

DE 00-211

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

**Petition for Valuation of J. Brodie Smith Hydro-Electric
Station**

**Order on Motions to Compel Discovery and to
Delay Procedural Schedule**

O R D E R N O. 23,831

November 1, 2001

This Order concerns two motions filed with the New Hampshire Public Utilities Commission (Commission) by the City of Berlin (City) in this proceeding, which the City instituted to seek the valuation and possible condemnation of the J. Brodie Smith Hydro-Electric Station (Smith Station) located in Berlin and owned by Public Service Company of New Hampshire (PSNH). On October 2, 2001, the City moved for an extension of its deadline for the submission of pre-filed direct testimony. One day later, the City filed a motion to compel discovery pursuant to Puc 204.04(f) with regard to a data request it had previously posed to PSNH. For the reasons that follow, we will grant both motions.

By Order No. 23,733 (June 28, 2001), the Commission determined that it would not undertake a full valuation of Smith Station pursuant to RSA 38:9 at this time, as requested by the City. Rather, in light of circumstances fully described in Order No. 23,733, we decided first to conduct

proceedings, culminating in an evidentiary hearing, on the question of whether the City's acquisition of Smith Station would meet the "public interest" test set forth in RSA 38:11. Thereafter, following a status conference, we approved by secretarial letter a procedural schedule for this "public interest" phase of the docket. That schedule called for pre-filed testimony from opponents of condemnation by July 7, 2001, data requests to condemnation opponents by September 14, 2001, responses to these data requests by September 28, 2001, pre-filed testimony from the City of Berlin by October 5, 2001, and additional discovery on the City's testimony thereafter culminating in a merits hearing on November 19-20, 2001.

The City's October 2 motion seeks a delay in the procedural schedule. The City averred that it had not received responses by PSNH to its data requests. Accordingly, the City sought a four-week procedural delay in order to permit it to prosecute a motion to compel discovery and analyze any responses ultimately received from PSNH. There were no objections to the City's request as to the procedural schedule.

The motion to compel was filed on October 3, 2001. At that point, the City indicated it was moving to compel a

response by PSNH only to the City's Data Request No. 13, which the City had made on September 14, 2001 and to which PSNH had objected on September 20, 2001. Data Request No. 13, in its entirety, sought " a copy of the power supply agreement under which PSNH provides electric service to the Paper & Pulp Mill of America," located in Berlin. As has been widely reported in the media, the owners of the mill have shut it down and have sought protection from creditors under the federal Bankruptcy Code.

According to the City, when PSNH objected to this data request as irrelevant, the City responded by asking PSNH to reconsider and noted that the City was agreeable to PSNH's production of the document pursuant to a confidentiality agreement. PSNH then indicated that it would not reconsider its decision.

According to the City, it is entitled to the requested document because (1) the mill "plays an extraordinary important role in the local and regional economies,"¹ (2) one of the City's objectives in seeking to

¹ In an effort to quantify the mill's economic significance, the City avers that the facility has (or had) 800 employees and comprises 25 percent of the City's tax base. According to the City, "[t]he economic survival of the City quite literally depends upon the economic survival of the mill." Berlin Motion to Compel at 2-3.

acquire Smith Station is to ensure long-term low-cost electric power for the mill, thus improving its economic situation, (3) that the City's investigation of the potential acquisition of Smith Station led to a conclusion that the acquisition would "significantly enhance potential economic opportunities," (4) that voter approval of the proposed acquisition vests the potential transaction with a statutory presumption of being in the public interest, (5) that the mill's bankruptcy filing renders the potential municipal acquisition "even more critical to the City's economic survival," (6) the mill has a peak demand of 40 megawatts and purchases approximately 8 megawatts of that power pursuant to the contract at issue in Data Request No. 13, and (7) Smith Station can provide up to 14 megawatts of output and to the extent that additional Smith Station power could be provided to the mill by the City it might "provide the incentive to get the mill restarted." Berlin Motion to Compel at 2-4. Thus, according to the City, the requested document is discoverable because it "is relevant to the determination of the extent to which the City's ownership and sale of electric output to the mill could provide potential economic benefits to the mill's operations." Berlin Motion to Compel, p. 5. Further, according to the City, the mill's bankruptcy filing is immaterial to the

question of whether the proposed acquisition could provide economic benefits to the mill, even though (as asserted by PSNH in its objection to Data Request No. 13) the bankruptcy filing has rendered the contract between PSNH and the mill executory.

The City invokes the definition of "relevance" contained in Rule 401 of the New Hampshire Rules of Evidence, and points out that as a matter of general practice the Commission is more liberal in admitting evidence than courts are, given that the Rules of Evidence (other than those governing evidentiary privileges) do not apply in Commission proceedings.

PSNH objected to the City's motion in writing on October 11, 2001. According to PSNH, the requested document is not discoverable by the City because the only issue before the Commission at the present time is whether it is in the public interest to take Smith Station by eminent domain." According to PSNH, the mill-related economic benefits arising out of the acquisition of Smith Station would be available to the City only if the City were to condemn the hydro-electric facility at a price that failed to reflect the cost of energy on the open market. In PSNH's view, a taking at that price would not provide PSNH and its customers with the fair market value of the asset and thus would violate both RSA 38 and the

PSNH Restructuring Settlement Agreement. Thus, according to PSNH, "the City's argument is specious, and nothing but the proverbial red herring." PSNH Objection at 2. Further, according to PSNH, the City is free to subsidize the mill's energy costs today and need not condemn Smith Station "to provide below-market energy to one particular customer." *Id.*

I. COMMISSION ANALYSIS

"[D]iscovery should be relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence." Investigation into whether Certain Calls are Local, Order No. 23,658 (March 22, 2001), slip op. at 5. Therefore, we will deny a motion to compel discovery only "when we can perceive of no circumstance in which the requested data will be relevant." Lower Bartlett Water Precinct, Order No. 23,471 (May 9, 2000), slip op. at 4-5.

Here, essentially for the reasons stated in PSNH's opposition to the discovery motion, it is possible that the requested document would have relevance to the Commission's public interest determination. The relationship among the amount paid for energy by the City's largest employer and taxpayer, the amount this customer would have to pay in order to regain its financial footing, and the amount it might have to pay if the City were to acquire Smith Station and make its

output available for this purpose is something that has a potential bearing on whether the City's acquisition would be in the public interest. PSNH's argument, that it would be improper or even illegal for the City to acquire the plant at a price that would yield significant economic benefits vis à vis the mill's energy needs, goes to the weight of the evidence in question, not its admissibility or its relevance. Given the liberality of the applicable discovery rule, the City has demonstrated its entitlement to the document in question.

We are aware of no reason why PSNH cannot produce the requested document in discovery immediately. Therefore, we direct PSNH to do so within five business days of the entry of this Order subject to confidential treatment by the City.

The remaining question, raised by the City's October 2 motion, concerns the effect of this discovery dispute on the procedural schedule. Given the pendency of its two motions, the City obviously did not submit pre-filed testimony as scheduled on October 5. We agree with the City that it should not have been expected to develop such testimony without the benefit of all discovery to which it is entitled.

In these circumstances, we will revise the procedural schedule in this docket as follows:

Pre-filed testimony from City of Berlin	November 16, 2001
Data requests to City of Berlin	November 26, 2001
Responses to 11/26 data requests	December 10, 2001
Merits Hearing	January 7 and 8, 2002
Written Briefs	January 25, 2002
Reply Briefs	February 1, 2002

Based upon the foregoing, it is hereby

ORDERED, that the motion to compel discovery of the City of Berlin is GRANTED and Public Service Company of New Hampshire is directed to produce the document requested in the City's Data Request No. 13 within five business days; and it is further

ORDERED, that the City of Berlin's motion for a delay in the procedural schedule is GRANTED and the procedural schedule is revised as set forth fully above.

By order of the Public Utilities Commission of New Hampshire this first day of November, 2001.

Thomas B. Getz
Chairman

Susan S. Geiger
Commissioner

Nancy Brockway
Commissioner

Attested by:

Claire D. DiCicco
Assistant Secretary