

BEFORE THE NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

DE 10-261

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Least Cost Integrated Resource Plan

**OFFICE OF CONSUMER ADVOCATE'S OBJECTION TO PSNH'S
MOTION TO COMPEL**

The Office of the Consumer Advocate ("OCA") respectfully requests that the Commission deny Public Service Company of New Hampshire's (PSNH's) motion to compel the OCA's responses to certain PSNH data requests. In support thereof, the OCA states the following facts and law:

Introduction

1. The OCA filed testimony of Kenneth E. Traum on July 27, 2011. PSNH issued Set 1 Data Requests ("DRs") to the OCA on August 15, 2011, as required by the procedural schedule.
2. The OCA provided its responses, along with several objections, to PSNH's Set 1 DRs on August 25, 2011. PSNH did not contact the OCA regarding the responses or objections, and did not file a motion to compel, which would have been due by our calculations on September 9, 2011. *See* Puc 203.09 (i) (requiring motions to compel responses to data requests within 15 business days of receiving the response or objection, or the deadline for receiving responses, whichever is sooner). The Set 1 DRs to which the OCA objected without challenge include four that are substantially the same as the four that PSNH now seeks to compel in Set 2.
3. On September 12, 2011 PSNH propounded Set 2 DRs to the OCA. The OCA provided its responses, as well as several objections, on September 22, 2011. The OCA objected to

certain data requests in part because the questions had already been asked and objected to without challenge in Set 1.

4. After receiving a letter from PSNH requesting that the OCA provide further responses on October 3, 2011, the OCA provided the attached letter to PSNH, along with two revised responses. *See Attachment 1.*
5. On October 21, 2011 PSNH filed its motion to compel. PSNH's motion seeks to compel four responses to Set 2 Data Requests: 2-3, 2-4, 2-5, and 2-11. As stated above, each of these Data Requests is nothing more than a revised version of a Set 1 Data Request, to which the OCA objected in August, and for which PSNH failed to file a timely motion to compel.
6. By failing to challenge the OCA's objections to these questions after PSNH originally asked them in Set 1, PSNH waived any rights it had to compel responses from the OCA. PSNH should not be allowed to subvert the Commission's discovery process or avoid the consequences of its failure to compel responses to these Set 1 questions by slightly re-wording and re-asking them in Set 2.

PSNH to OCA 2-3 and 2-4

7. PSNH to OCA 2-3 states:

Referencing page 6, lines 8-12: What is your understanding of the applicability of the Clean Air Interstate rule to the Canal Station in Massachusetts?

- PSNH to OCA 2-4 states:

What is your understanding of the applicability of the Clean Air Interstate rule to Newington Station?

These two Data Requests are substantially the same question as PSNH to OCA 1-11, which states:

Referencing page 6 lines 4-12, a study performed by Levitan for NStar, the quote from the Levitan report referred to financial challenges facing the Canal Station in Massachusetts.

- a. *As of the June 1, 2010 date of the Levitan report, what was the applicability of the Clean Air Interstate Rule (CAIR) to electric generating units (such as Canal) in Massachusetts?*
 - b. *As of June 1, 2010, what was the applicability of CAIR to electric generating units (such as Newington Station) in New Hampshire?*
8. The OCA provided a timely objection to question 1-11(a) (and subsection (b)) on August 25, 2011 because it: sought a legal opinion, was overbroad and unduly burdensome, not reasonably calculated to lead to admissible information, and sought information available to the requester. PSNH's revised version of this question, issued as Data Request 2-3, was also objected to by the OCA on the basis that it sought a response to a question that was properly objected to without challenge in Set 1.
9. PSNH did not contact the OCA and did not file a motion to compel after it received the OCA's timely objection to 1-11 and has therefore waived its right to seek to compel a response to this question.

PSNH to OCA 2-5

10. PSNH to OCA 2-5 states:

Referring to PSNH to OCA 1-19, please respond to part (a).

11. The OCA provided a timely objection to both parts of 1-19 as well as a response to subpart (b) on August 25, 2011. OCA 1-19(a) stated:

Referencing page 13, line 2, regarding PSNH's sole reliance on Emera to provide natural gas fuel:

- a. *Please identify any other suppliers, marketers or third parties with entitlements on PNGTS that you believe may provide PSNH's customers with better value than the operational and pricing provisions incorporated in the Emera fuel supply agreement with PSNH to serve Newington?*

12. The OCA objected to 1-19 because it is overbroad and unduly burdensome, is argumentative, and it seeks information that is (or should be) available to PSNH.

13. PSNH did not contact the OCA or file a motion to compel after it received the OCA's timely objection to 1-19(a) and has therefore waived its right to seek to compel a response to this question.

PSNH to OCA 2-11

PSNH to OCA 2-11 states:

Regarding your response to PSNH 1-51, please provide your understanding of whether the NPT Project received a Proposed Plan Application Approval under Section I.3.9 of the ISO-NE tariff? If such an approval was granted, please provide the date of the approval.

14. The OCA provided a timely objection to OCA 1-51 on August 25, 2011. OCA 1-51 states:

To the best of your knowledge, had the NPT project received a Proposed Plan Application (PPA) Approval under Section I.3.9 as of June 2011?

15. The OCA objected to this question because it is argumentative and seeks information that should be readily available to the requester, as PSNH is one of the parties involved in the Northern Pass project. Contrary to the wording of 2-11, the OCA did not otherwise respond to 1-51.

16. PSNH did not contact the OCA when it received the OCA's timely objection to 1-51 and has therefore waived its right to seek to compel a response to this question.

Discussion

17. PSNH would have the Commission view this dispute as one based upon the merits of questions asked by PSNH in Set 2 and the OCA's objections to those Set 2 questions. However, the issue for the Commission to decide actually concerns Set 1 questions and objections and, specifically, whether PSNH failed to follow the Commission's process for compelling the OCA's responses to certain Set 1 data requests.

18. The facts are clear: PSNH asked and the OCA objected to four questions in Set 1; PSNH did not challenge the OCA's objections; PSNH re-asked and the OCA re-objected these four questions in Set 2; and PSNH filed this motion to compel.
19. The Commission's rule is equally clear: "Motions to compel responses to data requests shall...[b]e made within 15 business days of receiving the applicable response or objection, or the deadline for providing the response, whichever is sooner." Puc 203.09 (i)(2).
20. PSNH seeks to subvert the Commission's discovery process and to avoid the consequences of its failure to abide by this rule for Set 1 by asking the OCA "new" questions in Set 2 and asking the Commission to compel the OCA's responses to these "new" Set 2 questions. The Commission should not allow PSNH to abuse the process in such a manner. To do so would undermine the order and clarity of the discovery process which the Commission's rules dictate, and upon which all parties to Commission proceedings, including other utilities, rely.
21. In its motion to compel, PSNH advances legal arguments on the merits of the OCA's objections to 2-3, 2-4, 2-5, and 2-11 (e.g., Commission should only deny a motion to compel when there is no circumstance under which a response would be relevant). PSNH's merits argument is not timely and should not be considered by the Commission. OCA 2-3, 2-4, 2-5 and 2-11 are simply restatements of OCA 1-11, 1-19 and 1-51, and to the extent that PSNH required responses to these Set 1 questions, it should have made these substantive arguments within the context of a motion to compel responses following Set 1. Such a motion would have been due by September 9, 2011.
22. PSNH would like the Commission to view its re-asking of Set 1 Data Requests as a form of complying with the requirement that parties make a good faith attempt to resolve discovery disputes before seeking Commission redress. What PSNH's argument overlooks is the fact

that this good faith attempt is required to occur before the deadline for a motion to compel and, in this case, because the responses PSNH seeks to compel are actually responses to Set 1 questions, that deadline was September 9. At no time, however, did PSNH make any such attempt before the September deadline for compelling responses to Set 1 data requests.

23. PSNH all but admits that it missed this deadline in its motion to compel in paragraph 9. The Company's claim that it "rephrased" Set 1 questions does not address the fact that it did not take the steps necessary during the Set 1 schedule to clarify the OCA's objections to Set 1 Data Requests or to reserve its right to file a motion if the required good faith efforts to resolve the dispute informally were not fruitful. While rephrasing a question may be something that a party suggests during the informal resolution process required by Puc 203.09 (i)(4), it is not appropriate as a means to avoid following the proper process or to escape the consequences of failing to follow the required process.
24. PSNH also states in its motion to compel that the Commission may waive rules pursuant to Puc 201.05. Unfortunately, PSNH makes this suggestion on October 21, 2011 when a motion to compel Set 1 DRs was due on September 9, 2011. The Commission should reject what may be a request for a waiver of any rule after six weeks has passed, including Puc 203.09(i).
25. For the sake of argument, if the Commission does consider PSNH's merits arguments despite the fact that they are six weeks late, it still must reject them and deny PSNH's motion to compel. The four data requests to which the Company seeks to compel responses are argumentative in that they seek addition testimony or legal opinions as well as information that the Company must have in its own possession.

26. In the interest of time, the OCA has not addressed the merits of each assertion in PSNH's motion. If the Commission considers the merits, the OCA requests that it schedule a hearing on the motion.
27. The Company is also seeking to mischaracterize Mr. Traum's testimony in its data requests and in its motion. For example, in paragraph 4 of its motion, PSNH recasts his testimony by stating that "a fossil generation who in his view is engaging in adequate planning," in reference to the Canal Station plant. Mr. Traum did not give this testimony.
28. Similarly, the questions relating to the Clean Air Interstate Rule also attempt to recast Mr. Traum's testimony. Mr. Traum referred in his testimony to a report conducted by PSNH's witness in this docket, Levitan & Associates, Inc. As is made clear in his testimony, Mr. Traum referred to the June 2010 study by Levitan provided in discovery as one example of how concerns about more stringent environmental regulations are being considered by owners of fossil fuel fired generating plants. He was not testifying as to the details of any particular rule that may be applicable to PSNH's generation stations, which he also made clear in his testimony.
29. Finally, any attempts that PSNH makes to cast the OCA as unwilling to cooperate are baseless. The only communications from PSNH on these data requests was a letter received on October 3, 2011, despite the fact that PSNH bears the burden under Puc 203.09 (i)(4) of making a good faith effort to resolve discovery disputes informally.¹
- Therefore, the OCA respectfully requests that the Commission:

¹ The OCA notes that its practice, including in this docket, is to contact a party to discuss potential ways to resolve discovery disputes early, and then to reserve its rights if necessary to allow time for discussions, and to review any responses that the responding party is willing to provide after objecting to a question. It would have been helpful for PSNH to do the same in this case in order to avoid litigation and to save the extremely limited resources of the OCA.

- A. Deny PSNH's motion to compel in its entirety because it is not a timely motion of Set 1 Data Requests;
- B. Deny PSNH's motion to compel in its entirety because it has not provide sufficient bases to compel responses to their Set 1 Data Requests;
- C. Schedule a hearing to hear arguments on the motion if the Commission reaches the merits of the Company's motion; and
- D. Provide any further relief as may be required.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Objection was provided this day to the parties to DE 10-261 by electronic mail.

October 31, 2011



Meredith A. Hatfield, Esq.

STATE OF NEW HAMPSHIRE

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October 10, 2011

Sarah B. Knowlton, Esq.
Public Service Company of New Hampshire
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Re: DE 10-261 PSNH Least Cost Integrated Resource Plan; PSNH to OCA Set 2 Discovery

Dear Ms. Knowlton:

I am writing to in response to your letter of October 3, 2011 regarding six Set 2 Data Requests from PSNH to OCA to which the OCA objected. Please see our responses below.

1. PSNH to OCA 2-2:

Referencing page 3, lines 9-10 and page 4, lines 13-14: Please identify every environmental law or regulation which you believe should have been addressed in PSNH's LCIRP but was not.

The OCA objected to this question on September 22, 2011, and our objections stand. Notwithstanding those objections, we will provide an additional response within the week.

2. PSNH to OCA 2-3:

Referencing page 6, lines 8-12: What is your understanding of the applicability of the Clean Air Interstate rule to the Canal Station in Massachusetts?

The OCA objected to this question on September 22, 2011, and our objections stand. In addition, PSNH asked a similar question in Set 1 (PSNH to OCA 1-11(a)), to which the OCA objected on August 25, 2011. That question asked:

Referencing page 6 lines 4-12, a study performed by Levitan for NStar, the quote from the Levitan report referred to financial challenges facing the Canal Station in Massachusetts.

- a. *As of the June 1, 2010 date of the Levitan report, what was the applicability of the Clean Air Interstate Rule (CAIR) to electric generating units (such as Canal) in Massachusetts?*

A party cannot simply ask a question a second time, or rephrase a question, in an attempt to address objections, and instead must file a motion to compel within the required time period. If PSNH wished to file a motion to compel a response to this question, it should have done so at the appropriate time. .

3. PSNH to OCA 2-4:

What is your understanding of the applicability of the Clean Air Interstate rule to Newington Station?

The OCA objected to this question on September 22, 2011, and our objections stand. In addition, PSNH asked a similar question in Set 1 (PSNH to OCA 1-11(b)), to which the OCA objected on August 25, 2011. That question asked:

PSNH to OCA 1-11:

Referencing page 6 lines 4-12, a study performed by Levitan for NStar, the quote from the Levitan report referred to financial challenges facing the Canal Station in Massachusetts.

- b. As of June 1, 2010, what was the applicability of CAIR to electric generating units (such as Newington Station) in New Hampshire?*

A party cannot simply ask a question a second time, or rephrase a question, in an attempt to address objections, but instead must file a motion to compel a response. If PSNH wished to file a motion to compel a response to this question, it should have done so at the appropriate time.

4. PSNH to OCA 2-5:

Referring to PSNH to OCA 1-19, please respond to part (a).

PSNH to OCA 1-19 asked:

Referencing page 13, line 2, regarding PSNH's sole reliance on Emera to provide natural gas fuel:

- a. Please identify any other suppliers, marketers or third parties with entitlements on PNGTS that you believe may provide PSNH's customers with better value than the operational and pricing provisions incorporated in the Emera fuel supply agreement with PSNH to serve Newington?*

The OCA objected to PSNH to OCA 1-19(a) in its entirety on August 25, 2011, and we provided a response to part (b) of that question, notwithstanding our objection. If PSNH wished to compel a response to part (a) of that question, it should have done so before the date for a motion to compel passed.

5. PSNH to OCA 2-10:

Ref OCA Response to PSNH 1-36. Did you review PSNH's response to OCA Set No. 1, Q-OCA-065 when you prepared your response? If you now review the response to OCA Set No. 1, Q-OCA-065, is your testimony still that Levitan excluded labor costs from its direct, loaded, fixed O&M costs going forward? Are depreciation and return on existing plant considered O&M costs?

The OCA responded to the first and second parts of this question on September 22, 2011. We do not believe that a further response is necessary to those parts of the question. We apologize that we did not respond to the third part, as this was an oversight on our part. We will provide a supplemental response within the week.

6. PSNH to OCA 2-11:

Regarding your response to PSNH 1-51, please provide your understanding of whether the NPT Project received a Proposed Plan Application Approval under Section I.3.9 of the ISO-NE tariff? If such an approval was granted, please provide the date of the approval.

The OCA objected to this question on September 22, 2011, and our objections stand. In addition, PSNH asked substantially the same question in Set 1 (PSNH to OCA 1-51) as noted in 2-10, to which the OCA objected on August 25, 2011. That question asked:

To the best of your knowledge, had the NPT project received a Proposed Plan Application (PPA) Approval under Section I.3.9 as of June 2011?

A party cannot simply ask a question a second time, or rephrase a question, in an attempt to address objections, and instead must file a motion to compel. If PSNH wished to file a motion to compel a response to this question, it should have done so at the appropriate time.

I also hope that we can amicably resolve these discovery disputes. As noted above, we will provide additional responses to PSNH to OCA 2-2 and PSNH to OCA 2-10, and we will do so as soon as possible this week. Because a motion to compel Set 2 data requests is due soon, please propose a new date for a motion to compel to be due.

Sincerely,



Meredith A. Hatfield, Esq.
Consumer Advocate