchange..." it is important to note that ISO-NE markets are different than the markets that existed in 1999. Because it is unclear which market prices apply to IPP purchases, that issue must be examined in this docket.

B. Second, the fact that the Commission's net metering rules contain language similar to the avoided cost provisions in the 1999 and 2015 Settlement Agreements does not preclude an examination of the 2015 Settlement Agreement language in this docket. This is especially so given that the net metering rules do not apply to PSNH's purchases from GSHA's member-IPPs.

C. Lastly, if approved, the 2015 Settlement Agreement will govern PSNH's IPP purchases during a period when PSNH will continue to own generation (i.e. from the date of the Commission's approval of the 2015 Agreement until divestiture occurs). Thus, PSNH's avoided costs are and will be (until divestiture) different from those of other utilities that purchase default service. Because PSNH is not situated similarly to other distribution utilities, the question of what PSNH should pay IPPs during the time it owns generation is not a "generic" one. Accordingly, because this question is implicated by the provisions of Section III.C. of the 2015 Agreement it must be examined here.

6. As the Commission has noted, "New Hampshire law favors liberal discovery" and discovery in a Commission proceeding extends to information that "is relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence." *Public Service*

Company of New Hampshire, Investigation of Merrimack Station Scrubber Project and Cost Recovery, DE 11-250, Order No. 25, 398 (Aug. 7, 2012) p. 2 (citations omitted). The Commission will typically allow “wide-ranging discovery” and will deny discovery requests only when it “can perceive of no circumstance in which the requested data would be relevant.” *Re Lower Bartlett Water Precinct*, 85 NH PUC 371, 372 (2000). A party in a legal proceeding in New Hampshire is entitled to “be fully informed and have access to all evidence favorable to his side of the issue. This is true whether the issue is one which has been raised by him or by his opponent, and whether the evidence is in the possession of his opponent or someone else.” *Scotsas v. Citizens Insurance Co.*, 109 N.H. 386, 388 (1969).

7. Under the foregoing discovery standard, GSHA’s data requests should be answered by PSNH. The information GSHA seeks all relates to demonstrating that PSNH’s payments to IPPs under the terms of 1999 Settlement Agreement, and its proposal for payments under the 2015 Settlement Agreement, are inconsistent with applicable law that defines avoided costs. Because the 1999 Settlement Agreement definition of avoided costs paid to IPPs is nearly identical⁵ to that found in the 2015 Settlement Agreement, GSHA’s data requests are clearly relevant to issues that are within the proper scope of this proceeding. The requested information will demonstrate that PSNH’s recent⁶ payments to IPPs under the 1999 Settlement Agreement are below PSNH’s actual avoided costs as defined by applicable federal and state law. As interpreted by PSNH, the provisions of the 1999 Settlement Agreement (which are similar to those found in the 2015 Settlement Agreement) have recently had adverse financial impacts upon IPPs and therefore should not be perpetuated in the 2015 Settlement Agreement. Thus, the issue

⁵ Note that while the 1999 Settlement Agreement at lines 1048-1049 specifies “short-term purchases of IPP power” (emphasis added), the 2015 Settlement Agreement at line 305 simply states “purchases of IPP power.”

⁶ This recent period is January 1, 2015 through June 30, 2015.

of the whether the definition of avoided costs in the 2015 Settlement Agreement is lawful, reasonable and proper, is squarely before the Commission in this docket. GSHA is not, as PSNH argues, hijacking this proceeding. For the reasons noted above, GSHA cannot accede to the wording of the first sentence of Section III. C. of the 2015 Settlement Agreement, and therefore must contest that language in this docket. Accordingly, due process requires that GSHA conduct discovery on the interrelated issues of PSNH's actual avoided costs, its recent IPP payments and, its proposed payments under the 2015 Settlement Agreement.

8. In addition to the above-stated legal standard that supports overruling PSNH's objection, sound public policy dictates that the Commission and the parties should have the responses to GSHA's data requests. The 2015 Settlement Agreement, at lines 84-85, states that the Settling Parties "agree that this Agreement is consistent with New Hampshire law and policy..." However, GSHA submits that Section III. C. of the 2015 Settlement Agreement does not comport with LEEPA. In these circumstances, the Commission and non-settling parties must be able to probe through legal and factual analysis whether the 2015 Agreement actually *is* "consistent with New Hampshire law and policy." This statement should not be accepted at face value. To do so would transform this important adjudicative proceeding into a rubber stamp. For these reasons, the Commission should not accept PSNH's improper and unnecessarily restrictive view of the scope of this proceeding which would preclude an examination of PSNH's avoided cost payments to IPPs.

9. In addition to its generalized objections to GSHA's data requests, PSNH asserted more particularized objections on the following grounds: A) relevance and materiality; B) questions seek publicly available information; and C) questions require speculation. For the reasons discussed below, these particularized objections must be overruled.

A. Objections Based on Relevance and Materiality – (GSHA 1-3, 1-4, 1-6, 1-7, 1-8A-C, 1-9A-C, 1-10, 1-12, 1-25, and 1-26). All of these questions seek information about the period January 1, 2015 through June 30, 2015 during which time Eversource/PSNH made IPP purchases, provided default service, generated its own electricity, and bought power from and sold it into the ISO-NE markets. All of this information is relevant to the issue of PSNH's avoided costs and how it has been treating IPP purchases under the 1999 Settlement Agreement, and whether that treatment is lawful and in the public interest in 2015 and beyond. Answers to these questions will enable the Commission and the parties to quantify the disparity between PSNH's actual avoided costs (i.e. costs of generating and purchasing power to serve default service customers) and the payments it made to IPPs during this period, which is relevant to the issue of whether it is in the public interest to approve the avoided cost language in Section III. C. of the 2015 Settlement Agreement.

B. Objections Alleging That Questions Seek Publicly Available Information - (GSHA 1-8D-E and 1-9D-E). GSHA 1-8D-E and 1-9D-E seek hourly ISO-NE day ahead and real time market rates at times during January 1, 2015 through June 30, 2015 when PSNH either bought or sold power through ISO-NE. PSNH has objected on the basis that this information is publicly available but has not claimed that it does not have the information nor that it would be unduly burdensome to provide the information. The fact that this information is publicly available is not dispositive of the question of whether PSNH should be excused from responding to these data requests. In addition to weighing whether the information is available from other sources, the Commission must also balance “such factors as the relevance of the requested information, the effort needed to gather it... and other relevant criteria.” *Public Service Company of New Hampshire*, DE 13-108, Order No. 25, 595 (Nov. 15, 595) p. 3-4. Because this information is

relevant to the important issues raised by GSHA which are within the scope of this docket, and because PSNH has not indicated that it does not possess the information or that it would be burdensome to produce it, the balance tips in favor of requiring PSNH to produce this information.

C. Objections Alleging that Questions Require Speculation - (GSHA 1-14, 1-15, 1-16, 1-17, 1-22 and 1-29). All of these questions seek information relative to Eversource's default service post divestiture. PSNH has objected to these data requests on the ground that they call for speculation. GSHA disagrees. Section III. B. of the 2015 Settlement Agreement is entitled "Default Service" and provides that, post divestiture, PSNH will transition to a competitive process for default service "consistent with the process determined by the Commission in its Docket No. IR 14-338... as may subsequently be modified by the Commission." 2015 Settlement Agreement, lines 298-302. Although the Commission held a hearing in Docket No. IR 14-338 on May 27, 2015, no order has been issued and no further activity has been scheduled in that docket. In these circumstances, GSHA believes that it is relevant and appropriate to probe in the instant proceeding PSNH's views about its post divestiture default service obligations, and how IPP purchases may figure into them. In the absence of an order in IR 14-338, the only opportunity for parties to investigate how Section III. B. of the 2015 Settlement Agreement may be implemented is to ask questions about it in the instant docket. Although PSNH may be required to alter its positions about default service after an order is issued in IR 14-338, PSNH should be required to respond now to questions about Section III.B. and how PSNH intends to meet its default service obligations post divestiture.

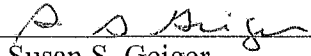
10. The undersigned counsel has made a good faith effort to resolve these discovery issues informally with PSNH as required by Puc 203.09(i)(4). In so doing, GSHA has agreed to withdraw data requests GSHA 1-3a., 1-19, 1-20 and 1-21.

WHEREFORE, GSHA respectfully requests that this honorable Commission:

- A. Compel PSNH to respond to data requests not withdrawn by GSHA; and
- B. Grant such further relief as it deems appropriate.

Respectfully submitted,

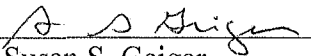
Granite State Hydropower Association, Inc.
By its Attorneys
ORR & RENO, P.A.

By: 
Susan S. Geiger
45 South Main Street, P.O. Box 3550
Concord, NH 03302-3550
Telephone: (603) 223-9154
e-mail: sgeiger@orr-reno.com

August 12, 2015

Certificate of Service

I hereby certify that on this 12th day of August, 2015 a copy of the foregoing motion was sent by electronic mail to the Service List in this docket.


Susan S. Geiger

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