

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 11-250

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Investigation of Merrimack Station Scrubber Project and Cost Recovery

Order Granting in Part Motion to Compel

ORDER NO. 25,334

March 12, 2012

I. PROCEDURAL HISTORY

On November 18, 2011, the Commission opened Docket No. DE 11-250 to investigate the costs of and cost recovery related to the installation of the wet flue gas desulphurization system (Scrubber) at the Merrimack Station owned and operated by Public Service Company of New Hampshire (PSNH). The Office of Consumer Advocate (OCA) filed a letter on December 12, 2011 stating that it would participate in the docket on behalf of residential ratepayers pursuant to RSA 363:28. On December 23, 2011, the Commission issued a secretarial letter granting the motions to intervene of New England Power Generators Association, Inc. (NEPGA), TransCanada Power Marketing Ltd and TransCanada Hydro Northeast Inc. (TransCanada), Sierra Club and Conservation Law Foundation (CLF).¹ The secretarial letter also approved a procedural schedule for the temporary rate portion of this docket. The procedural schedule included an opportunity for discovery and provided that motions to compel be brought within five business days from receipt of responses or objections for purposes of ensuring the orderly and prompt conduct of the temporary rate proceeding.

¹ The Secretarial Letter directed NEPGA and TransCanada to combine their discovery and cross-examination, and gave the same direction to Sierra Club and CLF.

The parties held a scheduled technical session on January 23, 2012. PSNH agreed to provide responses to data requests made at the technical session by January 31, 2012.²

On February 10, 2012, CLF filed a motion to compel a response to a data request identified as Q-TECH No. 8. PSNH filed an objection on February 17, 2012. No other parties to the docket assented to either the motion to compel or the objection.

II. POSITIONS OF THE PARTIES

A. Conservation Law Foundation

By way of background, CLF stated that, during the prehearing conference in the instant docket, CLF and Sierra Club had asserted that the U.S. Environmental Protection Agency (EPA) had not issued a permit to PSNH authorizing the discharge of wastewater from the Scrubber and questioned whether PSNH had obtained all required environmental permits to construct and operate the Scrubber system. CLF Motion to Compel at 1 (citations omitted). CLF said that the EPA issued a “Determination of Technology-Based Effluent Limits for the Flue Gas Desulfurization [FGD] Wastewater at Merrimack Station in Bow” (EPA Determination) on September 23, 2011. According to CLF, the EPA Determination states that “discharges of wastewater from a FGD scrubber system to a water of the United States must satisfy federal technology-based treatment requirements” and “[n]ew pollutant discharges to waters of the United States, such as PSNH’s proposed discharges of FGD wastewater to the Merrimack River, are prohibited unless and until authorized by a new NPDES³ permit” issued by EPA pursuant to the federal Clean Water Act. *Id.* at 1-2 (citations omitted). Referring to the EPA Determination, CLF claimed that the EPA has not issued a NPDES permit to PSNH under the Clean Water Act authorizing the discharge of wastewater produced by the Scrubber and, therefore, PSNH is

² See PSNH objection at 2.

³ NPDES means “National Pollutant Discharge Elimination System” as established in the federal Clean Water Act, 33 U.S.C. §1251 *et seq.*

precluded from discharging such wastewater as it intended when it designed and constructed a wastewater treatment facility as part of the Scrubber Project. *Id.* at 2.

CLF referred to the January 23 technical session and said that during the technical session the parties discussed PSNH's response to a data request propounded by the OCA identified as OCA Data Request 1-2 which reads as follows:

Please reference RSA 125-O:13, I. "The achievement of this requirement is contingent upon obtaining all necessary permits and approvals from federal, state, and local regulatory agencies and bodies[.]" Please identify and provide the status of "all necessary permits and approvals."

CLF said PSNH's response to OCA Data Request 1-2 provided a list of permits and approvals obtained for the Scrubber system. In the response, PSNH said that the remaining open item was the receipt of Certificates of Occupancy from the Town of Bow. CLF stated that the list appended to PSNH's response did not contain any permit or approval authorizing or otherwise addressing the discharge of the Scrubber wastewater. *Id.* at 3.

CLF said that at the technical session CLF repeatedly inquired of PSNH regarding the status of necessary permits and approvals for disposing Scrubber wastewater and requested, as a formal data request, copies of all permits and agreements which PSNH had obtained to dispose of Scrubber wastewater and the documents and/or records for disposal of Scrubber wastewater under such permits or agreements.⁴ *Id.*

PSNH responded to that data request as follows:

This Tech Session question is a merely [sic] variation of CLF-NHSC 01, Q-PROD-020, which PSNH timely objected to. PSNH continues to stand by that objection.

Notwithstanding that objection, PSNH provides the following information in response: PSNH is operating Merrimack Station in compliance with its existing NPDES permit. A copy of that permit is attached. Information concerning renewal of the existing NPDES permit is available from the EPA website at:
<http://www.epa.gov/region1/npdes/merrimackstation/>.

⁴ PSNH numbered this data request as Q-TECH No. 8.

PSNH has discharge permits/agreements with local municipal POTWs⁵ to dispose of treated Scrubber wastewater. Copies of representative permits/agreements are attached.

CLF stated that PSNH appended the following documents to its answer: (1) a document captioned “Water Disposal Agreement” with the Town of Hooksett, revised 9/7/11; (2) an Industrial Wastewater Indirect Discharge Request Approval issued by the New Hampshire Department of Environmental Services on August 19, 2011; and (3) a City of Concord Permit to Discharge Industrial Wastewater dated August 31, 2011. *Id.* at 4.

CLF claimed that PSNH’s response to Q-TECH No. 8 is incomplete and not responsive. In an email to PSNH dated February 1, 2012, CLF explained that its data request was far broader than as characterized by PSNH. In that email, CLF stated that a complete response must provide the following detail: (1) the total amount of wastewater PSNH has disposed of; (2) the amounts sent to each disposal facility; (3) the costs incurred for each wastewater shipment; and (4) when each wastewater transfer or disposal occurred. *Id.* at 4-5. According to CLF, PSNH’s claim that the request is a variation of a previously propounded data request “disregards the facial insufficiency of its response to Q-OCA-002, the clear implication created thereby that PSNH is withholding relevant information, and the extensive discussion regarding the same during the Tech Session.” *Id.* at 5.

According to CLF, the long-standing standard by which Commission evaluates discovery requests is whether the information being requested is relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence, citing *Verizon New England, Inc. et al*, 92 NH PUC 234, 236 (2007). CLF said that the data request clearly passes the first part of the test because it is critical for the Commission and the parties to understand how PSNH is

⁵ “POTWs” means “Publicly Owned Treatment Works.”

disposing of its Scrubber wastewater, whether it has all permits necessary to do so, and the cost for doing so, prior to the hearing on PSNH's petition for temporary rates. *Id.*

CLF stated that the requested information is directly relevant to whether PSNH is entitled to recover costs for the Scrubber in the first instance and concluded by requesting that the Commission grant its motion to compel and such other relief the Commission deems appropriate. *Id.* at 5-6.

B. Public Service Company of New Hampshire

In its objection, PSNH referred to the December 23, 2011 secretarial letter which directed that motions to compel be brought within five business days from receipt of responses or objections. According to PSNH, CLF's motion to compel should be denied because it was filed on February 10, 2012, ten days after PSNH filed its response to Q-TECH No. 8, and not within the five-day time frame established by the Commission. PSNH Objection at 1-2.

PSNH further stated that while the Commission does not need to reach the substance of CLF's Motion, CLF's arguments, if considered, are without merit. The Company said that the Commission's December 23 secretarial letter established an abbreviated schedule for the consideration of temporary rates, and provided for a single set of data requests. PSNH said it received 83 discovery requests to which it objected in part on January 23, 2012. Subsequently, PSNH reached an agreement with OCA, TransCanada, Sierra Club and CLF that, to the extent it had objected to their data requests on the basis that any request sought information not relevant to the consideration of temporary rates, the Company would not object to those questions being re-asked during the later phase of the docket. No motions to compel were filed by any of the parties. *Id.* at 2.

PSNH said that it received nine additional questions at the January 23, 2012 technical session. The Company made a note of these questions and agreed with the parties and Staff to provide answers by January 31, 2012. The Company recorded the subject data request, Q-TECH No. 8, as follows:

“Re: OCA 1-01,Q-OCA-2; Please provide agreements with municipal wastewater treatment facilities.”

On January 25, 2012, the OCA sent an email to PSNH’s counsel which stated, in part, that the response to Q-TECH No. 8 should include: (1) information related to the pending NPDES permit for the Scrubber wastewater; and (2) and information related to permits, approvals or contracts that the Company has received for purposes of disposing Scrubber wastewater. Based on this clarification, PSNH provided a response to the data request and included copies of the permits and agreements as attachments. *Id.* at 2-3

After PSNH had provided the response to Q-TECH No. 8, PSNH said that the Company received an email from CLF asking for significantly more information in response to the question, and stating that PSNH had misunderstood or changed the question. According to CLF, the Company had been asked to produce:

all permits, approvals, agreements, transit arrangements, bills of lading, manifests, invoices, and receipts with respect to all publicly or privately owned wastewater treatment/disposal facilities and /or shippers with whom PSNH has arranged to dispose of scrubber wastewater including records of disposal to date. Without limitation, a [sic] the response must be sufficiently detailed for the parties to ascertain from the foregoing information: 1) the total amount of wastewater PSNH has disposed of; 2) the amounts sent to each disposal facility; 3) the costs incurred for each such shipment; and 4) when each such wastewater transfer/disposal occurred.

Id. at 3.

PSNH responded to CLF’s email and informed CLF that the Company had answered Q-TECH No. 8 as asked and as clarified by the OCA. PSNH stated in its objection that the OCA

did not file a motion to compel regarding PSNH's response to OCA Data Request 1-2 or the technical session question that was a follow up to OCA Data Request 1-2. *Id.* at 4.

PSNH asserted that, through its motion to compel, CLF seeks to convert the technical session data request into a restatement of CLF's Data Request 1-11 which requested in part "applications to and approvals from permitted wastewater treatment facilities; Please provide a log and/or listing of all wastewater shipments sent to such permitted wastewater treatment facilities copies of all records relating to such shipments." PSNH further claimed that CLF now seeks to compel a response to this restated version of CLF's Data Request 1-11, to which the Company objected on January 9, 2012. PSNH said that the Commission should deny CLF's motion with respect to Q-TECH No. 8 and CLF's Data Request 1-11 because CLF did not move to compel within the required five days. *Id.*

PSNH also said that it had repeatedly informed CLF that the information requested by CLF regarding "transit arrangements, bills of lading, manifests, invoices and receipts" is not relevant to the determination of temporary rates. PSNH said that, pursuant to RSA 378:27, the Commission must "immediately fix, determine and prescribe" temporary rates if the public interest so requires. *Id.* at 4-5.

PSNH stated that CLF claims that the Company response to Q-TECH No. 8 is incomplete because the parties must be able to ascertain the amount of Scrubber wastewater PSNH has disposed of, the quantity sent to each disposal facility, and the costs and date of each shipment. PSNH said that CLF's argument assumes that before temporary rates could take effect, extensive discovery should be conducted regarding all of the details for costs incurred in connection with the Scrubber's construction and operation. PSNH said that such a result would contravene the statute and New Hampshire Supreme Court decisions holding that the standard for temporary

rates is less stringent than the standard for permanent rates, that temporary rates should be determined expeditiously, and that temporary rates may be set without the kind of investigation necessary to determine permanent rates, citing *New England Tel. and Tel. Co. v State*, 95 N.H. 515, 518 (1949) and *Appeal of Office of Consumer Advocate*, 134 N.H. 651, 661(1991). *Id.* at 5.

According to PSNH, CLF argues that its Motion to Compel should be granted because it is “critical” for the Commission and the parties to understand how the Scrubber wastewater is being disposed of, whether PSNH has the appropriate permits necessary to do so, and, therefore, to operate the Scrubber. PSNH said that it already responded to a data request affirming that it has all permits necessary to place the Scrubber in service and describing how it is handling the Scrubber wastewater, referring to Staff Data Request Set 1 No. 2. PSNH said that the Commission should deny CLF’s “invitation to turn this temporary rate review into a prudence review regarding disposal for wastewater—a subject that may be within the purview of the Department of Environmental Services, but which is well-beyond the jurisdiction of this Commission.” *Id.* at 6. PSNH concluded by stating that the Commission should deny CLF’s Motion to Compel. *Id.* at 6.

III. COMMISSION ANALYSIS

We note at the outset that PSNH has correctly stated that CLF failed to comply with the procedural schedule set forth in the Commission’s December 23, 2011 secretarial letter for the instant proceeding. In that letter, we directed parties to file motions to compel regarding temporary rate discovery within five business days from receipt of responses or objections. While we agree that CLF’s Motion to Compel suffers from this technical deficiency, and the Motion could be dismissed on technical grounds, for reasons set forth below we will not rely on the technical infirmity and will review the Motion on its merits.

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. 25,298 (December 7, 2011) and *Public Service Company of New Hampshire*, Order No. 25,048 (November 30, 2009).

Pursuant to RSA 378:27, the Commission may set temporary rates for the duration of a rate proceeding, subject to certain conditions and based on reports of the utility filed with the Commission. The Supreme Court has held that the standard to be used by the Commission in granting temporary rates is a less stringent standard than that for permanent rate setting, and that temporary rates shall be determined expeditiously without the extensive investigation warranted by the determination of permanent rates. *See Appeal of Office of Consumer Advocate* 134 N.H. at 660-661. Further, any temporary rate will be reconciled to the permanent rates as ultimately determined by the Commission. *See RSA 378:29*

In this phase of the proceeding we have before us a petition to establish temporary rates for the costs of the Scrubber installation at Merrimack Station. At present the record contains reports from PSNH generally describing the costs associated with the installation and operation of the Scrubber, including the October 14, 2011 testimony, the November 10, 2011 Progress Report and the November 18, 2011 addendum to the Progress Report, all filed with PSNH's November 18, 2011 Motion to Establish Temporary Rates. We do not find that the additional detail regarding the costs and circumstances of the disposal of wastewater from the Scrubber facility information requested in the Motion to Compel is likely to produce admissible evidence in the temporary rate portion of the docket. As PSNH stated in its objection, following CLF's

reasoning, there would have to be extensive discovery and confirmation of all details behind every cost associated with the Scrubber's installation and operation before temporary rates would be allowed. To delay addressing the matter of temporary rates by requiring that PSNH produce the level of detail requested would run contrary to the principle that temporary rates, which are fully reconcilable, are to be determined expeditiously and without extensive investigation.

CLF's also argues that the absence of this detailed information calls into question whether PSNH has all permits necessary to operate the Scrubber and, consequently, it questions whether PSNH should be allowed to begin recovery of Scrubber costs through temporary rates. We do not consider the discovery on wastewater disposal to be critical to this phase and will not delay the temporary rate hearing for further exploration of this issue.

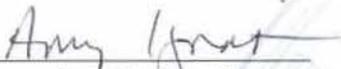
We agree, however, that the manner in which wastewater from the Scrubber is being handled at Merrimack Station is important, as PSNH has made clear in its petition that it will seek recovery of the costs related to the method or methods of wastewater disposal in permanent rates. As such, the Commission will be required to determine whether such costs were prudently incurred and reasonable in amount. To that end, we conclude that information about the manner and cost of wastewater disposal is reasonably calculated to lead to the production of admissible evidence in the permanent rate phase of this proceeding. Accordingly, we grant CLF's motion to compel in part, with the condition that PSNH need not produce the requested information in the context of the temporary rate phase of the proceeding. As previously stated, we are not concerned with the technical infirmity that the Motion was filed after the compressed five-day limit because discovery on the issue continues in the permanent rate phase of the docket in which the standard time periods apply. PSNH may comply with this order by producing the requested

information, to the extent it exists, at the time it responds to discovery requests in the permanent rate phase of this proceeding, without the need for CLF to resubmit the questions.

Based upon the foregoing, it is hereby

ORDERED, the Motion to Compel filed by Conservation Law Foundation is hereby GRANTED in part, subject to the condition set out above.

By order of the Public Utilities Commission of New Hampshire this twelfth day of March, 2012.



Amy L. Ignatius
Chairman



Michael D. Harrington
Commissioner

Attested by:



Debra A. Howland
Executive Director

