

STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION

DE 10-261

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

2010 Least Cost Integrated Resource Plan

Order Addressing Motions to Compel

ORDER NO. 25,298

December 7, 2011

**I. PROCEDURAL HISTORY**

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). On November 4, 2010, the Office of the Consumer Advocate (OCA) filed a notice of participation pursuant to RSA 363:28, II. On August 15, 2011, PSNH issued its first set of data requests (PSNH Data Request Set 1) relative to the OCA's July 27, 2011 testimony; OCA issued responses and objections to PSNH Data Request Set 1 on August 25, 2011. On September 12, 2011, PSNH issued its second set of data requests (PSNH Data Request Set 2) to the OCA; OCA issued responses and objections to PSNH Data Request Set 2 on September 21, 2011. On October 21, 2011, PSNH filed a motion to compel OCA's responses to certain data requests in PSNH Data Request Set 2, specifically, PSNH Data Requests 2-3, 2-4, 2-5, and 2-11. The OCA filed an objection to PSNH's motion to compel on October 31, 2011.

## II. PSNH MOTIONS TO COMPEL

### A. Positions of the Parties

#### 1. Public Service Company of New Hampshire

In its motion to compel, PSNH argued that its Data Requests 2-3, 2-4, 2-5, and 2-11 sought relevant information to which PSNH was entitled within the context of this LCIRP proceeding. PSNH Motion to Compel at 2. PSNH indicated that PSNH Data Requests 2-3 and 2-4 were modified follow-up questions to PSNH Data Request 1-10,<sup>1</sup> which had asked Mr. Kenneth Traum of OCA, who had filed testimony on OCA's behalf, regarding the applicability of the Clean Air Interstate Rule (CAIR) to electric generating units in Massachusetts and New Hampshire.<sup>2</sup> *Id.* at 5. PSNH noted that OCA had objected to PSNH Data Request 1-10, on the basis that the data request sought a legal opinion, was unduly burdensome, and sought information equally available to PSNH. PSNH argued that, rather than being mere repetitions of PSNH Data Request 1-10, PSNH Data Requests 2-3 and 2-4 were novel questions designed to elicit information within the reasonable purview of Mr. Traum, specifically, Mr. Traum's own understanding of the applicability of the CAIR rules. *Id.* at 5-6. PSNH Data Requests 2-3 and 2-4 read as follows:

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<sup>1</sup> Note: both PSNH and OCA refer to this data request as PSNH Data Request 1-11 in PSNH's motion to compel and in OCA's objection.

<sup>2</sup> PSNH Data Request 1-10 read as follows:

10. 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?

3. Referencing page 6, lines 8-12 [of Mr. Traum's testimony]: What is your understanding of the applicability of the [CAIR] to the Canal Station in Massachusetts?

4. What is your understanding of the applicability of the [CAIR] to Newington Station?

PSNH argued that PSNH Data Requests 2-3 and 2-4 were relevant questions necessary to examine Mr. Traum's understanding, as OCA's expert witness, of the applicability of CAIR to PSNH's Newington Station, and to Canal Station in Massachusetts (which Mr. Traum had used as a point of comparison to Newington Station in testimony), and requested that OCA be compelled to respond. *Id.* at 4.

PSNH indicated in its motion to compel that PSNH Data Request 2-5 was a follow-up question to a data request made as part of PSNH Data Request Set 1-18, part (a), which read:<sup>3</sup>

18. 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?

PSNH Data Request 2-5, in turn, read as follows:

5. Referring to PSNH to OCA 1-[18], please respond to part (a).

PSNH notes that OCA objected to PSNH Data Request 1-18 as overbroad, irrelevant, and designed to elicit information readily available to PSNH, and PSNH concedes that it did not file a motion to compel a response to PSNH 1-18(a) after receiving OCA's objection. *Id.* at 6-7.

PSNH, in its motion to compel, took issue with OCA's objections and argued that its failure to compel a response to PSNH 1-18(a) did not extinguish its procedural right to compel a response to PSNH 2-5, in that "the philosophy behind the Commission's rules is to encourage parties to

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<sup>3</sup> Note: both PSNH and OCA refer to this data request as PSNH Data Request 1-19 in PSNH's motion to compel and in OCA's objection.

resolve discovery issues,” and that “...the Company thought it prudent to point out that the response [to PSNH 1-18(a)] was missing and provide the OCA with another opportunity to respond.” *Id.* at 7.

Regarding PSNH Data Request 2-11, PSNH noted that this question, related to the proposed Northern Pass transmission project undertaken by the Company’s parent company, Northeast Utilities, was a follow-up question to a data request made as part of PSNH Data Request Set 1, PSNH Data Request 1-50, which read:<sup>4</sup>

50. To the best of your [Mr. Traum’s] knowledge, had the NPT [Northern Pass] project received a Proposed Plan Application (PPA) Approval under Section I.3.9 as of June 2011?

PSNH Data Request 2-11, in turn, read as follows:

11. Regarding your response to PSNH 1-[50], please provide your understanding of whether the NPT [Northern Pass] Project received a Proposed Plan Application Approval under Section I.3.9 of the ISO-NE [ISO-New England] tariff? If such an approval was granted, please provide the date of the approval.

PSNH noted that the OCA had objected to PSNH 1-50 as argumentative, seeking information equally available to PSNH, and not reasonably calculated to lead to the discovery of admissible evidence. *Id.* at 8. PSNH rejected OCA’s objections and argued, in its motion to compel, that PSNH 2-11 was a novel approach designed to elicit Mr. Traum’s understanding of the ISO-New England approval status of the Northern Pass project, which presumably formed the basis for Mr. Traum’s testimony regarding the matter. PSNH, on the basis that this understanding was relevant to Mr. Traum’s expert opinion expressed on a critical issue, requested that OCA be compelled to respond to PSNH 2-11. *Id.* at 8-9. PSNH also noted that the Commission had the authority to waive, pursuant to the Commission’s waiver rule, N.H.

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<sup>4</sup> Note: both PSNH and OCA erroneously refer to this data request as PSNH Data Request 1-51 in PSNH’s motion to compel and in OCA’s objection.

Admin. Rules Puc 201.05, any procedural defects caused by PSNH's forbearance in filing a motion to compel after the OCA's objections to the PSNH Data Request Set 1 questions. *Id.* at 5-6.

## 2. Office of the Consumer Advocate

The OCA, in its objection to PSNH's motion to compel, outlined the general procedural history of its discovery dispute with PSNH, which incorporated OCA's substantive objections to PSNH's data requests at issue discussed above. OCA Objection to PSNH Motion to Compel at 1-2. The OCA emphasized that PSNH, by failing to file a timely motion to compel, pursuant to Puc 203.09(i), to OCA's responses to PSNH Data Request Set 1 questions 1-10, 1-18(a), and 1-50, after OCA issued objections to these data requests in OCA's response of August 25, 2011, waived its rights to compel OCA responses to "substantially the same" data requests made as part of PSNH Data Request Set 2. *Id.* at 1 and 4-7. The OCA extended this argument to all four PSNH Data Request Set 2 questions at issue (Data Requests 2-3, 2-4, 2-5, and 2-11) in PSNH's motion to compel. *Id.* at 2-4. OCA argued that any PSNH attempt to compel responses to these data requests was essentially an attempt to file an untimely motion to compel on the original, very similar questions asked by PSNH in PSNH Data Request Set 1. *Id.* at 4-5. OCA requested that the untimely motion by PSNH be denied, and requested that the Commission, if considering the merits of PSNH's motion, schedule a hearing on the matter. *Id.* at 7. The OCA also requested that the Commission refrain from any *sua sponte* waiver of the provisions of Puc 203.09(i) under Puc 201.05.

### III. 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.

However, this standard of review is subject to procedural requirements related to discovery set forth in Puc 203.09. Procedural fairness in proceedings before the Commission is fostered by uniform application of rules governing objections to data requests and motions to compel responses to data requests. We agree with the OCA that PSNH, in its Data Request 2-5, merely reiterated its request for information previously requested in PSNH Data Request 1-18(a), to which OCA timely objected in its response of August 25, 2011. PSNH failed to file a timely motion to compel related to PSNH Data Request 1-18(a), and the Company's exact reiteration of this request within Data Request 2-5 does not obviate the procedural requirements of Puc 203.09(i). Therefore, we deny PSNH's request to compel an OCA response to PSNH Data Request 2-5.

In relation to PSNH's Data Requests 2-3, 2-4, and 2-11, however, we agree with the Company that PSNH significantly modified its queries to shift its emphasis to Mr. Traum's own understanding of given facts or circumstances. In the related PSNH Set 1 Data Requests (1-10 and 1-50), PSNH sought an opinion on the part of OCA regarding the existence of such facts or circumstances (including legal circumstances), through Mr. Traum. The Company's new approach to its line of questioning in the PSNH Set 2 Data Requests is sufficiently different that

it is not estopped from filing a motion to compel these responses under Puc 203.09(i) by its failure to compel responses to its related questions under the PSNH Set 1 Data Requests.

Furthermore, as PSNH Data Requests 2-3 and 2-4 seek to elucidate the understanding of Mr. Traum in CAIR-related matters discussed in his testimony on behalf of the OCA, which is of significance in an examination of OCA's positions on the Newington Station Continuing Unit Operation Study filed as part of PSNH's LCIRP, we find that this information is relevant to this proceeding, and grant PSNH's motion to compel with respect to Data Requests 2-3 and 2-4. Also, as PSNH Data Request 2-11 seeks to elucidate the understanding of Mr. Traum regarding the regulatory-compliance progress of the proposed Northern Pass project, which is discussed in Mr. Traum's testimony as a factor to be considered in assessment of Newington Station for planning purposes, we find that this information is also relevant to this proceeding, and grant PSNH's motion to compel with respect to Data Request 2-11.

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

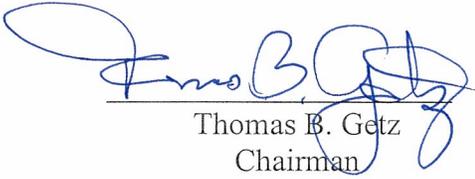
**ORDERED**, PSNH's motion to compel is hereby DENIED with respect to PSNH Data Request 2-5; and it is

**FURTHER ORDERED**, that PSNH's motion to compel is hereby GRANTED with respect to PSNH Data Requests 2-3, 2-4, and 2-11; and it is

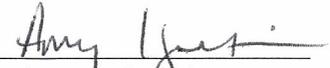
**FURTHER ORDERED**, that OCA's request for a hearing regarding this matter is hereby DENIED.

By order of the Public Utilities Commission of New Hampshire this seventh day of

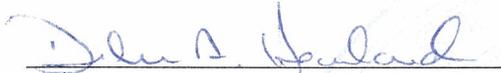
December, 2011.

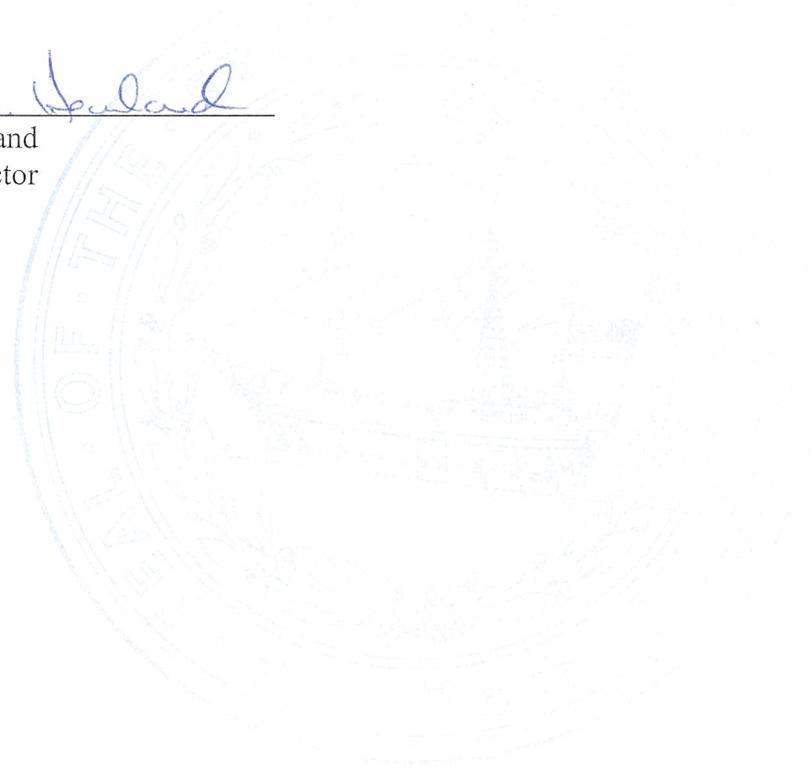
  
Thomas B. Getz  
Chairman

  
Clifton C. Below  
Commissioner

  
Amy L. Ignatius  
Commissioner

Attested by:

  
Debra A. Howland  
Executive Director



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