THE STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

Docket No. DE 08-145

FREEDOM LOGISTICS, LLC
AND
HALIFAX-AMERICAN ENERGY COMPANY

Investigation into Modifications to Merrimack Station

BRIEF
OF
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

CONCERNING APPLICABILITY OF RSA 369-B:3-a TO REPLACEMENT OF HP/IP TURBINE AT MERRIMACK STATION

Pursuant to the Commission's Secretarial letter dated May 4, 2009, Public Service Company of New Hampshire (hereinafter "PSNH" or "the Company") hereby submits its Brief concerning the applicability of RSA 369-B:3-a to the replacement of the HP/IP turbine at Merrimack Station.

As noted in the Commission's secretarial letter dated April 2, 2009, PSNH's previously filed Motion to Dismiss and Motion to Strike, as well as Petitioners' objections thereto, are still pending before, and remain under advisement by, the Commission. PSNH renews those prior Motions, as they would be dispositive of this matter.

The Company, in its November 24, 2008, Motion to Dismiss, has already briefed the applicability of RSA 369-B:3-a to the replacement of the HP/IP turbine at Merrimack Station. In this Brief, PSNH will update and apply certain facts to its previously presented arguments as requested by the Commission Chair.[1]

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[1] Changes to PSNH's previously filed Motion to Dismiss are indicated by blue-colored type, such as this footnote.

I. INTRODUCTION

The Petitioners are two unregulated entities that assert involvement to varying degrees in the competitive New Hampshire electric market. (As discussed below, neither Petitioner has asserted any basis whatsoever for having standing to bring their Petition.) The Petitioners raise yet another attack on PSNH's efforts to install and have operational a wet flue gas desulphurization system ("scrubber technology") to control mercury emissions at Merrimack Units 1 and 2 no later than July 1, 2013, pursuant to 2006 N.H. Laws Chapter 105 (the "Scrubber Law").[2, 3]

The Petition asks the Commission to open a proceeding under RSA 369-B:3-a to determine whether certain capital improvements at Merrimack Station intended to increase its net capability to offset power consumption requirements of the scrubber technology mandated by the Scrubber Law are in the public interest of retail customers of PSNH. Hence, this matter is directly related to the mandate placed on PSNH by the Scrubber Law to install scrubber technology at its Merrimack Station.

The Commission correctly found in Docket No. DE 08-103, Order No. 24,898, dated September 19, 2008 (the "Order"), that it "lacks the authority to make a determination pursuant to RSA 369-B:3-a as to whether this particular modification is in the public interest." Order, slip op. at 13. The Commission's legal analysis leading to that conclusion was detailed and comprehensive. As a result, the Commission recently reaffirmed its decision in Order No. 24,914, dated November 12, 2008 (the "Rehearing Order").

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[2] The Commission has noted that the Scrubber Law is "a generally expansive statutory scheme adopted by the Legislature to bring about the installation of scrubber technology." Rehearing Order, *slip op.* at fn 6.

[3] The Petitioners are engaged in at least four separate docketed proceedings in their campaign (as competitive market participants) challenging PSNH's efforts to install scrubber technology at Merrimack Station in compliance with RSA 125-O, to wit: the instant docket, NHPUC Docket No. 07-108 (PSNH LCIRP); N.H. Site Evaluation Committee Docket No. 2009-01; and, N.H. Air Resources Council Docket No. 09-12. In addition, the Petitioners have served PSNH with a "Notice of Intent to Sue Pursuant to Clean Air Act §7604" and counsel for the Petitioners filed a complaint with both NHDES and the EPA alleging that PSNH had initiated scrubber construction without the permit required under Title I of the Clean Air Act. Curiously, despite the fact that not one of these proceedings was initiated by PSNH, the Petitioners have had the audacity to complain, "Notwithstanding its objection to Sierra Club's request because 'there is no proceeding pending,' PSNH has filed a multitude of motions in this and the related proceedings resulting in an uncoordinated maelstrom of paper and process without regard to the resources of the potential parties and of the Council." Response of Freedom Logistics LLC and Halifax-American Energy Company, LLC to Motions to Dismiss Filed by Public Service Company of New Hampshire and Department of Environmental Services, April 17, 2009, Air Resources Council Docket No. 09-12 ARC. Apparently the Petitioners, having initiated every one of the above-listed challenges to the scrubber project save the LCIRP docket, have no regard for the resources of this Commission, or of the ultimate cost to customers resulting from their litigiousness. Freedom/Halifax's complaint is similar to the cries of the defendant who murdered his parents, and then pleaded for mercy on the grounds that he was an orphan.

The Petitioners' interest in protecting "the public interest of retail customers of PSNH" (RSA 369-B:3-a) is very curious. As unregulated entities asserting involvement to varying degrees in the competitive New Hampshire electric market, a higher price for PSNH's default energy service would benefit the Petitioners, not harm them. The Petitioners' are neither consumer advocates nor ombudsmen imbued with the public interest. PSNH is gratified that its actions at Merrimack Station in compliance with the Scrubber Law are drawing the concerns of unregulated competitive entities such as the Petitioners - - it can only mean that the interests of PSNH's retail customers are indeed being served by PSNH by installation of effective and economic improvements to Merrimack Station which will dramatically reduce emissions and continue to allow that plant to provide much-needed baseload electric power at the lowest price possible.

As in Docket No. DE 08-103, there is no basis for the Commission to assert authority in this matter in the manner requested by the Petitioners. Moreover, i) the Petitioners lack standing to receive the relief requested; ii) the issue presented for review in the Petition is moot as the subject capital investments have been completed and are presently used and useful in providing utility service to PSNH's retail customers; and, iii) regardless of the applicability of RSA 125-O: 13, IV, RSA 369-B:3-a does not apply to the actions of PSNH that are the subject of the Petition.

II. PROCEDURAL ISSUE

A. Standing

Neither of the Petitioners has standing to receive the relief requested. The Petition asks the Commission to open a proceeding under the authority of RSA 369-B:3-a. In particular, the Petitioners request "a determination by the Commission, as required by RSA 369-B:3-a, regarding whether it is in the public interest of retail customers of Public Service of New Hampshire ('PSNH') for PSNH to modify Merrimack Station (the 'Station') by investing in capital improvements that increase the Station's net capability for the purpose of restoring the Station's net power output (as measured in megawatts) that will be reduced due to the power consumption requirements or operational inefficiencies of scrubber technology to control mercury emissions." Petition, Introductory Paragraph.

Freedom Logistics, LLC describes itself in the Petition as an entity that "specializes in providing high-end management services to large end-users that are Market Participant End-Users ('MPEU'). An MPEU is a member of NEPOOL and ISO-NE and purchases electricity

directly from the ISO-NE hourly wholesale market." Petition, ¶14. Halifax-American Energy Company, LLC states that it "is the New England agent for South Jersey Energy Company, a subsidiary of South Jersey Industries. South Jersey Energy Company is a registered competitive electric power supplier in New Hampshire." *Id.*[4] Neither Petitioner demonstrates any basis whatsoever for having standing to bring their Petition. *See*, Rule Puc 102.10, RSA 541-A:1, XII.

Freedom Logistics, LLC does not represent that it is registered under the requirements of Chapter Puc 2000 of the Commission's rules as either a competitive electric power supplier or as an aggregator.[5] The Petition contains nothing demonstrating that the rights, duties, privileges, immunities or other substantial interests of Freedom Logistics, LLC may be affected by the matter presented, nor that Freedom Logistics, LLC is qualified to file for the relief requested under any provision of law. RSA 541-A:32.

Similarly, the Petition contains no representations that Halifax-American Energy Company, LLC is engaged as a competitive electric power supplier in PSNH's franchise service territory.[6] Per information posted on the Commission's website, South Jersey Energy Company, Halifax-American Energy Company, LLC's alleged principal, only offers service in New Hampshire in the franchise service territory of National Grid.[7] The Petition contains nothing demonstrating that the rights, duties, privileges, immunities or other substantial interests of Halifax-American Energy Company, LLC may be affected by the matter presented, nor that Halifax-American Energy Company, LLC is qualified to file for the relief requested under any provision of law. RSA 541-A:32.

This Commission's sister agency, the Department of Environmental Services, by and through its counsel, the Office of the Attorney General, has filed a similar "Motion to Dismiss Freedom Logistics, LLC and Halifax American Energy Company for Lack of Standing" dated April 10, 2009, in Air Resources Council Docket No. 09-12 ARC involving

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[4] Nowhere in the Petition does Halifax-American Energy Company, LLC assert that this Petition is being filed on behalf of South Jersey Energy Company.

[5] Apparently, as of April 1, 2009, Freedom Logistics LLC is registered as an aggregator using the trade name Freedom Energy Logistics. See, Docket No. DM 09-028. However, as noted *infra*, such registration does not automatically convey standing to Freedom Logistics in this matter.

[6] It should be noted that Halifax-American Energy Company, LLC is a limited liability company formed under New Hampshire law. Petition at ¶14. It also is not registered under the requirements of Chapter Puc 2000 of the Commission's rules as either a competitive electric power supplier or as an aggregator. Halifax American Operating Company is a trade name held by South Jersey Energy Company. It appears that Halifax-American Energy Company, LLC and Halifax American Operating Company do not have common ownership or control.

[7] *See*, http://www.powerischoice.com/pages/supplier.html.

Freedom/Halifax.[8] In that Motion the Attorney General's Office noted that, "Injury resulting from competition is rarely classified as a legal harm but rather is deemed a natural risk in our free enterprise economy." *Valley Bank v. State*, 115 N.H. 151, 154 (1975); *accord, Hardin v. Kentucky Util. Co.*, 390 U.S.1, 6 (1968).

Even if the Petitioners were able to show that they were engaged in the competitive electric market in PSNH's service territory, such a showing would not give them adequate standing to receive the relief requested. Neither Petitioner has made any showing that it has been adversely affected or aggrieved by the matter presented. *Re Northeast Utilities/Public Service Company of New Hampshire*, 75 NH PUC 558 (1990). The Petition seeks a proceeding pursuant to RSA 369-B:3-a wherein the Commission would determine whether certain capital improvements at PSNH's Merrimack Station are in the public interest of PSNH's retail customers. RSA 369-B:3-a is expressly designed to protect the public interest of *retail customers*, not *competitors*. As noted earlier, the Petitioners' are neither consumer advocates nor ombudsmen imbued with the public interest. The Commission has held, "'Special interest' is not enough to gain standing for appeal." *Id.*, citing to *Sierra Club v. Morton*, 405 N.H. 727, 734-735 (1972). The Petitioners do not gain standing to request relief under RSA 369-B:3-a merely because they allege potential harm to others. *Appeal of Richards*, 134 N.H 148, 157 (1991), citing *Blanchard v. Railroad*, 86 N.H. 263, 264-266 (1933).[9]

Just a few months ago, the New Hampshire Supreme Court reiterated the constitutional importance of determining a party's standing. In *Libertarian Party of New Hampshire v. Secretary of State*, 158 N.H. 194, 195 (2008), the Court noted that a party's standing is a question of subject matter jurisdiction. "'In evaluating whether a party has standing to sue, we focus on whether the party suffered a legal injury against which the law was designed to protect.' *Asmussen v. Comm'r, N.H. Dep't of Safety*, 145 N.H. 578, 587, 766 A.2d 678 (2000) (quotations and brackets omitted)." *Id.*

The law in question in this proceeding is RSA 369-B:3-a. The "legal injury which the law was designed to protect" is "the public interest of retail customers of PSNH." The Petitioners, Freedom and Halifax, are NOT retail customers of PSNH. Freedom and Halifax have NOT suffered a legal injury which RSA 369-B:3-a was designed to protect.

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[8] A copy of the Attorney General's Motion is attached hereto as Atch. 1.

[9] *See also*, the Attorney General's Motion, *id.*, at para. 5: "a party is not presumed to have standing in issues which only a generalized harm to the public is the primary basis to establish standing."

The injury alleged in the *Libertarian Party of New Hampshire* case is very similar to the situation involved in this proceeding. In that case, the New Hampshire Republican State Committee ("NHRSC") argued that it had suffered injury because the New Hampshire Democratic Party ("NHDP") made money by selling voter lists and it did not, thereby placing it at a disadvantage. During oral argument before the court the NHRSC contended: "We are an injured party to the extent that we operate in this closed environment with our competitors on the Democratic side and they benefited from this conduct and that benefit is directly to our detriment. Any benefit that they received came at our expense." *Id.* at 196. The court held that the NHRSC lacked standing and dismissed the appeal. "Any financial or political advantage potentially gained by the NHDP from selling the lists, however, is not, in any meaningful sense, an injury to the NHRSC. Moreover, while the NHRSC at times presents this as a case of unjust enrichment, casting the argument in such a way does nothing to demonstrate injury to it." *Id.*

In this proceeding, Freedom and Halifax, like the NHRSC, appear to be claiming standing as competitors to PSNH operating in the energy market. As the New Hampshire Supreme Court has ruled, an allegation of injury from competition is not a legal harm (*Valley Bank, supra)* and, similarly, simply alleging that one is a competitor does not create standing where no injury has been demonstrated. (*Libertarian Party of New Hampshire, supra*).[10]

The relief sought by the Petitioners could be viewed as a request for a declaratory ruling regarding the applicability of RSA 369-B:3-a to capital improvements made by PSNH at Merrimack Station that increase its net capability to offset power consumption requirements of the scrubber technology mandated by that law. Such a request for declaratory ruling would be governed by Rule Puc §207.01, "Declaratory Rulings." Rule Puc §207.01(C) provides:

> (c) The commission shall dismiss a petition for declaratory ruling that:
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> (1) Fails to set forth factual allegations that are definite and concrete;
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> (2) Involves a hypothetical situation or otherwise seeks advice as to how the commission would decide a future case; or
>
> (3) Does not implicate the legal rights or responsibilities of the petitioner.

[10] *See also, Blanchard v. Railroad*, 86 N.H. 263, 264--66, 167 A. 158, 159--60 (1933) (holding that a party to an administrative proceeding does not have standing to appeal an administrative agency's decision absent a showing of direct injury), and *Appeal of Richards,* 134 N.H. 148, 154 (1991) ("For a court to hear a party's complaint, the party must have standing to assert the claim.")

The instant Petition fails to meet the requirements of Rule Puc §207.01(C)(3). The Petition clearly does not implicate the legal rights or responsibilities of the Petitioners. Since RSA 369-B:3-a involves the public interest of *retail customers* of PSNH and not of *competitors*, the legal rights or responsibilities of the Petitioners are not implicated. Rule Puc §207.01(C)(3) expressly requires that "The commission *shall* dismiss a petition for declaratory ruling" in this instance.[11,12]

Neither Petitioner alleges any facts whatsoever that would give them standing to receive the relief requested. The Petition is completely silent regarding this basic jurisdictional requirement. Finally, the Petition does not implicate the legal rights or responsibilities of the Petitioners. As a result, PSNH urges the Commission to reject the Petition based upon lack of standing of the Petitioners.

III. SUBSTANTIVE ISSUES

A. The Scrubber Law eliminates any requirement for a preliminary public interest determination by the Commission under RSA 369-B:3-a for capital improvements made by PSNH at Merrimack Station that increase its net capability to offset power consumption requirements of the scrubber technology mandated by that law.

There is no basis for the Commission to assert the authority requested by the Petitioners. For the same reasons set forth in its Order and Rehearing Order in Docket No. DE 08-103, the Scrubber Law eliminates any requirement for a preliminary public interest determination by the Commission under RSA 369-B:3-a for capital improvements made by PSNH at Merrimack Station that increase its net capability to offset power consumption requirements of the scrubber technology mandated by that law.[13]

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[11] If the Commission does deem the Petition to be a request for declaratory ruling, the Petition also fails to meet the requirements of Rule Puc §207.01(B) which requires that "Such a petition shall be verified under oath or affirmation by an authorized representative of the petitioner with knowledge of the relevant facts."

[12] The general rule of statutory construction is that "the word 'may' makes enforcement of a statute permissive and that the word 'shall' requires mandatory enforcement." *Town of Nottingham v. Harvey*, 120 N.H. 889, 895 (1980).

[13] Stipulated Fact #2 contains a listing of work done at Merrimack Unit 2 during the Spring 2008 outage, separated into capital and O&M projects. The Petition initiating this proceeding relates solely to "capital improvements that increase the Station's net capability for the purpose of restoring the Station's net power output (as measured in megawatts) that will be reduced due to the power consumption requirements or operational efficiencies of scrubber technology to control mercury emissions." Petition, introductory paragraph. PSNH has represented that "the only investment planned at Merrimack Station that would increase its net generating capacity is the replacement of the turbine at Merrimack Unit 2." Transcript,

RSA 125-O:13, IV ("Compliance") provides that:

> IV. If the net power output (as measured in megawatts) from Merrimack Station is reduced, due to the power consumption requirements or operational inefficiencies of the installed scrubber technology, the owner may invest in capital improvements at Merrimack Station that increase its net capability, within the requirements and regulations of programs enforceable by the state or federal government, or both.

This statute gives PSNH ("the owner") authority to make certain capital improvements at Merrimack Station; i.e., those that increase net capability to mitigate the loss of net power output attributable to the scrubber.

The Petition acknowledges that the scrubber will reduce the net power output of Merrimack station. Petition, ¶1. Exhibit 1 to the Petition, the National Petroleum Council report, at page 8 correctly notes that, "Scrubbers and SCRs, like any auxiliary equipment in a power plant, require electricity to run. This electricity is obtained from the generating unit that is being controlled. This power loss is known as parasitic load. Just as heat rate is a measure of efficiency by calculating the amount of fuel needed for each kWh of power, parasitic load is an efficiency loss because a certain number of kWhs generated must be used for internal power plant use and cannot be sent to the grid to meet consumer demand." [14, 15] Moreover, the parties have stipulated to this fact. Stipulated Fact #7 states, "The parasitic load of the scrubber will cause the net power output (as measured in MW) from Merrimack Station to be reduced." As the Legislature has expressly given PSNH permission to make capital improvements to mitigate the parasitic load of the scrubber, there is no need for a

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Prehearing Conference, p. 24. Therefore, none of the other outage tasks listed in Stipulated Fact #2 are relevant to this proceeding, and PSNH will limit its remarks to the replacement of the HP/IP turbine.

[14] This exhibit further notes the existence and effect of parasitic load from a scrubber installation: "Of course with parasitic load, each scrubber or SCR installation will, in effect, lower the amount of realizable capacity that can be used to meet consumer demand." *Id.*

[15] The Petition at ¶5 discusses the loss of net generation capacity as a result of the scrubber's parasitic load. In that paragraph, the Petition states "According to information from ISO New England, Inc., PSNH submitted an interconnection request suggesting a possible reduction in capacity for the Station of approximately 95 MW. See, ISO New England Inc., Interconnection Request Queue (Spreadsheet), 10/17/08 (attached hereto as Exhibit 2). Cost estimates provided in the PSNH Report, however, indicate that the full pre-scrubber capacity of the Station will be restored as part of the project. PSNH Report at p. 13." PSNH does not understand either of the statements made by Petitioners in paragraph 5 of their Petition. The referenced ISO-NE Interconnection Request Queue (Spreadsheet) attached as Exhibit 2 to the Petition does not reference a possible 95 MW reduction in capacity for Merrimack Station. PSNH is unaware of any information discussing a scrubber parasitic load of 95 MW, as that number has no basis in fact. Furthermore, PSNH is unaware of any references indicating that the full pre-scrubber capacity of Merrimack Station will be restored. The Petition's reference to PSNH's September 2, 2008, Report filed in Docket No. DE 08-103 does not support this contention.

public interest determination under RSA 369-B:3-a.[16] Instead, PSNH is subject to the traditional post-installation "prudent investment rule" determination.[17]

PSNH is not suggesting that it gets a "free pass" under RSA 125-O:13, IV allowing it to make any capital improvement it so desires at Merrimack Station without review. PSNH understands that in order for it to recover the cost of such investments in rates, those investments must pass the "prudent investment rule" tests: "Under this traditional approach, referred to as the "prudent investment rule," cost recovery was available only on satisfaction of two conditions: costs were prudently incurred, and the project was "used and useful," *i.e.*, providing actual benefits to the public." *Id.* at 4.

In fact, such a prudence proceeding is now underway. On May 1, 2009, PSNH filed its annual application for reconciliation of energy service and stranded cost charges. The Commission has docketed PSNH's filing as Docket No. DE 09-091. One of the matters to be reviewed in Docket No. DE 09-091 is the prudence of the Company's decision to replace the HP/IP turbine at Merrimack Station. In Order No. 24,924, Docket No. DE 08-113, issued on December 30, 2008, after PSNH's initial Motion to Dismiss in the instant docket, the Commission noted that the turbine project would be the subject of such a prudence review: "We agree with Staff that the [turbine] outage will be a subject for review in PSNH's reconciliation of ES and stranded cost charges for 2008, and therefore will allow the estimated net outage-related costs as calculated by PSNH to be included in the 2009 ES rate, subject to that later review." *Slip op.* at 8-9.

Both the New Hampshire Supreme Court and this Commission have noted the interplay between such prudence reviews and the public interest. *Appeal of Conservation Law Foundation*, 127 N.H. 606, 637 (1986); *Fitzpatrick v. Public Service Co. of N.H.*, 101 N.H. 35 (1957); *Re Public Service Company of New Hampshire*, 81 NH PUC 531 (1996).[18] Thus, the precise inquiry that the petitioners are seeking here (i.e., "…an investigation and public proceeding to determine whether modification at Merrimack Station to restore the diminution

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[16] The Petition refers to "...the plenary authority of the Commission to determine whether modifications to the Station are in the public/ratepayers' interest...." Petition at ¶12. The Commission's authority is not plenary, but is limited to that delegated to it by the Legislature. PSNH refers the Commission to its "Memorandum of Law" dated September 2, 2008 and "Objection to Motions for Rehearing of TransCanada Hydro Northeast, Inc. and Certain Commercial Ratepayers" dated October 23, 2008, filed in Docket No. DE 08-103 for a discussion of this topic.

[17] *See*, "Pre-Approval Commitments: When and Under What Conditions Should Regulators Commit Ratepayer Dollars to Utility-Proposed Capital Projects?" S. Hempling, National Regulatory Research Institute, November 2008.

[18] Accord, *Re Public Service Company of New Hampshire*, 89 NH PUC 70, 93 (2004).

in capacity resulting from the installation of scrubber technology are in the public interest." (Freedom/Halifax Petition at 6) is currently before the Commission and will be dealt with in Docket No. DE 09-091.[19]

The Petitioners' assertion that PSNH must seek a public interest determination under RSA 369-B:3-a before making capital improvements at Merrimack Station that increase its net capability as allowed by RSA 125-O:13, IV is incorrect. If that assertion was accepted, it would render RSA 125-O:13, IV superfluous. The Supreme Court has stated that statutes should not be interpreted in a manner that renders one meaningless or superfluous. *Silva v. Botsch*, 120 N.H. 600 (1980); *Appeal of Soucy*, 139 N.H. 110 (1994); *Appeal of Barry*, 142 N.H. 284 (1997); *N.H. Dep't of Res. & Econ. Dev. v. Dow*, 148 N.H. 60 (2002); *Robinson v. N.H. Real Estate Comm'n,* 958 A.2d 958 (N.H., 2008).

Since the enactment of RSA 369-B:3-a in 2003, PSNH has had the ability to make modifications to its generation assets "if the commission finds that it is in the public interest of retail customers of PSNH to do so, and provides for the cost recovery of such modification or retirement." Via RSA 125-O:13, IV, enacted in 2006, the Legislature granted PSNH special authority to make certain capital improvements related to the loss of net power output caused by the scrubber. To give RSA 125-O:13, IV effect and not render it superfluous, it must be interpreted as providing PSNH authority different than that found in RSA 369-B:3-a to make the identified capital improvements at Merrimack Station.[20]

Interpretation of this provision of the Scrubber Law is not difficult. Recently, the Supreme Court issued its most recent holdings on statutory interpretation:

> We are the final arbiters of the legislature's intent as expressed in the words of the statute considered as a whole. *Blackthorne Group v. Pines of Newmarket*, 150 N.H. 804, 806, 848 A.2d 725 (2004). We first examine the language of the statute, and, where possible, ascribe the plain and ordinary meanings to the words used. *Id.* When a statute's language is plain and unambiguous, we need not look beyond it for further indication of legislative intent, and we refuse to consider what the legislature might have said or add language that the legislature did not see fit to incorporate in the statute. Id. Furthermore, we interpret statutes in the context of the overall statutory scheme and not in isolation. *Id.* By so doing, we are better able to discern the legislature's intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme. *Id.*

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[19] The Petitioners acknowledged this in their December 4, 2008, letter to the Commission docketed in Docket No. DE 08-113.

[20] In the Rehearing Order, the Commission noted, "...RSA 369-B:3-a does not constitute a necessary approval under RSA 125-O:13." Rehearing Order, *slip op.* at 13.

Robinson, supra, 958 A.2d at 960. *See also, State v. Dansereau,* 956 A.2d 310 (N.H., 2008); *Ouelette v. Town of Kingston,* 157 N.H. _, 956 A.2d 286 (2008).

The "plain and ordinary meaning" of RSA 125-O:13, IV is clear, as is the overall statutory scheme. The Scrubber Law mandates the installation of scrubber technology at Merrimack Station, and it provides PSNH with the option and authority to make capital improvements that increase the station's net capability to offset power consumption requirements of the scrubber. This provision of the scrubber law is plain and unambiguous. It is a simple if/then proposition. It begins: "If the net power output (as measured in megawatts) from Merrimack Station is reduced, due to the power consumption requirements or operational inefficiencies of the installed scrubber technology…." The parties have stipulated that installation of the scrubber will fulfill this condition precedent. Stipulated Fact #7. Having met the "if" part of the statute, the "then" part becomes effective: "the owner may invest in capital improvements at Merrimack Station that increase its net capability, within the requirements and regulations of programs enforceable by the state or federal government, or both." This is precisely what PSNH has done, in accordance with all applicable laws and regulations, by installation of a new HP/IP turbine "designed to increase the fossil fuel generation efficiency and net generating output of Merrimack Unit 2." Stipulated Fact #3.

In light of the undisputable applicability of RSA 125-O:13, IV, it is unnecessary to consider whether or not the turbine replacement project was either a routine maintenance function or a modification that might otherwise fall within the purview of RSA 369-B:3-a.

B. The capital improvements made at Merrimack Station are allowed by RSA 125-O:13, IV, are already installed, and are already used and useful in the provision of utility service to PSNH's retail customers.

PSNH has completed all capital improvements it intends to make at Merrimack Station that could fall under RSA 125-O:13, IV to increase the station's net capability to offset power consumption requirements of the scrubber. Those capital improvements were made during the plant's maintenance outage earlier this year, and the plant is back in service.[21] The

[21] Exhibit 2 to the Petition notes that the capital improvements in question had a projected commercial operation date of May 26, 2008.

capital improvements made are now used and useful in the provision of utility service to PSNH's retail customers.[22]

PSNH has included the cost of all such improvements to Merrimack Station in its September 12, 2008 petition to establish its default energy service ("ES") rate for bills rendered on or after January 1, 2009, that is the subject of Docket No. DE 08-113. Those costs will later be included for review in PSNH's annual filing for reconciliation of revenues and costs associated with its ES charge and stranded cost recovery charge ("SCRC") for calendar year 2008.[23] As noted in the "Order of Notice" in this year's ES and SCRC reconciliation proceeding, Docket No. DE 08-066, the reconciliation proceeding will include a review of "the prudence and reasonableness of PSNH's incurred capital costs."

The Commission, and parties with appropriate standing, will have the opportunity to determine whether the RSA 125-O:13, IV improvements made by PSNH to Merrimack Station meet the "prudent investment rule" tests described earlier.

C. The capital improvements made to Merrimack Station which are not part of the Scrubber Project are routine maintenance activities, not "modifications" subject to RSA 369-B:3-a.

PSNH has the responsibility to prudently operate its fossil/hydro generating assets.[24] As part of that responsibility, PSNH must periodically maintain those generating assets to ensure that they will continue to produce energy and capacity safely, reliably and economically. Capital projects that increase the efficiency of PSNH's generating assets and which do not materially impact the capacity or footprint of the plant have been routinely performed as part of this obligation.

As noted by Commissioner Below during the January 16, 2009 prehearing conference in this docket (Transcript, p. 49-50), the Commission's current practice includes a requirement that PSNH will comply with the Fossil Fuel Generation Efficiency Standard contained in the Energy Policy Act of 2005. That standard, added to the Public Utilities Regulatory Policy Act as part of the Energy Policy Act of 2005, requires that, "Each electric

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[22] See also, Stipulated Facts #1 and 2.

[23] Per Order No. 24,125 , Docket No. DE 02-127, dated February 14, 2003, PSNH's annual reconciliation filing is made on May 1 of each year. 88 NH PUC 65, 69 (2003). Such a filing has been made by PSNH and has been docketed as Docket No. DE 09-091.

[24] Agreement to Settle PSNH Restructuring, ¶IX, A, approved by the Commission in *PSNH Proposed Restructuring Settlement*, 85 NH PUC 154, 85 NH PUC 536 and 85 NH PUC 645 (2000).

utility shall develop and implement a 10 year plan to increase the efficiency of its fossil fuel generation." 16 U.S.C. § 2621 (d)(13). *See* Order No. 24,893, Docket No. 06-061, September 15, 2008, at 5. As Commissioner Below correctly related, in Order No. 24,893, the Commission determined, "We also agree that further consideration of fossil fuel generation efficiency is not necessary because the Commission reviews fossil fuel generation efficiency in connection with PSNH's annual stranded cost charge and energy service charge reconciliation filing." *Id.* at 7. Further, "The scrutiny given to PSNH's generation operations constitutes the Commission's implementation of a fossil fuel generation efficiency standard, and we agree that our consideration of the standard is not required due to these prior and continuing Commission actions." *Id.*

The parties to this proceeding have stipulated that "PSNH's new HP/IP turbine was designed to increase the fossil fuel generation efficiency and net generating output of Merrimack Unit 2." Stipulated Fact #3. In addition, the Petitioners acknowledge that turbine upgrades are considered to be efficiency improvements. The report appended to their Petition as Exhibit 1, at page 16 discusses steam turbines and notes:

> In addition, major performance improvements can be implemented on many turbines with newer, more efficient turbine blades and other components. These improvements are possible because current turbine designs perform more efficiently than the designs that were available ten to twenty years ago.

Thus, the replacement of the HP/IP turbine at Merrimack 2 with a new, more efficient model by PSNH was performed in compliance with the Fossil Fuel Generation Efficiency Standard contained in the Energy Policy Act of 2005 and this Commission's implementation of such a fossil fuel generation efficiency standard.

Moreover, the Commission's outside expert consultant, Liberty Consulting, has testified about the importance of Merrimack Unit 2 to customers, and the need for PSNH to give special consideration to maintenance of the unit's turbine:

> Liberty notes that massive turbine blade failures have occurred across the industry and those failures have drawn both industry and regulatory attention. In the case of PSNH, Merrimack-2 is now the cornerstone of the PSNH generation portfolio (since the sale of Seabrook) that provides customers with a hedge against market prices that can be many times those of historical levels. Its value of operation to customers is therefore similarly increased. Liberty believes that decisions regarding the maintenance and operation of the turbines should be made with maximizing operational life as the prime goal.

Testimony of Michael D. Cannata, P.E., Docket No. DE 04-071, Exhibit 5, MDC-3.

PSNH has historically performed similar replacements at its generating stations as part of its regularly scheduled outage activities. These replacements include:

- Merrimack Unit 1 HP/IP rotor replacement in 1986.
- Schiller Unit 6 HP rotor replacement in 1987.
- Schiller Unit 4 generator rotor replacement in 1987.
- Schiller Unit 6 LP turbine replacement in 1990.
- Merrimack Unit 2 two LP turbines replacement in 1991.
- Newington LP turbine replacement in 1992.
- Newington generator rotor replacement in 1992.
- Schiller Unit 6 generator rotor replacement in 1992.
- Smith Hydro runner replacement in 2006.
- Schiller Unit 5 generator rotor replacement in 2006.
- Newington rotating exciter replacement in 2008.

Recently, Seabrook Station upgraded its generating capacity by 102 MW (approximately an 8.5% increase).[25] That upgrade included modifications to the plant's HP turbine. Notably, that 102 MW increase in generating capacity was deemed not to be a sizeable change or addition to that facility. *See*, N.H. Site Evaluation Committee, Docket No. 2003-01.

RSA 369-B:3-a cannot be reasonably interpreted to require pre-approval of capital projects at PSNH's generating stations which do not materially impact the capacity or footprint of the plant. Otherwise, such a requirement would mean that Commission pre-approval would be necessary for virtually every capital activity that occurs during plant maintenance outages – both scheduled and unscheduled. The costs and impacts of the time necessary for such regulatory approval of activities would clearly be contrary to the public interest of PSNH's retail customers. These maintenance-related capital activities are routinely the subject of Commission scrutiny under the traditional "prudent investment rule" standard, discussed earlier. For example, in 2006, PSNH replaced the runner at its Smith Hydro Station with a new more efficient runner, resulting in expected higher output opportunities, shorter planned outages, and higher reliability for future years. That capital

[25] The reported percentage increase of the Seabrook upgrade varies amongst different documents on file with the New Hampshire Site Evaluation Committee in its Docket No. 2003-01. The 8.5% figure was calculated by using the difference between the former generating capacity of 1206 MWe to the upgraded generating capacity of 1308 MWe.

improvement was reviewed and approved by the Commission in its reconciliation of the SCRC and ES in Docket No. DE 07-057.

The capital improvements made to Merrimack Station during the spring 2008 outage are not part of the Scrubber Project.[26] They were regularly scheduled outage activities, not "modifications" subject to RSA 369-B:3-a. This includes replacing the HP/IP turbine with a functionally equivalent but more energy efficient model. This is evident as all the activities included in the listing of Stipulated Fact #2 were performed to meet PSNH's obligations to: continue to provide reliable and affordable energy to retail customers; run a well-maintained, efficient, and safe facility; avoid unplanned outages which would occur if such periodic maintenance activities did not take place; comply with the Fossil Fuel Generation Efficiency Standard contained in the Energy Policy Act of 2005; and, to meet the specific turbine maintenance expectations of the Commission's expert consultant. The HP/IP turbine replacement project is the twelfth in a line of similar projects that PSNH has undertaken in a 21-year period – an average of one such project every 1¾ years. The capital improvements made during Merrimack Station's 2008 maintenance outage did not materially impact the capacity or footprint of the plant and thus were outside the scope of RSA 369-B:3-a. The Commission, and parties with appropriate standing, will have the opportunity to determine whether these improvements are consistent with the "prudent investment rule" in PSNH's annual filing for reconciliation of revenues and costs associated with its ES charge and stranded cost recovery charge ("SCRC") for calendar year 2008, which is presently in progress and docketed as Docket No. DE 09-091.

IV. CONCLUSION

The Commission should dismiss the Petition due to: i) the Petitioners' lack of standing; ii) the inapplicability of RSA 369-B:3-a review for capital improvements made at Merrimack Station intended to increase the station's net capability to offset power consumption requirements of the scrubber pursuant to RSA 125-O:13, IV; iii) the fact that those RSA 125-O:13, IV improvements are already used and useful in the provision of utility service, are providing benefits to PSNH's retail customers, and will be the subject of a prudence review in the Company's next ES and SCRC reconciliation proceeding which is presently in progress and docketed as Docket No. DE 09-091; and, iv) that notwithstanding the

[26] The Parties of stipulated that the turbine replacement project was approved by PSNH personnel in April 2006 - - before the enactment of the Scrubber Law. Stipulated Fact #9.

applicability of RSA 125-O:13, IV, the particular capital improvements made during Merrimack Station's maintenance outage earlier this year are routine activities outside the scope of RSA 369-B:3-a.

Respectfully submitted this 22nd day of May, 2009.

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

By: _____

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CERTIFICATE OF SERVICE

I certify that on this date I caused the attached Brief to be served pursuant to N.H. Code Admin. Rule Puc 203.11.

May 22, 2009

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Attachment 1

Office of the Attorney General

Motion to Dismiss
Freedom Logistics, LLC and Halifax American Energy Company
for Lack of Standing

April 10, 2009

Air Resources Council Docket No. 09-12 ARC

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DEPARTMENT OF JUSTICE

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April 10, 2009

Almorinda M. Samson, Clerk
Air Resources Council
Department of Environmental Services
29 Hazen Drive
Concord, New Hampshire 03301

Re: Appeal of Sierra Club, et al - Docket No. 09-10 ARC

Dear Ms. Samson:

Enclosed for filing with reference to the above-captioned matters are an original and 15 copies of the *Department of Environmental Services' Motion to Dismiss Freedom Logistics, LLC and Halifax American Energy Company, LLC for Lack of Standing* and the *Department of Environmental Services' Motion to Dismiss the Conservation Law Foundation for Lack of Standing.*

Thank you for your attention to this matter.

Very truly yours,

Evan J. Mulholland
Assistant Attorney General
Environmental Protection Bureau
(603) 271-3679

/CMC
Enclosure
cc: N. Jonathan Peress, Esquire
Arthur B. Cunningham, Esquire
Melissa A. Hoffer, Esquire
Gregory H. Smith, Esquire

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENVIRONMENTAL SERVICES
AIR RESOUCES COUNCIL

Appeal of the Sierra Club, et al. (Docket No. 09-10 ARC)
Appeal of the Conservation Law Foundation (Docket No. 09-11 ARC)
Appeal of Freedom Logistics, LLC and Halifax American Energy Company, LLC
(Docket No. 09-12 ARC)

Department of Environmental Services' Motion to Dismiss Freedom Logistics, LLC and Halifax American Energy Company, LLC for Lack of Standing

The Department of Environmental Services ("DES" or "Environmental Services"), by and through its counsel, the Office of the Attorney General ("State"), and pursuant to Env-AC 204.15, hereby moves that the appeal of Freedom Logistics, LLC and the appeal of Halifax American Energy Company, LLC be dismissed for lack of standing. In support hereof, Environmental Services states:

Procedural History

1. On March 9, 2009, the Air Resources Division of DES issued Temporary Permit TP-0008 to Public Service of New Hampshire ("PSNH") to construct a flue gas desulphurization system ("FGD System") at PSNH's Merrimack Station in Bow, New Hampshire.

2. On March 19, 2009, Freedom Logistics, LLC ("Freedom") and Halifax American Energy Company, LLC ("Halifax") filed a notice of appeal requesting that the Air Resources Council (the "Council") reverse DES's decision to issue Temporary Permit TP-0008.

Applicable Law

3. RSA 125-C:12 governs appeals of decisions by DES to issue or deny permits pursuant to RSA 125-C:11. RSA 125-C:12, III limits the class of people who have standing to bring such an appeal to those who are "aggrieved" by the DES's decision: "Any person aggrieved by the decision of the commissioner granting or denying a permit application may within 10 days of the decision file an appeal with the air resources council." RSA 125-C:12, III.

4. DES has promulgated administrative rules describing with more particularity who has standing to bring an appeal of a permit issued pursuant to RSA Ch. 125-C. Env-AC 204.02 (b)(5) requires that a potential appellant show that:

(i) he or she "will suffer a direct and adverse effect or injury in fact as a result of the decision [of DES];" and

(ii) such an injury "is imminent and is particularized to the appellant, and ... is [greater] than any impact of the decision on the general public."

5. This two-pronged test for standing, (i.e., an injury in fact that is particularized to the potential appellant) was used by the Air Resources Council, and affirmed by the New Hampshire Supreme Court in the appeal of Environmental Action of Northern New Hampshire (Docket No. 2000-23 ARC) regarding a permit issued to Commonwealth Bethlehem Energy, LLC. See Appeal of Environmental Action of Northern New Hampshire, et al., No. 2002-0035 (Aug. 14, 2003) (unpublished order) (attached). In 2004, the Air Resources Council dismissed the appeal of Working On Waste (Docket No. 04-04 ARC) for lack of standing, noting that "a party is not presumed to have standing in issues which only a generalized harm to the public is the primary basis to establish

standing." See Decision & Order (March 25, 2004). This decision was upheld by the Council on a motion for reconsideration. See Decision & Order (June 8, 2004).

6. This requirement, that an appellant must have standing to bring an appeal, is not unique in New Hampshire to RSA Ch. 125-C or to the Air Resource Council. See, e.g., Appeal of Richards, 134 N.H. 148, 156 (1991) ("No individual or group of individuals has standing to appeal when the alleged injury caused by an administrative agency's action affects the public in general."); Blanchard v. Railroad, 86 N.H. 263 (1933).

7. When an organization is an appellant, it must demonstrate that at least one of its members possesses standing. Env-AC 204.02 (b)(5); see also, supra, Appeal of Working On Waste, Order at 2 (March 25, 2004). Alternatively, the organization must allege that the organization itself will suffer a particularized injury. See Warth v. Seldin, 422 U.S. 490, 511 (1975) (An organization may be granting standing "in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the [organization or] association itself may enjoy.").

8. The concept of "associational standing" of an organization on behalf of its members is well-developed in federal law. See Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 343 (1977). According to Hunt, an organization has standing to assert claims on behalf of its members when:

> (a) its members would otherwise have standing to sue in their own right;
> (b) the interests it seeks to protect are germane to the organization's purpose; and
> (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Id. at 343.

9. When reviewing a motion to dismiss for lack of standing, the Council must look beyond an appellant's unsubstantiated allegations and determine, based on facts, whether the appellant has demonstrated a sufficient basis to bring this appeal. See Appeal of Environmental Action of Northern New Hampshire, et al. No. 2002-0035 (Aug. 14, 2003) (unpublished order); Ossippee Auto Parts v. Ossippee Planning Board, 134 N.H. 401, 403 (1991).

Argument

10. In their Notice of Appeal, Freedom and Halifax state that they have standing

> "because they are located within 20 miles of Merrimack Station. In conducting the business of [Halifax and Freedom], numerous employees regularly transit I-93 within 3 miles of Merrimack Station. Both [Halifax and Freedom] and its [sic] employees are immediately and adversely affected from air pollutant emissions from Merrimack Station in the conduct of the Companies [sic] business activities, especially insofar as such emissions result from regulatory approvals improperly authorizing emissions from Merrimack Station that were contrary to case law, statute, rules and/or arbitrary and capricious.

Notice of Appeal at 6. It is the burden of Halifax and Freedom to establish standing. This unsupported statement is insufficient to establish standing under any theory.

11. Neither Halifax nor Freedom allege any particularized injury to themselves, as corporate entities, that may occur as a result of the issuance of the permit appealed. Compare Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982) (holding that a non-profit organization had standing to bring an action in its own right where it alleged that "petitioners' [racial] steering practices have perceptibly impaired [its] ability to provide counseling and referral services for low-and moderate-income home-seekers ... with the consequent drain on the organization's resources.") A "mere interest in [the] problem" is

insufficient to confer standing. Sierra Club v. Morton, 405 U.S. 727, 739 (1972); see also Valley Bank v. State, 115 N.H. 151, 154 (1975) ("Injury resulting from competition is rarely classified as a legal harm but rather is deemed a natural risk in our free enterprise economy."); accord Hardin v. Kentucky Util. Co., 390 U.S. 1, 6 (1968). The statement in their Notice of Appeal is insufficient to establish standing for either company in its own right.

12. Nor does the Notice of Appeal establish Halifax's or Freedom's right to bring this appeal as representatives of their respective employees. In order to bring an appeal on behalf of its members, an organization must demonstrate that at least one of those members would have standing in his or her own right. See Env-AC 204.02 (b)(5); Appeal of Working On Waste, Order at 2 (March 25, 2004). Neither Halifax nor Freedom names any of its individual members (or employees) nor their proximity to the plant. Further, Halifax and Freedom fail to explain how any of these individual members (or employees) would suffer a discrete and particularized injury from the issuance of TP-0008, distinct from that of the general public.[1]

13. Neither Freedom nor Halifax has established that they have standing in their own right, or that any of their individual members would have standing. Because of this, their appeal must be dismissed. See, supra, Appeal of Working On Waste, Order at 2 (March 25, 2004) (A failure to identify any member of an organization results in a failure to prove standing.).

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[1] Although the three prong test for standing of Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977), has not yet been adopted by New Hampshire, the second prong may be applicable here. The interests that Halifax and Freedom seek to protect presumably consist of their employees desire for reduced air emissions. It is hard to see how these interests are germane to Halifax's or Freedom's purpose: to "provide [their] customers with access to cheap wholesale power direct from the real-time power market." See http://haecpower.com/ (last visited on April 10, 2009).

WHEREFORE, the Department of Environmental Services respectfully requests that the Appeals of Freedom and Halifax be dismissed for lack of standing.

Respectfully submitted,

State of New Hampshire
Department of Environmental Services

By its attorneys,

Kelly A. Ayotte
Attorney General

Dated: April 10, 2009 By:

Evan J. Mulholland
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Certificate of Service

I certify that a copy of the foregoing has been mailed first-class postage prepaid this day to Arthur B. Cunningham, Esq., Melissa A. Hoffer, Esq., N. Jonathan Peress, Esq., and Gregory H. Smith, Esq.

Evan J. Mulholland

SUPREME COURT

In Case No. 2002-0035, Appeal of Environmental Action of Northern New Hampshire, Inc. & a., the court on August 14, 2003, issued the following order:

The appellants, Environmental Action of Northern New Hampshire (EANNH) and several residents or property owners of the Town of Bethlehem, appeal a decision of the Air Resources Council (council) dismissing their appeal for lack of standing. We affirm.

After the Air Resources Division (division) of the New Hampshire Department of Environmental Services issued a permit to Commonwealth Bethlehem Energy L.L.C. (CBE) to construct and operate an enclosed evaporator flare, the appellants appealed to the Air Resources Council. CBE then intervened and filed a motion to dismiss, challenging their standing. The council granted the motion to dismiss and this appeal followed. At oral argument, the appellants stated that the issue on appeal is not the standard to be applied to determine standing, but rather the showing necessary to satisfy that standard

"Any person aggrieved by the decision of the commissioner granting or denying a permit application may within 10 days of the decision file an appeal with the air resources council." RSA 125-C:12, III (Supp. 2002); see RSA 125-C:8 (Supp. 2002) (authorizing commissioner to delegate certain duties to his subordinates). "Aggrievement is found when the appellant shows a direct definite interest in the outcome of the proceedings." Caspersen v. Town of Lyme, 139 N.H. 637, 640 (1995). "No individual or group of individuals has standing to appeal when the alleged injury caused by an administrative agency's action affects the public in general, particularly when the affected public interest is represented by an authorized official or agent of the State." Appeal of Richards, 134 N.H. 148, 156 (1991). The existence of the interest and resultant standing to appeal are factual determinations. See Caspersen, 139 N.H. at 640. Because CBE's motion to dismiss challenged the appellant's standing to sue, the council was required to look beyond their unsubstantiated allegations to determine based upon the facts whether they had sufficiently demonstrated their right to claim relief. See Ossipee Auto Parts v. Ossipee Planning Board, 134 N.H. 401, 403-04 (1991).

In its order, the council ruled that "the burden is upon the petitioning party to show direct affectation to the petitioner as a result of the decision of DES" and that allegations of a "generalized harm to the public" were insufficient.

The appellants argue that they presented sufficient evidence to establish their standing. We disagree. In their appeal to the council, the appellants cited

In Case No. 2002-0035, Appeal of Environmental Action of Northern New Hampshire, Inc. & a., the court on August 14, 2003, issued the following order:

general concerns about the effect of the flare on the "health of the residents of the Town of Bethlehem"; they also contended that the installation and operation of an incinerator was "detrimental to the public's welfare, in that it lowers property values of the appellants" and that the flare added an "additional source of air pollution and light to noxious odors generated by the landfill." Their motion for reconsideration failed to provide any more specific allegations. At oral argument, counsel for the appellants conceded that the council was not obligated to comb through the record to determine whether an adequate showing had been made. Based upon the record before us, we conclude that the council correctly determined that the appellants had failed to establish standing. See Appeal of Richards, 134 N.H. at 156.

While the appellants have also cited in their brief several alleged procedural deficiencies in the proceedings before the council, the record reflects that these issues were neither raised in their motion for reconsideration nor in their notice of appeal. We therefore decline to consider them. See Appeal of Richards, 134 N.H. 148, 154 (1991); State Farm Mut. Ins. Co. v. Pitman, 148 N.H. 499, 503 (2002).

Affirmed.

NADEAU, DALIANIS and DUGGAN, JJ., concurred.

Eileen Fox,
Clerk

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