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E-Discovery 'Fiasco' Stalls Case, Hikes Costs

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PSEG Power New York Inc., turned over more than 3,000 e-mails and 211,000 pages of documents to a legal adversary, but a magistrate judge has found that the company still failed to comply with a discovery request.

Magistrate Judge Randolph F. Treece directed PSEG to try again to produce the materials in a coherent form as requested by Alberici Constructors Inc., its adversary in a suit in the Northern District of New York. PSEG must do so at its own expense, despite a plea from the energy company to shift some of the e-discovery costs to Alberici.

While the e-discovery "fiasco" has caused expense, frustration and delay in *PSEG Power New York, Inc. v. Alberici Constructors, Inc.*, 1:05-cv-657, Treece wrote, it is also emblematic of the problems that discovery requests can create in the computer age.

"With the rapid and sweeping advent of electronic discovery, the litigation landscape has been radically altered in terms of scope, mechanism, cost and perplexity," the magistrate judge wrote. "This landscape may be littered with more casualties than successes and the discovery imbroglio in this case is a prime example of this observation."

Alberici is the principal contractor in construction of a \$25 million, gas-fired PSEG power plant outside of Albany. In 2005, PSEG sued for \$4.4 million, contending that Alberici improperly performed some work and failed to complete other jobs at the Bethlehem Energy Center project. Alberici filed a mechanic's lien against PSEG for \$6.8 million with the Albany County Clerk and countersued PSEG for \$11.4 million.

Both companies made complex discovery requests for documents and internal communications concerning the Bethlehem project.

Martha A. Connolly, attorney for the St. Louis-based Alberici, said she began to notice in January 2007 that the discovery materials PSEG delivered through an information materials vendor were incomplete. While the 3,000-plus e-mails were present, Connolly said many of the attachments that accompanied the messages were not.

In some instances, Connolly said this week in an interview, there were up to 12 attachments per e-mail that became separated from their original messages.

Months of work ensued in which PSEG, its vendor and Alberici tried to figure out ways to reattach the materials to the e-mail messages. At one point, PSEG supplied a spreadsheet to Alberici that PSEG said would match attachments with e-mails. But it did not work, according to Treece.

"We spent a lot of our time and money trying to put Humpty-Dumpty back together again," said Connolly, of Ernstrom & Dreste in Rochester.

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Other efforts to reach an accommodation failed, with PSEG estimating it would cost an "unconscionable" \$206,000 for it to redo the e-mail and attachment retrieval process. If that were to be done, the cost should be shifted to Alberici, PSEG contended.

Alberici countered that it handed over discovery materials as voluminous as those requested from PSEG and that the energy company had failed to comply with Rule 34 of the Federal Rules of Civil Procedure.

"We carried the ball on our side and paid for it," Connolly said in an interview. "PSEG dropped the ball and said, 'If you want it done right, you should pay for it.' Had they done it right in the first instance, we wouldn't be here. Why should we pay for it?"

DISCOVERY IMPASSE

Treece stepped in to resolve what he termed the e-discovery "quagmire."

"For nearly six months, the parties and the Court have been grappling with an electronic discovery monstrosity with the hope that it could be corralled and definitely resolved, thereby obviating the need for motion practice," the magistrate judge wrote. "Alas, attempts to resolve the issue in lieu of briefs fell woefully beyond the parties' grasp and, as the last straw, they have set the matter at our feet for appropriate resolution."

PSEG had filed a motion for summary judgment in January, but it was denied by District Judge David N. Hurd. He ordered that discovery be completed first.

Connolly said she continued to collect depositions in the case during the late winter and spring of 2007, but she argued that she was disadvantaged when questioning witnesses by not having the PSEG e-mails matched with the attachments.

Treece agreed that Alberici should get the discovery documents in a usable form.

"We find that Alberici has successfully demonstrated that the information it [Alberici] seeks is relevant and germane to the subject matter of this litigation," the magistrate judge wrote. "Attachments to e-mails are important and useful and may assist Alberici in presenting admissible evidence to its Counterclaims."

Although acknowledging, "the cost of retrieval in this matter is by no means cheap," the magistrate judge wrote that it may not be as high as the \$206,000 estimated by PSEG. He noted that lower-cost alternatives could be available, and that Alberici's own information technology vendor estimated that it could do the job for \$37,500.

"Considering the monumental production issue that confronts us, \$37,500 is a significant discount when compared to PSEG's vendor's proposal and may be a bargain," the magistrate judge wrote. "Although no one wants to spend any significant amount of money on discovery, whether it be thousands of dollars or hundreds of thousands of dollars, but if they have to, PSEG's access to resources rivals, if not exceeds, Alberici's claim to resources."

NO DELIBERATE ERROR

Daniel J. Hurteau, representing PSEG in the suit, said in an interview the \$206,000 price tag includes the estimated cost for lawyers and paralegals to sift through e-mails and attachments to verify that they are properly matched and to eliminate data not relevant or protected from disclosure because it contains proprietary information.

Hurteau, of Nixon Peabody in Albany, said the problem was created by software incompatibility between PSEG and its vendor. When e-mails were relayed to the vendor, some attachments were converted into files which became detached from their accompanying messages, the attorney said.

"If there was any fault for the vendor, it was that they didn't notice it and they didn't tell us. We didn't know it either," Hurteau said. "For everyone it was a learning process. It wasn't anyone's fault."

The e-mail attachments sought by Alberici have been retained by PSEG, according to Hurteau.

The issue is not that information was not disclosed, Hurteau said. It was that e-mails and attachments were not disclosed together. He said his client is now struggling to figure out how to comply with the magistrate judge's order.

Treece signed an order Tuesday giving PSEG until Nov. 5 to turn over the e-mails and their related attachments and Alberici until Jan. 5, 2008, to review and log the materials. Alberici then would get five more weeks to complete its deposition process, the magistrate judge ordered.

Neither Connolly nor Hurteau would say how much discovery has cost their clients so far.

Treece rejected PSEG's claim that since discovery requests went out prior to December 2006, when the Federal Rules of Civil Procedure were modified to address electronic discovery, the new guidelines do not apply. The magistrate judge said the e-mails and attachments were documents "kept in the usual course of business" under the previous discovery rules and have to be produced as requested by Alberici.

PSEG New York is a subsidiary of the Newark, N.J.-based Public Service Energy Group.