THE STATE OF NEW HAMPSHIRE
BEFORE THE
NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DE 11-250

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Investigation of Merrimack Station Scrubber Project and Cost Recovery

Objection to Public Service Company of New Hampshire's Motion for Rehearing of Order No. 25,445

NOW COMES TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast Inc. (together, "TransCanada"), an intervenor in this docket, and objects to Public Service Company of New Hampshire's ("PSNH") Motion for Rehearing of Order No. 25,445 dated January 23, 2013 ("Motion") pursuant to Admin. Rule Puc 203.07(f). In support of this Objection TransCanada states as follows:

1. TransCanada filed three different but related Motions to Compel in this docket. Some of the issues raised by the first Motion to Compel were addressed in Order No. 25,398 issued on August 7, 2012. The remaining issues were addressed in Order No. 25,445 issued on December 24, 2012, the Order which PSNH is now asking the Commission to reconsider.

2. On January 23, 2012 PSNH filed a Motion for Rehearing of Order No. 25,445. In that Motion PSNH argues, among other things, that the Commission's reading of the variance provision in RSA 125-O:17 "is plain error." Motion at 3. PSNH contends that the Order is based on faulty assumptions, that it ignores the plain language of RSA 125-O:17, that it ignores the fact that a variance based on an alternative reduction

requirement could never be requested during construction, and finally that it misinterprets the authority of DES to grant a variance that would void the requirement to construct the scrubber. In rebuttal to PSNH's Motion TransCanada incorporates by reference the arguments raised in the three Motions to Compel and the Legal Brief that it filed in this docket on these issues on August 28, 2012, as well as the arguments articulated below.

3. The Commission may grant rehearing when a motion states "good reason for the rehearing." RSA 541:3. Such a showing may be made "by new evidence that was unavailable at the original hearing, or by identifying specific matters that were either 'overlooked or mistakenly conceived.'" *Verizon New Hampshire Wire Center Investigation*, 91 NH PUC 248, 252 (2006), quoting *Dumais v. State*, 118 N.H. 309 (1978). See also *Lambert Const. Co., Inc. v. State*, 115 N.H. 516, 519 (1975). "A successful motion does not merely reassert prior arguments and request a different outcome. See *Connecticut Valley Electric Co.*, 88 NH PUC 355, 356 (2003)." 91 NH PUC at 252. RSA 541:4 requires that a rehearing motion "set forth every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable."

4. In the Motion PSNH falls back on the same arguments that it made in prior filings with this Commission. PSNH has thus failed to raise any new arguments or to point out anything that was overlooked or mistakenly conceived by the Commission that would justify reconsideration of Order No. 25,445. In particular, PSNH falls back on the illogical and contradictory argument that the Commission should ignore the variance provision because the provisions of the scrubber law were non-severable under RSA 125-O:10. As TransCanada and others argued in this docket, this is precisely why the variance provision must be taken into account, i.e. because reading it in the manner that

PSNH has argued would give no meaning to the clear language of the variance provision, a provision that is part of the delicate balance of this law, and would thus violate the non-severability clause. The Commission recognized this in its Order at 26 when it noted the statute's express understanding that the mercury reduction requirement was part of a balanced approach.

5. PSNH also illogically argues that "by ignoring the language of Section 17 and the overall statutory context" the Commission is putting section 17 at odds with the other sections of the scrubber law. Motion at 5-6. PSNH has it backwards and the Commission had it right, the Commission's order gives meaning to the language of Section 17; PSNH's interpretation would give no meaning to this statute, contrary to fundamental principles of statutory construction.

6. PSNH has argued throughout this docket, and does so again in the Motion, that it was "mandated by the Legislature", when in fact it crafted, lobbied vigorously for and supported the passage of the very "mandate" that it now claims forced it to undertake the Scrubber Project [1] and that this basically trumps all other provisions of the scrubber law and all obligations that PSNH has as a regulated public utility. In addition, this argument oversimplifies the law and fails to recognize the provisions in sections 17 and 18 that provide for a variance and a prudence review. Adopting PSNH's argument on this point would require that the Commission ignore the variance and prudence review sections of the law, contrary to one of the fundamental statutory construction principles, i.e. that statutes must be read as a whole, giving meaning to all of the provisions in the law. *Appeal of Public Serv. Co. of N.H.*, 141 NH 13, 17 (1996).

[1] In his September 2, 2008 letter to the Commission in DE 08-103, at p. 2, Gary Long, President and Chief Operating Office of PSNH, noted with pride PSNH's "*vigorous collaboration on, and crafting of*, the first-in-the-nation groundbreaking four-pollutant bill". [Emphasis added.]

7. PSNH also fails to recognize that by granting a variance from the law and ultimately shutting down Merrimack Station, DES, after consulting with the Commission as required by Section 17, would still have accomplished the primary goal of the law, i.e. achieving significant reductions in mercury emissions. RSA 125-O:11, I. The Commission recognized this in its Order: "Retirement of Merrimack Station would effectively eliminate all emissions from the station and leave only continued emissions from PSNH's other generation units reducing PSNH's overall mercury emissions significantly." Order at 25.

8. As pointed out by TransCanada in prior filings with the Commission, PSNH's construction of Section 17 would lead to the absurd result that PSNH could have spent an unlimited amount of money on the scrubber and never had to seek a variance from the law. The Commission recognized this in its Order when it said that PSNH's interpretation that the law required installation irrespective of cost would have allowed PSNH to install technology costing billions and that this "flies in the face of common sense". Order at. 25. PSNH's argument, when taken to its logical conclusion, is patently absurd and contrary to principles underlying public policy and public utility regulation. Nowhere in the law does it grant PSNH such unlimited discretion in spending on the scrubber project, nor is it reasonable to believe that the New Hampshire Legislature in its deliberations would choose to "mandate" a project that would ultimately impact ratepayers with zero consideration to its cost and the scale of impact to the well-being of citizens and the State's economy. The scrubber law does not restrict the Commission's traditional and fundamental authority to act as the arbiter between the interests of the customer and the interests of the regulated utility and to insure that rates are just and

reasonable. RSA 363:17-a; RSA 374:2. In fact quite the contrary, a section of the scrubber law, RSA 125-O:18, explicitly recognizes that the Commission is to conduct a prudence review. The Commission recognized this language in its order in DE 08-103, *Re Investigation of PSNH's Installation of Scrubber Technology at Merrimack Station*, 93 NH PUC 564, 572 (2008), as did the New Hampshire Supreme Court, in dismissing an appeal of the Commission's order in the 2008 docket for lack of standing, where it specifically said that "any potential injury the petitioners may suffer would arise only in a subsequent rate setting proceeding." The Court there cited to the language of RSA 125-O:18: PSNH "shall be allowed to recover all prudent costs…in a manner approved by the [Commission]". *Appeal of Stonyfield Farm*, 159 N.H. 227, 231 (2009). This docket is the prudence review and proceeding anticipated by the Commission and the Supreme Court in these orders and PSNH's attempts to try to limit the Commission's ability to conduct a full and fair review should be rebuffed.

9. The interpretation of RSA 125-O:17 that PSNH espouses would negate the Commission's authority and responsibility to conduct this prudence review. The Order does not, as PSNH argues, vest "powers in the Commission that are beyond its statutory authority and jurisdiction". Motion at 6. Instead, the Order reflects a reasonable exercise of the authority and responsibility given to the Commission under the law and recognized in years of precedent. As the Commission noted in the Order, reading the variance provision as PSNH recommends would lessen PSNH's "obligation to engage at all times in good utility management." Order at 26. Contrary to PSNH's argument, the Commission's Order does not create bad public policy—instead it continues good public policy because it recognizes and reinforces the obligation that regulated utilities have to

act responsibly. The Commission's Order insures that utilities understand that they have an obligation, in fact a duty of care, to constantly engage in good utility management practices. See *Re Public Service Company of New Hampshire*, 87 NH PUC 876, 886 (2002). This is where PSNH's argument ultimately fails, because it does not recognize the scope and implications of a prudence review, which is what the Legislature clearly said it not only wanted, but expected. RSA 125-O:18.

10. PSNH argues that there is no need and no authority for the Commission to review the issue of whether the Scrubber was too expensive because it exceeded some presumed price that appears nowhere in the law. Motion at 7. In making this argument PSNH ignores the statutory requirement to conduct a prudence review noted above and it ignores the legislative history cited in TransCanada's Third Motion to Compel in this docket, as well as the reference in the law to this being done "with reasonable costs to consumers", RSA 125-O:11,V, and the language of RSA 125-O:11,VIII: "The mercury reduction requirements set forth in this subdivision represent *a careful, thoughtful balancing of cost*, benefits, and technological feasibility and therefore the requirements shall be viewed as an integrated strategy of non-severable components." [Emphasis added.] [2]

11. PSNH makes a nonsensical argument that a variance could never be requested during construction because compliance could only be determined after a

[2] In his September 2, 2008 letter to the Commission in DE 08-103 cited above even Mr. Long noted, at p. 2, that the Legislature "performed a careful balancing of the costs and ensuing benefits" of the scrubber, though he failed to note that the costs that he referred to that the Legislature considered and that were referred to in the law were the $250 million figure provided to the Legislature in 2006, not the $457 million that the estimate had risen to in 2008. It is also quite ironic to review Mr. Long's continued references in this letter to the need to work on this project "on an accelerated basis" in order to "save money" and obtain "early compliance credits" given what has now turned into, on a temporary rate basis (which did not even give PSNH the full recovery of costs for this Project that they requested), an additional cent per kWh on ES customer rates.

period of operation. Motion at 5. Taking this argument to its logical conclusion would require ignoring the plain language of the variance law that allows the owner to submit information to substantiate "economic infeasibility" as the basis for seeking an alternative reduction requirement. According to PSNH's logic the owner would have to construct the facility before they could argue it would be economically infeasible to meet the requirements of the law. PSNH clearly could have, and arguably should have, sought a variance before beginning construction when it became clear how expensive it was going to be to continue to operate this aging facility in compliance with the requirements of the scrubber law and other reasonably foreseeable regulatory requirements. See *Re Investigation of PSNH's Installation of Scrubber Technology at Merrimack Station*, 93 NH PUC 564, 572 (2008). To interpret the law as PSNH is requesting would provide no protection for ratepayers and totally abrogate any responsibility PSNH had to exercise good utility management.

12. In terms of PSNH's argument that the Commission misinterprets the DES authority to grant a variance as allowing it to void the requirement to construct the scrubber at all, PSNH is once again asking the Commission to ignore the plain language of the variance provision and the language in the law about this being done at a cost that would be reasonable to customers. The resulting costs have been clearly unreasonable and have triggered within its customer base a race to alternative energy supply, something that PSNH reassured the Legislature in 2009 was permissible at any time to avoid paying costs associated with the scrubber. See Attachment A to this Motion, the cover pages and page 20 from a presentation PSNH made to the Legislature in 2009.

13. As noted in the prior Motions to Compel and the briefs submitted in this docket, the standard for discovery in Commission proceedings is broad and extends to information that is relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence. *Re Investigation into Whether Certain Calls are Local*, 86 NH PUC 167, 168 (2001). The Commission will typically allow "wide-ranging discovery" and will deny discovery requests only when it "can perceive of no circumstance in which the requested data would be relevant." *Re Lower Bartlett Water Precinct*, 85 NH PUC 371, 372 (2000). A party in a legal proceeding in New Hampshire is entitled to "be fully informed and have access to all evidence favorable to his side of the issue. This is true whether the issue is one which has been raised by him or by his opponent, and whether the evidence is in the possession of his opponent or someone else." *Scontsas v. Citizens Insurance Co.*, 109 N.H. 386, 388 (1969). Because the Order that PSNH is seeking reconsideration of is an order addressing discovery it is important to keep in mind the broad discretion that the Commission has in granting discovery. PSNH begrudgingly notes this on page 7 of its Motion when it says that it recognizes this order is "limited to a consideration of discovery requests". In addition, since PSNH has now responded to the data requests that it had originally objected to, but which the Commission directed it to respond to in the Order at issue here, PSNH's Motion should be considered to be moot.

14. For the reasons noted above and included in TransCanada's prior pleadings in this docket, the Commission should deny PSNH's Motion for Rehearing.

WHEREFORE, TransCanada respectfully requests that this honorable Commission:

A. Deny PSNH's Motion for Rehearing; and

B. Grant such further relief as it deems appropriate.

Respectfully submitted,

TransCanada Power Marketing Ltd.
TransCanada Hydro Northeast Inc.
By Their Attorneys
ORR & RENO, P.A.
One Eagle Square
Concord, NH 03302-3550
Telephone: (603) 223-9161
e-mail: dpatch@orr-reno.com

Douglas L. Patch

January 28, 2013

Certificate of Service

I hereby certify that on this 28th day of January, 2013 a copy of the foregoing motion was sent by electronic mail to the Service List.

Douglas L. Patch

956437_1