

**STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION**

**DE 10-261**

**PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE**

**2010 Least Cost Integrated Resource Plan**

**Order Granting Motion to Compel, Addressing Confidentiality of 5 Year Capital Budgets  
and Denying Request for Testimony**

**O R D E R N O. 25,263**

**August 30, 2011**

**I. DISCOVERY DISPUTE RE: NEWINGTON STATION**

On September 30, 2010, Public Service Company of New Hampshire (PSNH or Company) filed its 2010 Least Cost Integrated Resource Plan (LCIRP) pursuant to RSA 378:37, RSA 378:38, and Commission Order Nos. 24,945 (February 27, 2009) (PSNH's prior LCIRP filing), and 25,061 (December 31, 2009) (PSNH's Default Energy Service Rate Docket). Several parties, including TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast Inc. (together, TransCanada), Conservation Law Foundation (CLF), and New Hampshire Sierra Club (NHSC) were granted discretionary intervention, pursuant to RSA 541-A:32, II. As required by Order No. 25,061, PSNH filed a Continuing Unit Operation Study for the Company's Newington Station (Newington CUO Study) prepared by the Company's consultant, Levitan and Associates, Inc. (Levitan), as part of its LCIRP.

During the course of discovery on this docket, the Company and Levitan elected to file certain corrections to the Newington CUO Study on April 26, 2011. In light of these corrections, the procedural schedule was modified to allow for application of the corrected Newington CUO

Study data to the Company's responses to data requests from the non-Company parties, and to integrate a third round of discovery requests to the Company related to the corrected Newington CUO Study information. On May 4, 2011, Staff filed a request for these modifications, with the concurrence of the Office of Consumer Advocate (OCA) and PSNH; the requested modification to the procedural schedule was approved on May 9, 2011 (*see* Secretarial Letter from Executive Director D. Howland dated May 9, 2011). In accordance with the revised procedural schedule, TransCanada served on PSNH three data requests related to the corrected Newington CUO Study information. PSNH, on June 13, 2011, objected wholly to Data Request 2. In response, on June 28, 2011, TransCanada filed a motion to compel and on July 7, 2011, to which PSNH objected.<sup>1</sup>

#### **A. POSITIONS OF THE PARTIES**

##### **1. TransCanada**

Data Request 2, to which PSNH objects, reads as follows:

2. Please provide Newington [Station] annual generation costs, revenues, profit margins, and profitability indices from the GE-MAPS model runs prepared for Northeast Utilities by Charles River Associates ("CRA") as part of CRA's study entitled "LMP and Congestion Impacts of Northern Pass Transmission Project," dated December 7, 2010. The data requested should be provided for scenarios both with and without the Northern Pass Transmission Line.

TransCanada received the following response from the Company on June 13, 2011:

"According to the Secretarial letter dated May 9, 2011, in this proceeding, the third round of data requests to be served on June 3, 2011 was limited to questions derived from new Levitan data supplied to the parties on April 26, 2011. PSNH therefore objects to this data request as not timely. Furthermore, the CRA Study was issued several months after PSNH's Least Cost Plan filing was prepared and submitted; therefore, the information in that study was unavailable to the persons filing the PSNH Least Cost Plan." (*See* TransCanada Motion to Compel at 2).

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<sup>1</sup> Though not authorized under our administrative rules, TransCanada filed a response to PSNH's objection on July 11, 2011.

TransCanada argues that the requested information is of primary importance to the development of an independent evaluation of the Newington CUO Study, including evaluation of Levitan's analytical methodologies used preparing the Newington CUO Study. TransCanada Motion to Compel at 2. TransCanada stated that intervening parties such as itself have a key role to play in evaluating the Newington CUO Study, and that access to the requested data related to the CRA study would enable Staff, OCA, and the intervening parties to subject the Newington CUO Study to a more robust independent verification analysis. *Id.* at 2. TransCanada stated that the parties in this LCIRP proceeding have identified the independent assessment of the Newington CUO Study's conclusions to be of great interest and relevance, especially in light of Levitan's corrections to the Newington CUO Study data. *Id.* at 2-3, 4-5. As such, TransCanada asserted that disclosure of the requested CRA study information by PSNH and its parent company Northeast Utilities would likely lead to the discovery of evidence that would be admissible in this LCIRP docket, as it would directly relate to the economic viability of Newington Station's continued operation. *Id.* at 3.

In response to PSNH's June 13, 2011 objection to Data Request 2 on the basis of timeliness under the procedural schedule approved on May 9, 2011, TransCanada stated that the very significant revisions to the Newington CUO Study undertaken by Levitan, summarized in the May 9 procedural schedule under the rubric of "New Levitan Data," implicated disruptions to the parties' formulation of discovery that sharpened TransCanada's impetus for critical examination of the Newington CUO Study, and Levitan's methodologies in general. *Id.* at 4-5. TransCanada stated that it discovered the CRA study related to the potential impact of the Northern Pass proposal by Northeast Utilities through its own background research undertaken

after the April 26, 2011 corrections to the Newington CUO Study. *Id.* at 4-5.<sup>2</sup> TransCanada argues that the CRA study would provide the parties information needed to assess the revised Newington CUO Study conclusions and methodology without undue prejudice to the Company or disruption to the procedural schedule on this docket. *Id.* at 4-5. TransCanada argues that Levitan's exclusion of the potential impact of the Northern Pass project was a judgment worthy of critical analysis by the parties to this proceeding, as it implicates the reasonableness of Levitan's methodology. *Id.* at 2.

TransCanada also argues that the Company's objection to Data Request 2 on the theory that it should not be discoverable because the CRA study was issued after PSNH filed its LCIRP is illogical, as acceptance of such a principle of discovery would, in theory, prohibit discovery of any new information generated by the Company or the parties, for the purposes of independent assessment of the LCIRP's data and methodology, after the filing of an LCIRP. *Id.* at 7-8. Furthermore, TransCanada stated that the CRA study would have been provided by PSNH under the ambit of its earlier rounds of discovery on the Company, had the Company fully complied with TransCanada's discovery requests. *Id.* at 5-6.

## **2. Public Service Company of New Hampshire**

In its objection to TransCanada's motion to compel, PSNH argued that the information requested by TransCanada was neither relevant to the proceeding, nor reasonably calculated to lead to the discovery of admissible evidence, nor timely in the context of the procedural schedule in this docket. PSNH reiterated its position that discovery in an LCIRP proceeding should be limited to "the information available to the persons preparing the write up of the plan or studies

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<sup>2</sup> The CRA study was filed by Northeast Utilities in a Northern Pass-related Federal Energy Regulatory Commission (FERC) proceeding and is available to the public through FERC. TransCanada Motion to Compel at 8-9.

supporting the plan.” PSNH Objection at 2. PSNH also objected to TransCanada’s request for the CRA study-related information as not timely, on the basis that the information was not directly tied to the corrected Newington CUO Study data presented by Levitan. *Id.* The Company disagreed with TransCanada’s claim that the CRA study materials would have been within the ambit of its earlier rounds of discovery questions. *Id.*

PSNH stated that the CRA study-related materials sought by TransCanada were not relevant to the LCIRP proceeding because the CRA study’s limited purposes “of showing whether congestion would be eased by the addition of the Northern Pass Transmission project and the effect that proposed project might have on market clearing prices in New England” were met by the text of the CRA study itself, not the background materials sought by TransCanada. *Id.* at 2-3. PSNH also stated that the “vastly different” methodologies applied by the CRA study, as compared to the Newington CUO Study, would render the information sought by TransCanada irrelevant for the purposes of an assessment of the Newington CUO Study. *Id.* at 3. PSNH also stated that the information sought by TransCanada through its motion to compel was not in the Company’s possession. *Id.*<sup>3</sup>

## **B. COMMISSION ANALYSIS**

In a discovery dispute, the Commission applies by analogy the standard applicable to litigation in Superior Court, which requires a party seeking to compel discovery to show that the information being sought is relevant to the proceeding or is reasonably calculated to lead to the discovery of admissible evidence. *See Public Service Company of New Hampshire*, Order No. 25,048 (November 30, 2009), *citing City of Nashua*, Order No. 24,681 (October 23, 2006).

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<sup>3</sup> In its response to PSNH’s objection, TransCanada suggested that either PSNH or its parent company, Northeast Utilities, which commissioned the CRA study, contact CRA for the information.

In its motion to compel, TransCanada argues that the requested background information to the CRA study related to Newington Station is of great importance in its, and the other parties', independent assessment of the Newington CUO Study's methodology and conclusions. Given this Commission's directive to PSNH to include the Newington CUO Study in its LCIRP, TransCanada believes that the information sought would be relevant and/or likely to lead to evidence that is relevant in this proceeding.

We agree. In this docket, we must assess PSNH's LCIRP pursuant to the standards prescribed in RSA 378:39, which require our assessment of the economic implications of the Company's planning-related decisions. In our effort to assess PSNH's planning processes, we have ordered the inclusion of the Newington CUO Study, to provide insight into the economic aspects of that plant's operation. Independent verification of the data and methodology used in the Newington CUO Study by the parties to this proceeding, through discovery, assists us in this goal. The Company and its consultant, Levitan, have provided the parties, on an ongoing basis, with new information and corrections regarding the Newington CUO's Study, which could potentially shed more light on the Newington CUO Study's methodology and data. Likewise, the CRA study-related information sought by TransCanada could provide direct information regarding the potential economic performance of Newington Station, in the future context of a major transmission project proposed by PSNH's parent company, and could also serve as an additional measure of the Newington CUO Study's methodologies. Therefore it is reasonable to conclude that TransCanada's Data Request 2 is calculated to lead to the discovery of admissible evidence. We expect that the production of the information sought by TransCanada would not be unduly burdensome to PSNH, with CRA's cooperation. Therefore, we grant TransCanada's

motion to compel. If PSNH views confidential treatment of the requested material to be appropriate, it should submit a motion for our consideration.

## **II. PROTECTIVE ORDER RE: 5 YEAR CAPITAL BUDGETS AND MOTION TO AMEND**

On April 8, 2011, PSNH requested confidential treatment regarding summary information on capital expenditures for its generating units, which the Commission denied in Order No. 25,234 (June 14, 2011). Subsequent data request OCA 2-004 asked for “a detailed breakdown supporting each amount provided” in the summary information provided previously. On July 15, 2011, PSNH requested confidential treatment regarding its response to OCA 2-004, as the response identified distinct capital projects and dollar expenditures by generating unit and by year. (July 15 Motion to Protect). PSNH asked that the information be protected from public disclosure and that it not be disseminated to competitive suppliers in the docket.<sup>4</sup> In its motion, PSNH argues that these itemized budget capital expenditure dollar amounts are confidential, commercially-sensitive financial information. PSNH claims that disclosure of these budget figures would: give competitive power suppliers enhanced bargaining power in the Company’s negotiations for supplemental power supplies during maintenance-related outage periods, which could be discerned from the itemized data by knowledgeable parties. PSNH also argues that disclosure of these figures would harm the Company’s bargaining position with potential contractors for its plant maintenance and construction services, as these contractors would have future knowledge PSNH’s budgetary parameters for its projects, which could negatively impact

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<sup>4</sup> Parties who would not receive the information, under PSNH’s request, are TransCanada, Granite Ridge Energy LLC, New England Power Generators Association, Freedom Energy Logistics, LLC and Halifax America Energy Company, LLC.

PSNH's efforts at cost savings in its contracting. These effects of disclosure would, in PSNH's view, cause competitive harm.

With regards to any public interest in disclosure, PSNH argues that the public has no interest in the specific level of operational detail presented by the itemized budget figures, generally and within the context of the LCIRP process, that these projections do not provide any insight into the workings of this Commission and its LCIRP process, and that the competitive harms that could result from disclosure of the information would likely result in higher costs for PSNH ratepayers.

PSNH moved on August 9, 2011 to amend the request, in light of a July 21, 2011 lawsuit filed against PSNH by CLF related to PSNH's operation of Merrimack Station (Motion to Amend)<sup>5</sup> PSNH had argued previously that CLF may be using its participation in this docket "as an opportunity to gain discovery for other litigation"; the Commission found that potential litigation was not relevant to the balancing tests required by RSA 91-A. *See* Motion to Amend at 3 and Order No. 25,234 at 10-11. The Motion to Amend asked that dissemination be withheld from CLF as well as the competitive suppliers in light of the pending action in U.S. District Court. PSNH argues that "the Commission should not allow CLF to use this docket as a means to gain information for that federal court case" and that CLF should instead pursue discovery in the federal court. Motion to Amend at 5. PSNH also argues that dissemination to CLF will fail to inform the public of the conduct and activities of its government, part of the balancing test of a

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<sup>5</sup> CLF filed a citizen suit against PSNH under Section 304 of the Clean Air Act in U.S. District Court of the District of New Hampshire, Civil Action No. 11-CV-353, *Conservation Law Foundation, Inc. v. Public Service Company of New Hampshire*.



Right to Know request, and that the summary information provided to all parties previously is sufficient. *Id.* at 6.

CLF objects, arguing that PSNH's effort to insulate itself from "potential harm" in the pending federal court litigation does not constitute an "invasion of privacy" that warrants protection under RSA 91-A. It argues the data is fundamental to PSNH's planning process and as an active party to the docket, retaining an expert and filing testimony on PSNH's planning processes, environmental and market projections, and operating costs and revenues for Schiller Station it is entitled to review the detailed capital budgets.

The New Hampshire Right-to-Know Law, RSA 91-A:5, IV, states, in relevant part, that records of "confidential, commercial, or financial information" are exempted from disclosure. *See Unitil Corp. and Northern Utilities, Inc.*, Order No. 25,014 (September 22, 2009) at 2. In determining whether commercial or financial information should be deemed confidential, we first consider whether there is a privacy interest that would be invaded by the disclosure. *Unitil Corp. and Northern Utilities, Inc.*, Order No. 25,014, at 2-3. Second, when a privacy interest is at stake, the public's interest in disclosure is assessed. *Id.* at 3. 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. *Id.* Finally, when there is a public interest in disclosure, that interest is balanced against any privacy interests in non-disclosure. *Id.* This is similar to the Commission's rule on requests for confidential treatment. *See* N.H. Code Admin. Rules Puc 203.08; *see also Unitil Corp. and Northern Utilities, Inc.*, Order No. 25,014 (September 22, 2009) at 3.

In Order No. 25,234, we held that the general, non-itemized budget figures considered could be disclosed. Order No. 25,234 at 8-9. In this instance, however, we agree with the Company that the itemized budget information considered here is financial information in which a strong privacy interest resides. Further, competitive harm may befall PSNH if this financial planning-related information is disclosed. *See Union Leader Corp. v. NH Housing Fin. Auth.*, 142 N.H. 540, 554 (1997), *cited in Unutil Corp. and Northern Utilities, Inc.*, Order No. 25,104 (September 22, 2009). We also agree that there does not appear to be a strong public interest in disclosure of the itemized budget figures based upon the information providing the public with insight into the activities of government. Nonetheless, a strong public interest in this information arises from the purposes of the LCIRP framework, as this information could be relevant to an assessment of the adequacy of the Company's planning process as it relates to impacts on the environment. *See* Order No. 25,234 at 10-11.

Thus, in weighing these interests, we conclude that the Company's July 15 Motion to Protect should be granted, within the original parameters of the Motion, as the balance tips against disclosure of the information to competitors of PSNH. Likewise, we find that the balance tips against disclosure of this information to the public at large, as this would have the same effect as direct disclosure of the information to the Company's competitors. We do find that the balance tips in favor of disclosure of this information to non-competitor intervenors in this docket contingent upon execution of nondisclosure agreements with PSNH, as this would enable the public's interest in the Commission having a full examination of environmental issues on this docket to be satisfied, while protecting PSNH against competitive harms.

In examining the Motion to Amend, the focus of the Commission must be on whether an intervenor is entitled, under RSA 91-A, to the information in dispute in our proceeding, irrespective of the uses to which it may be put in another forum. Our basis for restricting dissemination of capital expenditures to competitive suppliers is to protect against market manipulation and safeguard ratepayers from competitive disadvantage that could result from dissemination to other market participants. We do not find PSNH's arguments that its litigation interests in the federal court proceeding constitute a privacy interest in the capital budgets. We will grant protection of the detailed capital budgets from the public generally and from competitive supplier intervenors, in keeping with the original parameters of the July 15 Motion to Protect. We find no basis, however, to restrict dissemination to CLF. Therefore, we will grant the July 15 Motion to Protect information regarding distinct capital projects and dollar expenditures by generating unit and by year and deny the Motion to Amend. We admonish those who receive the information, however, that it remains under protective treatment and cannot be disclosed to the public or to parties in this or any other proceeding.

### **III. NHSC REQUEST FOR TESTIMONY FROM ENVIRONMENTAL AGENCY**

On May 31, 2011 and again on July 25, 2011, NHSC requested that the Commission seek the testimony of the New Hampshire Department of Environmental Services-Air Resources Division (NHDES-ARD), regarding certain information sought by NHSC in the context of NHDES-ARD's ongoing environmental-compliance supervision of PSNH. NHSC had filed a motion to compel responses to NHSC's data requests served on PSNH to elicit this information, which was denied by this Commission in Order No. 25,220 (May 4, 2011). For the same reasons

outlined in Order No. 25,220, and pursuant to N.H. Admin. Rules Puc 203.23(d), which requires that we exclude irrelevant and immaterial evidence, we deny the request.

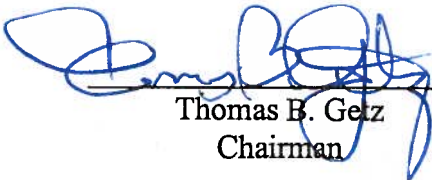
**Based upon the foregoing, it is hereby**

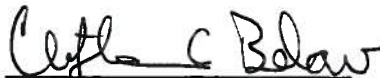
**ORDERED**, TransCanada's motion to compel is hereby GRANTED; and it is

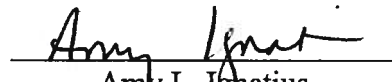
**FURTHER ORDERED**, that PSNH's July 15, 2011 Motion to Protect 5 Year Capital Budgets is GRANTED while its August 9, 2011 Motion to Amend that Motion is DENIED; and it is

**FURTHER ORDERED**, that NHSC's request for testimony to be filed by NHDES-ARD in this docket is hereby DENIED.

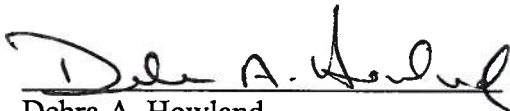
By order of the Public Utilities Commission of New Hampshire this thirtieth day of August, 2011.

  
Thomas B. Getz  
Chairman

  
Clifton C. Below  
Commissioner

  
Amy L. Ignatius  
Commissioner

Attested by:

  
Debra A. Howland  
Executive Director