STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

Docket No. DE 11-250

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Investigation of Merrimack Station Scrubber Project and Cost Recovery

MOTION OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE FOR REHEARING OF ORDER NO. 25,546

August 9, 2013

Pursuant to RSA 541:3 and Rule Puc 203.33, Public Service Company of New Hampshire ("PSNH" or the "Company") respectfully moves the New Hampshire Public Utilities Commission ("Commission") to rehear and reconsider Order No. 25,546 issued in this proceeding on July 15, 2013 ("the July 15 Order"). The July 15 Order conflicts with prior orders, is internally inconsistent, ignores the plain language of the statute and construes the statute in a way that renders it unconstitutional.

The July 15 Order is fundamentally inconsistent with prior orders issued by the Commission over the past five years. Those orders[1] concluded that PSNH was obligated by the "Scrubber Law" (RSA 125-O:11-18) to build the Scrubber, had no discretion whether to do so, and that the Legislature retained, rather than delegated to the Commission, jurisdiction to consider whether it should be built.[2] The orders also found that the Commission had no

[1] *See, inter alia,* Orders Nos. 24,898 (September 19, 2008), 24,914 (November 12, 2008), and 25,332 (February 6, 2012) in Docket DE 08-103 and Order No. 24,979 (June 19, 2009) in Docket DE 09-033, and others as cited herein.

[2] As the Commission is aware, the "Scrubber" is a wet flue gas desulphurization system mandated by RSA 125-O:13 to be installed at PSNH's Merrimack Station. The Scrubber first went into commercial operation on September 28, 2011, and has significantly reduced emission of mercury and sulfur oxides from the Station.

authority to assess whether the overall construction cost was "too high" (as opposed to reviewing the prudence of the costs of compliance) because such authority over the overall cost was also retained by the Legislature.[3]

The Commission begins its analysis in the July 15 Order with this statement from Order No. 24,898: "[n]owhere in RSA 125-O does the Legislature suggest that an alternative to installing Scrubber technology as a means of mercury compliance may be considered, whether in the form of some other technology *or retirement of the facility.*" July 15 Order at 6 (emphasis and brackets in original). But it then concludes that PSNH indeed could have considered retirement of the facility as just such an alternative to installing Scrubber technology. The Commission goes even further, and asserts that notwithstanding the mandatory cost recovery provision of RSA 125-O:18, it can deny PSNH recovery of the prudent costs of constructing the Scrubber if economic considerations might have indicated potential divestiture of Merrimack Station by PSNH. Thus, the July 15 Order departs from and is inconsistent with prior determinations of the Commission.

The July 15 Order not only conflicts with prior orders, it is also internally inconsistent. The Commission concludes that it will *not* revisit its prior finding in Order No. 25,506 that RSA 125-O:17 ("Section 17" or the "Variance" section) does not allow PSNH to seek a variance from its obligation to construct the Scrubber. Order at 7. Yet less than two pages later, it states that Section 17 allows it to determine whether "PSNH had been prudent in proceeding with

[3] "[A] substantial increase in the cost estimate does not constitute a grant of Commission authority to determine whether the project is in the public interest. The Legislature has already made an unconditional determination that the scrubber project is in the public interest." Order No. 24,898 at 12. "RSA 125-O:13, IX directs PSNH to report annually to the legislative oversight committee on electric utility restructuring the progress and status of installing the scrubber technology including any updated cost information. This reporting requirement also suggests the Legislature's intent to retain for itself duties that it would otherwise expect the Commission to fulfill if RSA 369-B:3-a applied." *Id.* at 11. "[T]he Commission's authority is limited to determining at a later time the prudence of the costs of complying with the requirements of RSA 125-O:11-18 and the manner of recovery for prudent costs." *Id.* at 13.

installation of the Scrubber in light of increased cost estimates" and other factors, including "reasonably foreseeable" changes to environmental laws. *Id.* at 8-9. It thus concludes within the same July 15 Order that nothing in Section 17 allowed PSNH to avoid building the Scrubber, but that same section of the law allows the Commission to now decide whether PSNH acted imprudently by building it. The Commission was correct the first time. Nothing in Section 17 permits PSNH to seek a variance from the mandate to install Scrubber technology because the conditions precedent to such a variance set out in that Section never occurred.

The Commission also erred in holding that RSA 125-O:18 ("Section 18" or the "Cost Recovery" section of the law) provides a new ground for it to assert jurisdiction to consider whether the Scrubber should have been built. This *sua sponte* finding in the July 15 Order was made nearly five years after the Commission first noted that PSNH was *required* to build the Scrubber. It also was made nearly a year after the Commission focused its attention on Section 17 of the Scrubber law and requested that the parties to this docket address the issue of whether Section 17 *permitted* PSNH to seek relief from constructing the Scrubber and thus *required* PSNH to do so. The Commission devoted nearly a year to an analysis of that issue, and entered two orders directed at interpreting Section 17. Now, with no prior notice, the Commission has concluded that Section 18, the "Cost Recovery" provision, is a substantive section that allowed PSNH to avoid construction because it could have sold Merrimack Station before or during construction. Based on that conclusion, the Commission asserts that it may examine in this docket whether PSNH can recover the prudent costs of complying with the Scrubber Law after some unspecified date at which the Commission would have deemed the resulting costs to consumers to be unreasonable.

This strained, and wholly new, interpretation of Section 18 is defective. It is contrary to prior orders. It is contrary to the language of Section 18. It is contrary to the Legislative findings in Section 11 and with the law controlling divestiture found at RSA 369-B:3-a. It is contrary to the Legislative history surrounding the Scrubber Law. It construes RSA Ch. 125-O in a manner that unnecessarily places sections of the statute in conflict with one another and that is contrary to the mandate of the statute. It reads the statute to create an unworkable result. And it reads the statute in a manner that would render it unconstitutional.

The Commission's prior statements and orders found that PSNH was *required* to build the Scrubber and the Commission had no authority to review that requirement under RSA 369-B:3-a. The July 15 Order now finds that PSNH was required not to build the Scrubber if certain circumstances arose, and that the Commission has the authority under RSA 369-B:3-a to consider whether PSNH was prudent in building the Scrubber. This result makes no sense, is arbitrary and capricious, and impairs PSNH's due process rights.

The Commission errs because it fails to accept that the decision whether it was prudent to build the Scrubber was made by the Legislature in 2006. In the July 15 Order, the Commission also fails to accept that the Legislature found *as a matter of law* that the installation of the Scrubber would be achieved at a reasonable cost to consumers (RSA 125-O:11,V) and was in the best interest of PSNH's customers (RSA 125-O:11,VI), a conclusion that this Commission previously recognized in Order No. 24,898, at 8. PSNH completed the Scrubber as mandated by law and in reliance on the Commission's prior orders. It is too late now for a different

Commission to revisit these findings.[4] The July 15 Order should be reconsidered and revised in a manner that correctly reflects the law and the previous orders of this Commission.

I. The July 15 Order Is Inconsistent With the Commission's Own Previous Orders and With the Provisions of RSA 125-O:11-18.

Nearly five years ago, in Order No. 24,898, the Commission held that the Scrubber Law mandated construction of the Scrubber, withheld authority from the Commission to review that mandate, had no cap on costs or rates, and did not allow any alternative review mechanism. In Order No. 25,445 (December 24, 2012) the Commission disregarded that earlier order, and ruled that under Section 17, PSNH could have requested a variance "from the 80% reduction level [set out in RSA 125-O:13, II] or from any installation of mercury reducing technology." Order No. 25,445 at 25. Specifically, the Commission stated:

> [w]hen the Scrubber cost projections rose to nearly double the cost presumed by the Legislature when enacting the statute, PSNH, citing economic infeasibility, could have requested a variance from the 80% reduction requirement, and could have sought a lesser level of reduction, even down to no reduction at Merrimack Station, while pursuing a request to retire Merrimack Station pursuant to RSA 369-B:3-a.

Id. This finding strongly implied that the scope of the hearing in the current docket would include the issue of whether PSNH had been prudent in not seeking relief from the mandate to construct the Scrubber under Section 17.

PSNH sought rehearing of the Commission's December 2012 order. Three months ago, in Order No. 25,506 (May 9, 2013) the Commission granted PSNH's request to reconsider Order No. 25,445, based on the Commission's conclusion that it was indeed inconsistent with Order

[4] As the Commission aptly noted in the July 15 Order at 6-7, "It is simply not possible, more than three and a half years later, to revisit that issue." As noted *infra* in in footnote 26, the reference to "three and a half years later" was incorrect – it should have read "more than **four and a half years later."** This correction magnifies the error caused by the Commission's recent revisiting of issues.

No. 24,898 issued nearly five years ago. PSNH had argued,[5] and the Commission agreed, that reading Section 17 as including an alternative to constructing the Scrubber was contrary to the Commission's prior finding in Order No. 24,898 (at 12-13) that:

> The Legislature has already made an unconditional determination that the scrubber project is in the public interest. Nowhere in RSA 125-O does the Legislature suggest that an alternative to installing scrubber technology as a means of mercury compliance may be considered, whether in the form of some other technology or retirement of the facility. Furthermore, RSA 125-O does not: (1) set any cap on costs or rates; (2) provide for Commission review under any particular set of circumstances; or (3) establish some other alternative review mechanism. Therefore, we must accede to its findings.

The Commission thus again concluded on May 9 that it was "not…within PSNH's management discretion to propose retirement of Merrimack Station as an alternative reduction requirement under RSA 125-O:17." Order 25,506 at 17. The Commission ratified this holding in the July 15 Order, stating: "Therefore, we continue to find that our interpretation of RSA 125-O:17 and the inability of PSNH to use retirement as a means of obtaining a variance from the requirements of RSA 125-O in the Rehearing Order is the correct interpretation." July 15 Order at 7.

But inexplicably, after repeatedly finding that installation of the Scrubber was a legal mandate and not an exercise of management discretion, and that retirement of Merrimack Station would not satisfy the requirements of the Scrubber Law, the Commission now reads Section 18 (for the first time) to reverse not only those prior findings, but the reaffirmation of those prior findings contained in the July 15 Order:

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[5] *See* PSNH's Motion for Rehearing of Order No. 25,445, January 23, 2013 at 7-12. As the Commission is also aware, PSNH has consistently contended that Section 17 has no relevance to this proceeding at all, since it permits PSNH to seek a variance only from the schedule for constructing the Scrubber, or from the mercury reduction requirements if, once completed, meeting the 80 percent reduction requirements was "economically infeasible." *Id.* at 12-17. *See also* PSNH's August 28, 2012 Memorandum in Response to Commission Order No. 25,398 at 15-29.

> RSA 125-O:18 makes clear that PSNH retained the management discretion to divest itself of Merrimack Station, if appropriate. Likewise, under RSA 369-B:3-a, PSNH retained the management discretion to retire Merrimack Station in advance of divestiture. Consequently, we have never construed RSA 125-O to mandate that PSNH continue with the Scrubber's installation if continuing would require PSNH to engage in poor or imprudent management of its generation fleet.

July 15 Order at 8.

Then, despite its prior determination in Order No. 24,898 (which was reaffirmed in Order No. 25,506 and the July 15 Order) that PSNH could *not* have sought a "variance" under RSA 125-O:17 to comply with the Scrubber Law by some means other than installation of Scrubber technology,[6] the Commission's July 15 Order resurrects its ability under that same "Variance" provision of the law to make that very determination.[7] In summary, in Order No. 24,898 in September 2008, the Commission held that the Variance provision of the Scrubber Law could *not* be used to provide any alternative to installation of Scrubber technology. In Order No. 25,445 (December 2012), the Commission held that retirement of Merrimack Station *could* be used via the Variance provision to satisfy the law. Then, on rehearing, in May 2013, the Commission reversed the December 2012 order, and reaffirmed its 2008 decision that retirement of Merrimack Station could *not* be used to satisfy the Scrubber Law. In the July 15 Order, the Commission again reaffirmed the inability of PSNH to use retirement as a means of complying with the Scrubber Law, but inexplicably also said that PSNH retained the management discretion

[6] "We concluded that PSNH could have sought a variance in order to comply with RSA 125-O through means other than scrubber technology, including retirement of Merrimack Station. On rehearing, PSNH points out that we previously opined that '[n]owhere in RSA 125-O does the Legislature suggest that an alternative to installing scrubber technology as a means of mercury compliance may be considered, whether in the form of some other technology or retirement of the facility.' Order No. 24,898 at 12. Only after PSNH raised this issue in its motion did we recognize the apparent contradiction, and we grant limited rehearing on this point. After reconsideration, we will not disturb the prior Commission ruling in Order No. 24,898." Order No. 25,506 at 17.

[7] In the July 15 Order, the Commission now claims that the Variance provision of the law at RSA 125-O:17 gives it authority to determine "whether PSNH had been prudent in proceeding with installation of scrubber technology in light of increased cost estimates and additional costs from other reasonably foreseeable regulatory requirements… ." July 15 Order at 8-9.

to retire Merrimack Station and the Variance provision of the law could be used to determine whether PSNH had been prudent in proceeding with installation of Scrubber technology.

These repeated reversals in opinion and revisiting of issues reflect arbitrary and capricious decision-making, in violation of PSNH's due process rights.[8] The Commission apparently finds that under Section 17, the Variance provision, no alternative to installation of Scrubber technology, including retirement, could be used to satisfy the Scrubber Law; and, at the same time, Section 18, the Cost Recovery provision, required PSNH to retire or to sell the Station if "good utility management" warranted those actions.[9] As a result, the Commission has decided that the scope of this docket will include consideration of whether PSNH acted imprudently in installing the mandated Scrubber technology and failing to seek permission to retire or sell Merrimack Station as a means of avoiding the statutory mandate. If such imprudence is found, the Commission contends that it may deny recovery of even the prudent costs of complying with the requirements of RSA Ch. 125-O.

The Commission's entire analysis is based on a significant false premise - one that it has rejected repeatedly. The July 15 Order assumes that the scope of the Commission's review under Section 18 "is determined by the management discretion PSNH had under existing law."[10] But, almost five years ago in Order No. 24,898, the Commission *rejected* the premise that PSNH

[8] "Indeed, an agency acting consistently with its prior actions is generally what makes an agency action not arbitrary, although such an action may still be unlawful for other reasons." *Verizon Tel. Companies v. F.C.C.,* 453 F.3d 487, 497 (D.C. Cir. 2006).

[9] The Commission once again presents PSNH with a Hobson's Choice: Retirement of Merrimack Station would not comply with the emissions reductions requirement of the Scrubber Law, with such noncompliance having potential felony penalties under RSA 125-O:7; however, failure to consider retirement of Merrimack Station may be an abuse of management discretion, with potential prudence-related monetary penalties. Clearly, the Legislature did not – and could not – have intended such a result.

[10] "While PSNH had no discretion, and continues to have no discretion, whether to install and operate the Scrubber if it remains the owner and operator of Merrimack Station, the Scrubber law does not allow PSNH to act irrationally with ratepayer funds." July 15 Order at 7-8.

had *any* discretion or *any* management prerogative whether the Scrubber should be built. As the Commission then found (and repeated on May 9, 2013), the Legislature does not even "suggest" an alternative to constructing the Scrubber in RSA Ch. 125-O either by changing the required technology or by retirement of the Station. Likewise, the Commission has found that the Legislature did not "set any cap on costs *or rates*" or "provide for Commission review under any particular set of circumstances." These earlier findings are completely inconsistent with the July 15 Order.

The conclusions that PSNH had any management discretion regarding the decision to install Scrubber technology and that the Commission has jurisdiction to review that discretion under Section 18 are also directly contrary to the Commission's Order No. 21,979 in Docket No. DE 09-033 issued over four years ago. There, in considering whether the Commission had authority to review and place conditions on the construction of the Scrubber as part of proceedings relating to the issuance of long-term debt, the Commission explicitly stated:

> The principal distinction between the financing in this case and the prior Seabrook financing cases for the Coop and PSNH discussed above is that each of the prior cases involved management decisions by the utility, when faced with a range of possible supply options. At various points, those management decisions involved whether to continue to construct and operate the Seabrook plant or to pursue other power supplies….In other words, those management decisions reflected an inherent management prerogative to choose a course of action**.** ***In the instant case, by contrast, the scrubber installation at Merrimack Station does not reflect a utility management choice among a range of options. Instead, installation of scrubber technology at the Merrimack Station is a legislative mandate, with a fixed deadline.*** *See* RSA 125-O: 11, I, II; RSA 125-O:13, 1. ***The Legislature, not PSNH, made the choice, required PSNH to use a particular pollution control technology at Merrimack Station, and found that installation is "in the public interest of the citizens of New Hampshire and the customers of the affected sources."*** RSA 125-O: 11, VI.
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> ***Further distinguishing this case is the fact that the Legislature pre-approved constructing a particular scrubber technology at Merrimack Station by finding***

> ***it to be in the public interest and thereby removing that consideration from the Commission's jurisdiction.*** *See Investigation of PSNH's Installation of Scrubber Technology at Merrimack Station*, Order No. 24,898 at 13; *Investigation of PSNH's Installation of Scrubber Technology at Merrimack Station*, Order No. 24,914 at 12. ***As a result, the regulatory paradigm that applies to the Merrimack scrubber installation is fundamentally different from the regulatory paradigm that applied to Seabrook.***

Order No. 24,979 at 14-15 (emphases added). In sum, the premise in the July 15 Order that PSNH had any "management discretion…under existing law" concerning whether to build the Scrubber is incorrect. The July 15 Order's revisiting of this issue cannot be reconciled with the Commission's prior orders. It is simply not possible, nearly five years later, and after PSNH relied on the Commission's prior decisions, invested its capital, and after the Scrubber has been designed, procured, built, and placed into operation, to revisit that issue. *See* fn. 4, ***supra.***

PSNH does not, and cannot, dispute that it has an obligation not to "act irrationally with ratepayer funds." But that obligation does not somehow create an obligation to disregard the law mandating the installation of the Scrubber. As the Commission held in Order No. 24,979, RSA Ch. 125-O established a new and "fundamentally different…regulatory paradigm" from the general obligation regarding ratepayer funds by mandating that the Scrubber be built, that it be built in a particular way, and that it be built by a particular date. Even more to the point, the Legislative findings in RSA Ch. 125-O specifically establish that constructing the Scrubber was not "act[ing] irrationally with ratepayer funds." The Legislature made specific findings in RSA 125-O:11, the law's Statement of Purpose and Findings, that:

> I. *It is in the public interest* to achieve significant reductions in mercury emissions at the coal-burning electric power plants in the state as soon as possible. … *To accomplish this objective, the best known commercially available technology shall be installed at Merrimack Station no later than July 1, 2013.*
>
> V. The installation of scrubber technology will not only reduce mercury emissions significantly but will do so without jeopardizing electric reliability and with *reasonable costs to consumers*.

> VI. The installation of such technology is in the public interest of the citizens of New Hampshire and the *customers of the affected sources*.

RSA 125-O:11 (emphases added). This Commission has found that "the customers of the affected sources are, in fact, PSNH customers." Order No. 24,898 at 8.

Thus, the Commission's central conclusion in the July 15 Order that Section 18 gives it discretion to review PSNH's construction of the Scrubber under its general authority to review PSNH's "rational use of ratepayer funds" conflicts squarely with the Legislature's prior finding that PSNH's construction of the Scrubber *is* a rational use of those funds and *is* in the interest of the public generally and of PSNH's retail customers specifically. Put differently, the Legislature retained for itself jurisdiction to consider whether the construction of the Scrubber (as opposed to the prudent management of the costs to complete construction) was in the public interest of ratepayers under RSA 369-B:3-a and whether the resulting costs would be reasonable.

The Commission also addressed the interplay between the Legislature's public interest findings in RSA Ch. 125-O and its jurisdiction under RSA 369-B:3-a years ago in Order Nos. 24,898, 24,914 and 24,979. As the Commission then recognized, but disregards in the July 15 Order, "[t]he Legislature has….retained oversight of the scrubber installation including periodic reports on its cost. *See* RSA 125-O:13, IX." Order No. 24,979 at 15. In the words of the Commission, oversight by the Legislature prevented it from reviewing the costs of the Scrubber during construction under RSA 369-B:3-a.

> We do not find it reasonable to conclude that the Legislature would have made a specific finding in 2006 that the installation of scrubber technology at the Merrimack Station is in the public interest, set rigorous timelines and incentives for early completion, and provided for progress reports to the Legislature while simultaneously expecting the Commission to undertake its own review, conceivably arrive at a different conclusion, and certainly add significant time to

> the process. ***If we concluded otherwise, we would be nullifying the Legislature's public interest finding and rendering it meaningless.***
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> Under the Commercial Ratepayers' theory, the Legislature's public interest finding would be restricted to a specific level of costs and the Commission would effectively be required to second guess the Legislature's public interest finding at any dollar level above $250 million. Hence, for all practical purposes, the Legislature's public interest finding would be so limited as to be negated, and the RSA 369-B:3-a approach would be resurrected to require Commission permission before PSNH could act. ***We find such a constrained reading of the statute to be incompatible with the generally expansive statutory scheme adopted by the Legislature to bring about the installation of scrubber technology.***

Order No. 24,898 at 7-8 (emphases added). The Commission's revisiting that issue and its current reading of Section 18 are incompatible with its earlier holdings and with the statutory scheme.

The Commission's determination that under Section 18 PSNH had an obligation to seek the Commission's approval via the RSA 369-B:3-a process prior to installing the mandated Scrubber technology is not only new, it is surprising. Five years ago, when considering the issue of its jurisdiction under RSA 369-B:3-a, the Commission interpreted Section 18 very differently from its interpretation in the July 15 Order. Then, the Commission emphatically stated: "We observe that the last sentence of [Section 18] ***bolsters our finding that the Legislature intended to rescind the Commission's authority to pre-approve the Scrubber installation under RSA 369-B:3-a.***" Order No. 24,898 at 12 (emphasis added).[11] Now, upon revisiting that issue, it concludes exactly the opposite. If the Commission had no authority to pre-approve the Scrubber installation then, it now has no authority to consider whether PSNH should have installed the Scrubber.

[11] *See also* Order No. 25,050 issued on December 8, 2009 in Docket No. DE 09-033: " Given the legislative finding that the scrubber project is in the public interest at RSA 125-O:11, we do not have the authority to transform the review of this financing request into a pre-approval proceeding relative to the scrubber project."

The Commission's last minute effort to re-assert jurisdiction over the decision to construct the Scrubber through these continued reversals is not only contrary to its prior orders and to the statute, it is such arbitrary and capricious decision-making that it violates PSNH's due process rights.

II. The Commission's Reading of Section 18 Puts That Section in Conflict with the Legislative Mandate to Build the Scrubber in RSA Ch. 125-O, Violates Principles of Statutory Construction, Creates Illogical Results and Bad Public Policy, Would Render RSA 125-O:18 Unconstitutional and Violates Due Process

Despite its prior orders, the Commission now finds that Section 18 gives it jurisdiction under RSA 369-B:3-a to consider whether PSNH should have sought divestiture as a means of avoiding its obligation to construct the Scrubber. Because it reads one sentence of Section 18 to allow PSNH to divest itself of Merrimack Station "prior to, or during, construction of the Scrubber," it concludes that it may evaluate whether PSNH was imprudent in failing to do so based on "market and regulatory circumstances at the time decisions were being made," notwithstanding that it has otherwise concluded that "the scrubber installation at Merrimack Station does not reflect a utility management choice." Order No. 24, 979 at 14. Thus, after investments have been made, construction has been completed and the Scrubber put into operation, the Commission now cites to Section 18 to carve out an exception to its prior orders that held PSNH had no discretion to exercise in building the Scrubber (much as it had previously found - and then rejected - a similar exception in Section 17).

A. Conflict and Inconsistency With the Plain Language of Section 18 and With the Remainder of RSA Ch. 125-O

RSA 125-O:18 reads as follows:

> Cost Recovery. – If the owner is a regulated utility, the owner shall be allowed to recover all prudent costs of complying with the requirements of this subdivision in a manner approved by the public utilities commission. During ownership and

> operation by the regulated utility, such costs shall be recovered via the utility's default service charge. In the event of divestiture of affected sources by the regulated utility, such divestiture and recovery of costs shall be governed by the provisions of RSA 369:B:3-a.

The Scrubber Law at RSA 125-O:10 requires that the statutory provisions are not severable and that no provision "shall be implemented in a manner inconsistent with the integrated multi-pollutant strategy of this chapter." The Commission reads Section 18 in a manner contrary to its plain language, contrary to the law's non-severability provision, that undercuts the mandate in RSA 125-O:13, I and II, and is inconsistent and incompatible with its own earlier orders. This reading is both illogical and unnecessary.

Section 18 is entitled "Cost Recovery." The Commission reads this section as providing a mandated mechanism for cost recovery of the Scrubber's construction by a public utility in the first and second sentences, but then to restrict the recovery of those costs in the third sentence. The Commission thus converts a section that was designed to require as a matter of law the recovery of prudent costs incurred in complying with the Scrubber Law's requirement into a means of restricting the right to recover the costs of compliance with that mandate. A far more logical, and straightforward, reading of Section 18 is one consistent with the mandates contained throughout the statute to complete construction: the first sentence *mandates recovery* of *those* costs subject only to prudence review, the second provides the *means for recovering* those costs, and the third provides the mechanism for recovering those costs *if*, at some point in the future, and *after the Scrubber is completed*, PSNH divests its assets, *and if it has not fully recovered that cost.* In short, Section 18 was a directive to this Commission by the Legislature to allow PSNH to recover the mandated cost of constructing a specific project, in a specific way, in a specific time frame, in order to fulfill the public interest. The Commission's attempt to read a cost

recovery provision to provide discretion to undermine the construction mandate is erroneous and leads to unconstitutional results.

First, as the Commission has previously recognized:

> In order to interpret the relevant statutory language we must first examine its plain and ordinary meaning. If the language of the statutes does not unambiguously yield a meaning, or if the relevant statutes conflict, then we look to the Legislature's intent as revealed through a reading of the overall statutory scheme, legislative history and recognized rules of statutory construction. *See, Appeal of Pinetree Power, Inc.,* 152 N.H. 92, 96 (2005); and *Petition of Public Service Co. of N.H., 130 N.H.* 265, 282-83 (1988).

Order No. 24,898 at 6.[12] The first sentence of Section 18 reads as follows: "If the owner is a regulated utility, the owner *shall* be allowed to recover all prudent costs *of complying with the requirements of this subdivision* in a manner approved by the public utilities commission." RSA 125-O:18 (emphasis added). The "if" part of this statute has clearly been satisfied – PSNH is a regulated utility; therefore, the "then" part of the statute is operative, i.e., PSNH *shall* be allowed to recover all prudent costs of complying with the Scrubber Law. This is the plain meaning of the law.

Moreover, the language plainly indicates that the Commission's cost recovery review pertains to "all prudent costs of complying with the requirements of this subdivision." Such a review can only occur *after* the costs of compliance are capable of determination, i.e., after the Scrubber is complete. Until installation was complete, the "costs of complying with the requirements of this subdivision" remained in flux, subject to construction and operational contingencies. Nothing in the third sentence of RSA 125-O:18 contradicts that conclusion. The

[12] *See also Freedom Logistics, LLC and Halifax-American Energy Company*, Docket No. 08-145, Order No. 25,008 (September 1, 2009) at 11-12, citing *Appeal of Public Service Company of New Hampshire*, 125 N.H. 46, 52 (1984). "[W]hen interpreting a statute we begin with the plain meaning of the language used. Further, consistent with New Hampshire Supreme Court precedent, '[w]e will follow common and approved usage except where it is apparent that a technical term is used in a technical sense.'"

first sentence limits the Commission's jurisdiction to the review of the prudence of the costs of compliance, which are the only costs mentioned in Section 18. The third sentence must thus be read to address how *those costs* will be treated in the case of divestiture. Since those costs are only capable of determination after compliance with the requirements of the subdivision has occurred, nothing in the sentence can reasonably be read to evidence any intent by the Legislature to undercut the mandate by requiring PSNH to retire or divest Merrimack Station before or during construction or the Commission to review costs before compliance has been completed.

Section 18 deals only with cost recovery. The Section mandates the recovery of the costs of compliance. Thus, the reference to divestiture cannot reasonably be read to imply that it was intended to allow the Commission to review, or require PSNH to seek, retirement or divestiture in order to avoid compliance. The Commission's reading writes the words "complying with the requirements of this subdivision" out of the statute.

The Commission reads the third sentence to provide it with the power under RSA 369-B:3-a to consider whether PSNH was prudent in incurring any, or some, of the costs to build the Scrubber. This adds words to the sentence that do not appear in it. The Commission reads the word "prudence" into that sentence. In fact, the third sentence has nothing to do with prudent costs. In contrast with the first and second sentences, which specifically refer to the "prudent costs of compliance" and the manner in which "such costs" shall be recovered, the third sentence refers only to the "recovery of costs" at the time of a divestiture. Since this sentence is in the Scrubber Law, it logically follows that it refers to recovery of Scrubber costs. And it just as logically follows, from the absence of the reference to prudence, that the sentence refers to how the costs of compliance that have been determined to be prudent will be recovered if, after the

Scrubber is complete, divestiture is sought. This reading is confirmed by the Commission's prior decision in Order No. 24,898 that: "the last sentence of [Section 18] *bolsters our finding that the Legislature intended to rescind the Commission's authority to pre-approve the Scrubber installation under RSA 369-B:3-a.*" Order No. 24,898 at 12 (emphasis added.) If the Commission has no authority under the third sentence of Section 18 to pre-approve installation under RSA 369-B:3-a, then it follows that the review of cost recovery in divestiture must relate only to the cost recovery of Scrubber costs already determined to be prudent (as well as other costs) *post installation*.

Putting aside the issue of the mandate in the statute, if the Legislature had intended to allow the Commission to consider the prudence of PSNH going forward with Scrubber installation (as opposed to the costs of compliance), it could have said so. It could have written the statute to say "If the owner is a regulated utility, the owner shall be allowed to recover all prudent costs of complying with the requirements of this subdivision in a manner approved by the public utilities commission*, to the extent that the public utilities commission determines installation and operation of the scrubber technology to be a prudent exercise of management discretion*." But the Legislature did not say that.[13] And, significantly, during the 2009 Legislative session, when the $457 million cost estimate to complete the Scrubber was known, the Legislature *rejected* Senate Bill 152, "AN ACT relative to an investigation by the public utilities commission to determine whether the scrubber installation at the Merrimack station is in

[13] This Commission has held, "When faced with a confusing and ambiguous statute, we draw upon New Hampshire case law as a guide to statutory interpretation. 'We first interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include.' *State v. Langill*, 157 N.H. 77, 84 (2008) (citations omitted)." *Public Service Co. of New Hampshire*, Docket No. DE 08-053, Order No. 24,940 (February 6, 2009) at 16.

the public interest of retail customers." By doing so, the Legislature refused to amend the Scrubber Law to provide the very authority the Commission now claims it had all along.[14]

Third, the Commission's interpretation also fails to recognize the reality of the situation. The Commission concludes that because the statute refers to an "owner," PSNH specifically was not required to fulfill its mandate. This is a plausible, but impractical, reading of the statute. The statute required the construction of a multi-million dollar project as soon as possible, but no longer than seven years from the date of enactment, i.e., by July 1, 2013 (RSA 125-O:13, I), required annual reports to the Legislature on the status of compliance with the mandate beginning June 30, 2007 (RSA 125-O:13, IX), created incentives for early compliance with those deadlines (RSA 125-O:16), and imposed administrative and criminal penalties – up to and including felony conviction - for violations of its provisions (RSA 125-O:7).[15] Each of these requirements would apply regardless of the owner. [16]

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[14] PSNH's reading is also entirely consistent with statements of the Legislature made in the course of its consideration of a second scrubber-related bill during its 2009 session. As this Commission is aware, in 2009, Scrubber opponents introduced legislation designed to cap the cost of construction and provide jurisdiction to this Commission to review those costs. *See* Memorandum of PSNH in Response to Commission Order 25,398 (August 28, 2012) at 22-24. The majority report of the House Committee on Science, Technology and Energy, in recommending that the legislation (H.B. 496) be deemed inexpedient to legislate stated: "In 2006, the legislature had required the plant owner to proceed with construction without placing a specific limit on the cost. The majority believes that to choose now to place an absolute cap on the cost at this time would pose significant problems….[I]t is the role of the PUC….to decide the amount of funds to be recovered *after the completion of the project* in a legal process known as prudency review*….[T]he majority believes that placing a cap on cost recovery at this point would be arbitrary and unconstitutional as it could amount to a taking*." House Record No. 25, March 24, 2009, p. 899 (emphases added).

[15] As the Commission has made plain, the Legislature expressly noted that time was of the essence in completing the Scrubber. ("The legislative history supports a conclusion that the Legislature viewed time to be of the essence. This conclusion is consistent with the economic performance incentives *that PSNH can earn*, pursuant to RSA 125-O:16, if the scrubber project comes on line prior to July 1, 2013." Order No. 24,898 at 10 (emphasis added).)

[16] As noted, *infra*, the mandate to install and have operational Scrubber technology at Merrimack Station by July 2013 would apply to whoever owned Merrimack Station. A divestiture process would not extinguish that legal mandate. However, a divestiture process would take years to complete. Before divestiture could occur, the following events, *inter alia*, would have to be completed: the required findings by the Commission under RSA 369-B:3-a following an adjudicative proceeding; creation of a divestiture protocol; engagement of a divestiture agent; creation of an offering memorandum; issuance of a request for bids; a due diligence period; receipt and evaluation of bids; negotiations with selected bidders; drafting and execution of contracts; Commission review and approval of the final contract via a second adjudicative proceeding; Federal Energy Regulatory Commission review and approval of

Given those timetables and the severity of the penalties for non-compliance, is it logical to conclude that anyone other than the 2006 owner (PSNH) could possibly have complied with the mandate? Likewise, is it logical to conclude that PSNH could have sold Merrimack Station to any third party with this mandate in place? Is it logical to conclude that a PSNH divestiture proceeding could have been conducted in time to allow the new owner to comply with the Scrubber Law's mandate or that given the delay caused by the divestiture proceeding, that any third party would ever have agreed take on the responsibility of the mandate, or subject itself to the penalties resulting from its failure to meet the reduced time period to meet that mandate? Would it have been prudent for PSNH to ignore the "time is of the essence" requirement of the law, disregard early performance incentives (RSA 125-O:16) and suspend the project while pursuing a multi-year divestiture process that may or may not have been successful, and face potential felony prosecution for failing to meet the July 2013 statutory deadline? The answer to all these questions is unequivocally *no*. The statutory mandate to install and have operational Scrubber technology by July 2013 is unequivocal, regardless of who the "owner" was. The *only* party that had *any reasonable and practical* chance at compliance was PSNH.

The July 15 Order further ignores the fact that the Commission[17] and the Supreme Court[18] have always referred to the mandate as one that PSNH must meet and could not avoid by

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the asset sale and of new interconnection agreements; potential Department of Justice anti-trust review pursuant to Hart-Scott-Rodino Act requirements; and, approval of lenders under PSNH's credit agreements. All the while, the Scrubber mandate and the July 2013 date would loom ever-closer, with no certainty that the Commission would make the necessary preliminary finding, no certainty that there would be any bidders, and no certainty that any bid would receive all necessary approvals to consummate a divestiture of the asset. *See generally* Section VIII and Appendix F of the "Agreement to Settle PSNH Restructuring" referenced throughout RSA Ch. 369-B and in RSA 125-O:4,V and approved by the Commission in Docket No. DE 99-099, Order Nos. 23,443 (April 19, 2000) and 23,549 (September 8, 2000).

[17] "In this instance the Legislature has made the public interest determination and required the owner of the Merrimack Station, viz., PSNH, to install and have operational scrubber technology to control mercury emissions no later than July 1, 2013." Order No. 24,898 at 10. "The legislative history supports a conclusion that the Legislature viewed time to be of the essence. This conclusion is consistent with the economic performance incentives that

divestiture. Nowhere in any of the Commission's orders or in the Supreme Court's opinions, is there a reference to construction by anyone other than PSNH - at least until the July 15 Order.[19]

Reading the statute as intending to potentially require divestiture prior to or during construction creates an absurd result. In fact, from the very first day of its very first pronouncement regarding the Scrubber, this Commission has recognized that *it was PSNH that had the duty to construct the Scrubber*: "RSA 125-O:11, enacted in 2006, *requires PSNH to install new scrubber technology at Merrimack Station by July 1, 2013* that will achieve at least an 80 percent reduction in mercury emissions." NHPUC Secretarial Letter initiating Docket No. DE 08-103, "Investigation of PSNH Installation of Scrubber Technology at Merrimack Station," August 22, 2008. "RSA 125-O:11 et seq. *requires PSNH to install the scrubber technology* at Merrimack Station, a coal-fired electric generation facility in the town of Bow, in order to reduce mercury emissions." Order No. 24,898 at 1 (emphasis added). It is simply not possible, nearly five years later, and after PSNH relied on the Commission's prior decisions, after the capital has been invested, and after the Scrubber has been designed, procured, built, and placed into operation, to revisit that issue. *See* fn. 4, *supra.*

PSNH can earn, pursuant to RSA 125-O:16, if the scrubber project comes on line prior to July 1, 2013." *Id.* "RSA 125-O:13, IX directs PSNH to report annually to the legislative oversight committee on electric utility restructuring the progress and status of installing the scrubber technology including any updated cost information." *Id.*

[18] *Appeal of Stonyfield Farm,* 159 N.H. 227, 229 (2009): "To comply with the Mercury Emissions Program, PSNH must install the scrubber technology and have it operational at Merrimack Station by July 1, 2013. See RSA 125-O:11, I." ; "To ensure that PSNH makes "an ongoing and steadfast effort . . . to implement practicable technological or operational solutions to achieve significant mercury reductions" even before the scrubber technology is constructed and installed, the legislature has provided PSNH with certain economic performance incentives administered by DES. RSA 125-O:11, IV." *Id. Appeal of Campaign For Ratepayers' Rights*, 162 N.H. 245, 247 (2011): "This case involves the installation of a wet flue gas desulphurization system (also known as a "scrubber") at Merrimack Station, an electricity generating facility in Bow owned by the appellee, Public Service Company of New Hampshire . . . . The installation of such a system was mandated by the legislature in 2006."

[19] The Commission has also held, "We already determined, in Order Nos. 24,898 and 24,914, that the legislature found installation of the scrubber technology to be in the public interest ***and required PSNH to pursue that installation***." *Public Service Co. of New Hampshire*, Docket No. DE 07-108, Order No. 24,966 (May 1, 2009) at 6 (emphasis added) and "For planning purposes, it was reasonable for PSNH in this docket to have assumed that it would install the scrubber technology ***as required*** by RSA 125-O:11-18." *Id.* (emphasis added).

Because in reality, the statutory mandate was imposed on PSNH and not some hypothetical owner who might acquire the Station via divestiture *before or during* completion, the Commission's reading of the third sentence of Section 18 places that Section squarely in conflict with the statutory mandate. By contrast, reading the third sentence as relating to how costs will be recovered in the event of divestiture *after* completion creates no such conflict with the mandate in 125-O:13, or any of the other timelines in the law. In this very docket, the Commission recognized "the principle of statutory interpretation that one avoid an illogical or absurd result when construing legislative language. *In re Johnson*, 161 N.H. 419, 423 (2011), citing *Weare Land Use Assoc. v. Town of Weare*, 153 N.H. 510, 511-12 (2006); and *In re Alex C.*, 161, N.H. 231, 235 (2010) *citing State v. Gubitosi*, 157 N.H. 720, 723-24 (2008)." Order No. 25,445 at 25-26. Because the Commission's new reading of Section 18 is contrary to the language of the section, and produces just such an illogical or absurd result, it should be reconsidered.

B. <u>Conflict Between RSA 369-B:3-a and RSA 125-O:18</u>

The July 15 Order also ignores that the passage of RSA Ch. 125-O limited the Commission's jurisdiction under RSA 369-B:3-a. Instead, the Commission asserts such authority by interpreting one sentence of Section 18 as granting jurisdiction under RSA 369-B:3-a to consider whether construction of the Scrubber was in the "economic interest of retail customers of PSNH." This ignores the relationship between these statutes.

As with other decisions in the July 15 Order, the interplay between Section 18 and RSA 369-B:3-a was addressed by the Commission five years ago in Order No. 24,898. There, Scrubber opponents claimed that the Commission had the authority to consider whether construction of the Scrubber was a "modification" of Merrimack Station, thus allowing the

Commission to decide whether construction was in the "public interest" of PSNH's retail customers (the standard of review in RSA 369-B:3-a) notwithstanding the statutory public interest findings in RSA 125-O:11. The Commission rejected that claim, finding that it could not "harmonize" the two statutes (and their public interest findings) and that the later, more specific statute "trumped" the former, thereby divesting the Commission of jurisdiction.

As discussed above, in reaching this conclusion, the Commission also addressed the third sentence of RSA 369-B:3-a, the very same sentence it now employs to reassert its jurisdiction to consider whether the Scrubber should have been built:

> We also observe that the last sentence of this provision bolsters our finding that the Legislature *intended to rescind the Commission's authority to pre-approve the scrubber installation under RSA 369-B:3-a*. Specifically, the Legislature specifically provided that in the event of divestiture of Merrimack Station, such divestiture and recovery of costs would be governed by RSA 369-B:3-a. The Legislature would only need to make special notice that RSA 369-B:3-a would apply in the event of divestiture, if it intended that RSA 369-B:3-a not apply absent divestiture, which is the case before us.

Order No. 24,898 at 12 (emphasis added). In sum, the Commission found that it had no authority to "pre-approve the scrubber installation," i.e., to consider whether it should be built.

This Commission's prior finding in Order No. 24,898 is fundamentally inconsistent with the July 15 Order in two respects. First, because it could not "pre-approve" the Scrubber, it cannot now consider whether it should have been built. Second, since the Commission had *no authority* to review the Scrubber construction prior to completion, PSNH had neither the ability nor the requirement to seek such permission from the Commission.

Standing alone, the Commission's inconsistent findings in Order No. 24,898 are enough to require rehearing and revision of the July 15 Order. The Commission itself has so stated in both Order No. 25,506 (at 17: "After reconsideration, we will not disturb the prior Commission ruling in Order No. 24,898.") and the July 15 Order (at 6-7: "Order No. 24,898, which was

issued on September 18, 2009, confirmed for PSNH that retirement of Merrimack Station was not recognized as a method of compliance with the mercury reduction requirements of RSA 125-O. It is simply not possible, more than three [sic] and a half years later, to revisit that issue.").

The Commission's effort to revisit and revive its jurisdiction raises this question: After removing nearly all of the Commission's authority over the Scrubber, did the Legislature nonetheless intend that the Commission retain jurisdiction over Scrubber construction by one reference to the word "divestiture" in a "cost recovery" provision of the non-severable, integrated, multi-pollutant strategy of RSA Chapter 125-O, or did it intend to restrict the Commission's review to a determination of the prudence of costs PSNH incurred to comply with the requirements of the Scrubber Law after construction was complete? Once again, when RSA 369-B:3-a and RSA 125-O:11-18 are read together the answer is clear: the Commission's traditional jurisdiction returns only after the Scrubber is complete and compliance with the requirements of RSA Ch. 125-O has been achieved.

In fact, the Commission already provided this same answer in Order No. 24,898. There, construing the statutes together, the Commission held:

> RSA 369-B:3-a delegated to the Commission, in 2003, the authority to determine whether to pre-approve modifications to PSNH's fossil and hydro generating plants. Subsequently, in 2006, the Legislature enacted RSA 125-O:11, overriding its grant of pre-approval authority for a specific modification to the Merrimack Station. Accordingly, the Commission's authority is limited to determining at a later time the prudence of the costs of complying with the requirements of RSA 125-O:11-18 and the manner of recovery for prudent costs. In order to meet our obligations in that regard, we will continue our review of the documents already provided by PSNH, require additional documentation as necessary, and keep this docket open to monitor PSNH's actions as it proceeds with installation of the scrubber technology.

Order No. 24,898 at 13.

The Commission was clear. First, RSA 125-O:11 removed any authority to "pre-approve" the construction of the Scrubber, that is, to determine under RSA 369-B:3-a whether it was in the economic or public interest of retail customers of PSNH to build it. Second, the prudent costs to be evaluated by the Commission were the prudent costs of compliance, that is, of building the Scrubber. Third, given those facts, the "later time" at which the Commission's review of "cost recovery" would occur in relation to divestiture must be after compliance has been met. The Commission did not say that it will keep the docket open to monitor whether PSNH should continue to construct the Scrubber or to evaluate cost recovery during construction. Rather, it made clear that PSNH was to "proceed[ ] with installation of the scrubber technology" and that the Commission had no jurisdiction to conduct a review under RSA 369-B:3-a of this specific modification.

Order No. 24,898 thus made clear that Section 18 provided only a very narrow exception to the rescission of the Commission's jurisdiction under RSA 369-B:3-a to consider the public and economic interests of PSNH's ratepayers in relation to the Scrubber; namely, how (not whether) to provide for recovery of costs in the event of divestiture post installation. The Commission's July 15 Order revisiting this issue completely ignores these prior findings, and the mandate in RSA 125-O:13.

As the Commission recognized in Order No. 24,898, it is an agency of limited jurisdiction and its authority extends to "only those powers granted to it by the Legislature." Order No. 24,898 at 13, citing *Appeal of Public Service Company of N.H.*,122 N.H. 1062, 1066 (1982).[20] RSA Ch. 125-O stripped the Commission of its authority under RSA 369-B:3-a to

[20] *See also Petition of Boston & M. R. R.*, 82 N.H. 116, 129 A. 880 (1925). ("The Public Service Commission is an agency of limited powers and authority. While the Legislature may delegate to such an agency certain of its own powers and authority, the exercise of such delegation does not extend beyond expressed enactment or its fairly

consider public interest as related to pre-approval of the Scrubber. If the Legislature had intended Section 18 to give the Commission authority to generally revisit the Legislature's explicit public interest findings that the Scrubber be built, it would have said so explicitly. Yet it did not do so, and RSA 125-O:11-18 is replete with findings that construction of the Scrubber is in the public interest. The only reasonable reading of Section 18 is that it directed how the Commission would address the impacts of any divestiture of Merrimack Station after construction was complete.

The error in the Commission's analysis of Section 18 is conclusively revealed by the relationship between RSA 125-O:11-18 and RSA 369-B:3-a. Assuming the Commission proceeded to consider (or reconsider) the mandate of RSA 125-O:13, what would have happened if a docket was opened to investigate PSNH's divestiture of Merrimack Station before or during construction? As a prerequisite to divestiture, PSNH would have had to demonstrate to the Commission, and the Commission would have had to determine, that PSNH retaining Merrimack Station with the Scrubber was no longer in the "economic interest of retail customers of PSNH." (RSA 369-B:3-a). In that situation, PSNH and the Commission would be faced with two problems. First, as the Commission has already found, the Legislature retained jurisdiction to review the cost of the Scrubber during construction.[21] Second, the Legislature had already made findings as a matter of law that are controlling and that would have been directly contrary to what the Commission would be required to decide under RSA 369-B:3-a.

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implied inferences. The establishment of such an agency is of a special rather than general character, and power and authority not granted is withheld.")

[21] In 2009, with an estimated scrubber cost of $457 million known to it, the Legislature exercised its retained authority to consider the Scrubber Law's mandate, and refused to amend, modify or repeal it. With a final cost in the $421 million range – approximately $36 million *less* than the cost considered by the Legislature – this Commission lacks authority to second-guess that decision.

RSA 369-B:3-a provides that before PSNH may retire or divest any of its generating assets, certain Commission findings are required. For divestiture, the statute requires a Commission finding "that it is in the economic interest of retail customers of PSNH to do so"; for retirement, a finding "that it is in the public interest of retail customers of PSNH to do so." However, for the Scrubber, the Legislature expressly found as a matter of law that installation of the Scrubber would be performed "with reasonable costs to consumers" (RSA 125-O:11,V) and that installation of the Scrubber "is in the public interest of the citizens of New Hampshire and the customers of the affected sources." (RSA 125-O:11,VI). The Commission has no authority to make findings contrary to the findings of the Legislature and contained in the Scrubber Law.[22] Therefore, with respect to the Scrubber mandate, the Legislature removed from the Commission any ability to make the findings that are legal prerequisites to any retirement or divestiture process. Hence, neither retirement nor divestiture of Merrimack Station were options available to PSNH. The Commission has no authority to make findings that deviate from the legislative findings contained in the law and cannot use divestiture and/or retirement as "alternatives" to Scrubber installation as a basis for denying PSNH recovery of all prudent costs of complying with the requirements of the Scrubber Law.

What the Commission said in Order No. 24,898 about its jurisdiction to review or "pre-approve" construction of the Scrubber under RSA 369-B:3-a applies with equal force here:

[22] On November 12, 2008, in Order No. 24,914 (at 11) the Commission came to this very same conclusion that in light of the statutory findings contained in the Scrubber Law, it had no authority to make contrary findings under RSA 369-B:3-a: "In Order No. 24,898, we undertook an analysis of RSA 125-O:11-18 and RSA 369-B:3-a, and we found that the Legislature's public interest finding in RSA 125-O:11 that scrubber technology should be installed at Merrimack Station superseded the Commission's authority under RSA 369-B:3-a to determine whether it is in the public interest for PSNH to modify Merrimack Station. Consequently, we concluded that the Commission lacked the authority to conduct a public interest review, in the form of pre-approval, of PSNH's decision to install scrubber technology." *See also* Order No. 24,898 at 8, "[T]he Legislature's finding under RSA 125-O:11, VI subsumes any finding the Commission might make under RSA 369-B:3-a."

> We do not find it reasonable to conclude that the Legislature would have made a specific finding in 2006 that the installation of scrubber technology at the Merrimack Station is in the public interest, set rigorous timelines and incentives for early completion, and provided for annual progress reports to the Legislature, while simultaneously expecting the Commission to undertake its own review, conceivably arrive at a different conclusion, and certainly add significant time to the process. If we concluded otherwise, we would be nullifying the Legislature's public interest finding and rendering it meaningless.

Order No. 24,898 at 9.

C. **The Commission's Reading of Section 18 Renders the Statute Unconstitutional As Applied**

Starting with Docket No. DE 08-103, and continuing until the July 15 Order, the Commission has not once given PSNH notice of its purported jurisdiction to consider, after the fact, whether PSNH should have considered divestiture of Merrimack Station before or during construction. On the contrary, the Commission specifically found in Order No. 24,898 that "the Commission lacks authority to pre-approve installation" and that the Legislature "intended to rescind the Commission's authority" to approve the installation prior to or during construction.

Now, after the Scrubber is complete, and after more than $400 million has been spent, the Commission reaches the opposite conclusion, asserting the ability to decide whether PSNH prudently exercised discretion the Commission previously said it did not have, or in making management decisions the Commission previously said it had no management prerogative make. Likewise, the Commission now says that PSNH could have declined to build the Scrubber notwithstanding its previous finding the Legislature imposed an "unequivocal mandate" on PSNH to build it.

In *Appeal of Public Service Co. of N.H.*, 122 N.H. 1062, 1069 (1982), the Supreme Court considered whether the Commission's restrictions on financing for the Seabrook nuclear power plant after construction had begun and in the face of a legislative resolution "[t]hat both units of

the Seabrook nuclear power plant should be completed and brought to full generating capacity as quickly as possible" were within its delegated authority. As the Court there stated:

> PSNH has long passed the point where its right to complete the twin units vested: "In this State, the common-law rule is that `an owner, who, relying in good faith on the absence of any regulation which would prohibit his proposed project, has made substantial construction on the property or has incurred substantial liabilities relating directly thereto, or both, acquires a vested right to complete his project in spite of the subsequent adoption of an ordinance prohibiting the same.' " *Henry and Murphy, Inc. v. Town of Allenstown,* 120 N.H. 910, 912, 424 A.2d 1132, 1133-34 (1980)….Regulated industry or not, the owner or developer "who, in good faith, makes substantial construction on his property `acquires a vested right to complete his project . . . .'" *Id.* at 913, 424 A.2d at 1134 (citations omitted) (emphasis in original). If ever a case for vesting applied, it is the expenditure of hundreds of millions of dollars to date at Seabrook!

Id. The Court held that because the imposition of conditions would result in a denial of the right to recover the costs of uncompleted construction under the anti-CWIP statute, the Commission's order would result in a non-compensable taking in violation of Part I, Article 12 of the New Hampshire Constitution. 122 N.H. at 1071-72.

The Commission's July 15 Order in this case achieves a similarly unconstitutional result. The Legislature mandated construction of the Scrubber and completion "as soon as possible." In order to comply with that mandate, PSNH had to begin construction immediately.[23] Pursuant to the mandate, PSNH had a legal duty and a vested right to complete construction and to recover all costs of construction that it prudently managed. In the face of that mandate, and of continued construction in reliance on it, the Commission's newly minted reading (raised for the first time nearly two years after construction was complete) of Section 18 as allowing it to determine whether certain of the costs of construction may not be recovered (even if prudently incurred)

[23] "The legislative history supports a conclusion that the Legislature viewed time to be of the essence." Order No. 24,898.

constitutes a taking. The statute cannot, need not, and should not, be read as creating such a result. *State v. Pierce*, 152, N.H. 790,791 (2005); *State v. Smagula*, 117 N.H.663, 666 (1977); *Maritime Packers v. Carpenter*, 99 N.H. 73 (1954); Singer, "Sutherland, Statutes and Statutory Construction," 7th Ed. Section 45.11 at 81.

The Commission's apparent reversal on the question of whether PSNH had a duty to construct the Scrubber also violates due process.

> Due process is a flexible standard in the administrative law context. We expect and will require meticulous compliance with its mandates, however, in the case of the PUC because as long ago as 1929 this court recognized that the PUC was created by the legislature as a "state tribunal, imposing upon it important judicial duties." *Parker-Young Co. v. State*, 83 N.H. 551, 556, 145 A. 786, 789 (1929). When it is not acting in a rule-making capacity but in an adjudicative one…the procedural posture of the PUC is different. "If private rights are affected by the board's decision the decision is a judicial one." *Petition of Boston & Maine Corp.*, 109 N.H. 324, 327, 251 A.2d 332, 336 (1969) (decision of PUC, closing railroad grade crossing, was judicial).

Appeal of Public Service Co. of N.H., 122 N.H. at 1073 (some citations omitted).

Here, acting as a judicial body, the Commission has denied PSNH due process by its repeated flip-flops in position and by its revisiting of issues without fair warning to PSNH of its obligations under the law, especially the alleged obligations to consider retirement and divestiture under Section 18 despite the "unequivocal mandate" in RSA 125-O:13 which the Commission five years ago found to be controlling. For the reasons set forth above, the Commission's current position is plainly erroneous and could not have been predicted from any reasonable reading of the statute or from the Commission's own Order Nos. 24,898, 24,914, and 25,332 in Docket DE 08-103 and Order No. 24,979 in Docket DE 09-033 - orders issued *seventeen* to *fifty-eight months prior* to the July 15 Order.

The Commission's prior orders contradict nearly every premise supporting its current Order. A few examples may suffice.

Current Premise or Finding (July 15 Order)	**Contrary Prior Finding**
The scope of its prudence review relating to divestiture is determined by PSNH's management discretion under RSA Ch. 125-O.	"[T]he Scrubber installation at Merrimack Station does not reflect a utility management choice." Order No. 24,979.
Even though PSNH "had no discretion, and continues to have no discretion, whether to install the Scrubber" it cannot "act irrationally with ratepayer funds."	RSA 125-O does not: (1) set any cap on costs or rates." Order No. 24,898.
"[U]nder RSA 369-B:3-a, PSNH retained the management discretion to retire Merrimack Station in advance of divestiture. Consequently, we have never construed RSA 125-O to mandate that PSNH continue with the Scrubber's installation if continuing would require PSNH to engage in poor or imprudent management of its generation fleet."	"The last sentence of this provision [Section 18] bolsters our finding that the Legislature intended to rescind the Commission's authority to pre-approve the Scrubber installation under RSA 369-B:3-a." *Id.* "Nowhere in RSA 125-O does the Legislature suggest that an alternative to installing scrubber technology as a means of mercury compliance may be considered, whether in the form of some other technology or retirement of the facility." Order No. 24,898.
"RSA 125-O:17. . . provide[s] a basis for the Commission to consider, in the context of a later prudence review, arguments as to whether PSNH had been prudent in proceeding with installation of scrubber technology."	"To the extent that Order No. 25,445 interpreted the variance provision, RSA 125-O:17, to allow retirement of Merrimack Station rather than installation of the scrubber technology as a method of meeting the emissions reduction requirements, that portion of Order No. 25,445 alone is reversed." Order No. 25,506.
"PSNH's prudent costs of complying with RSA 125-O must be judged in accordance with the management options available to it at the times it made its decisions to proceed with and to continue installation."	"The Legislature has determined that the scrubber project is in the public interest and has directed PSNH to go forward with the project and have it operational no later than July 1, 2013." Order No. 24,898. "In this instance the Legislature has made the public interest determination and required the owner of the Merrimack Station, viz., PSNH, to install and have operational scrubber technology to control mercury emissions no later than July 1, 2013." *Id.*

	"The Legislature has already made an unconditional determination that the scrubber project is in the public interest." *Id.* "In the instant case, by contrast, the scrubber installation at Merrimack Station does not reflect a utility management choice among a range of options. Instead, installation of Scrubber technology at the Merrimack Station is a legislative mandate, with a fixed deadline. See RSA 125-O:11, I, II; RSA 125-O:13, I." Order No. 24,979. "The Legislature, not PSNH, made the choice, required PSNH to use a particular pollution control technology at Merrimack Station, and found that installation is 'in the public interest of the citizens of New Hampshire and the customers of the affected sources.' RSA 125-O:11, VI." *Id.* "RSA 125-O:11 et seq. requires PSNH to install the Scrubber at Merrimack Station to reduce air pollution, including mercury emissions." Order No. 25,332. "Pursuant to the express language in RSA 125-O:11, the Legislature required that PSNH install the Scrubber by July 1, 2013… ." Order No. 25,346. "RSA 125-O:11 requires PSNH to build the Scrubber." *Id.*

These differing decisions over time are clear evidence of arbitrary decision-making.[24] PSNH was obligated to proceed on the statutory mandate to build the Scrubber and was entitled

[24] "It is well established that…any agency's 'unexplained departure from prior agency determinations' is inherently arbitrary and capricious in violation of APA § 706(2)(A). *American Federation of Government Employees, Local 2761 v. FLRA,* 866 F.2d 1443, 1446 (D.C.Cir.1989). The Authority's failure to follow its own well-established

to rely on the Commission's Orders finding that it had no ability to exercise discretion in doing so. Likewise, PSNH was entitled to rely on the Commission's Orders finding that the Commission had no authority under RSA 369-B:3-a to "pre-approve" the Scrubber, that is, to evaluate the reasonableness of the costs to construct it as opposed to the prudent management of those costs. On those findings, to say nothing of the public interest findings in RSA 125-O:11, PSNH was entitled to reasonably conclude that it need not seek any Commission review prior to completion of construction. Given its good faith reliance on the mandates contained in RSA Ch. 125-O, a denial of the cost of construction violates Part I, Article 12 of the New Hampshire Constitution.[25] Moreover, the Commission's current creation of an ability to deny costs relating to construction "even if prudently managed," is so arbitrary and capricious as to constitute a denial of due process under Part II Article 5 of the New Hampshire Constitution as well as the 14th Amendment of the U.S. Constitution.

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precedent without explanation is the very essence of arbitrariness." *Nat'l Treasury Employees Union v. Fed. Labor Relations Auth.*, 404 F.3d 454, 457-58 (D.C. Cir. 2005).

[25] Every administrative and judicial body that has had an opportunity to discuss the Scrubber Law has confirmed that PSNH was mandated by law to construct the Scrubber, including, *inter alia*: i. the New Hampshire Supreme Court, which has twice described RSA Ch. 125-O as a mandate to install the Scrubber technology to meet the emissions reduction requirements of the statute. *Appeal of Stonyfield Farm*, 159 N.H. 227, 228-29 (2009) ("[T]he legislation specifically requires PSNH to install 'the best known commercially available technology . . . at Merrimack Station,' which the New Hampshire Department of Environmental Services (DES) has determined is the scrubber technology"; "To comply with the Mercury Emissions Program, PSNH must install the scrubber technology and have it operational at Merrimack Station by July 1, 2013."); *Appeal of Campaign for Ratepayers' Rights*, 162 N.H. 245, 247 (2011) ("This case involves the installation of a wet flue gas desulphurization system (also known as a 'scrubber') at Merrimack Station…The installation of such a system was mandated by the legislature in 2006."); ii. The Site Evaluation Committee, which also noted that the "Scrubber Bill" codified in RSA Ch. 125-O "requires the installation of a wet flue gas desulfurization system (Scrubber Project) otherwise known as a "Scrubber" at the Merrimack Station facility no later than the year 2013." Order Denying Motion for Declaratory Ruling, NHSEC Docket No. 2009-01, August 10, 2009, *slip op.* at 2; and, iii. The N.H. Department of Environmental Services which ruled that PSNH was subject to a mandate to install the scrubber. "The owner shall install and have operational scrubber technology to control mercury emissions at Merrimack Units 1 and 2 no later than July 1, 2013." Title V Operating Permit No. TV-0055, September 7, 2011, at 13; "…PSNH Merrimack must install an FGD system which will also reduce SO2 emissions by at least 90 percent below uncontrolled levels by July 1, 2013." Title V Operating Permit Findings of Fact and Director's Decision, March 15, 2010, at 16.

The Due Process Clause of the U.S. Constitution contains a substantive component that bars arbitrary, wrongful government actions "regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986). The New Hampshire Supreme Court has held on numerous occasions that an agency has erred when it has acted illegally with respect to jurisdiction, authority, or observance of the law, has abused its discretion, or has acted arbitrarily, unreasonably, or capriciously. *See, e.g., Gosselin v. New Hampshire Dept. of Corrections*, 153 N.H. 696, 697-98 (2006); *In re Chase Home for Children*, 155 N.H. 528, 532 (2007); *Milette v. New Hampshire Retirement System*, 141 N.H. 342, 344 (1996); *Appeal of Lemire-Courville Associates*, 127 N.H. 21, 32 (1985). The myriad changes in position contained in the July 15 Order reflect agency action which exceeds the Commission's authority, fails to observe the law, is an abuse of discretion, and is arbitrary, unreasonable, or capricious. Hence, the July 15 Order was issued in error, and rehearing and revision is appropriate.

III. The Commission's Interpretation of Section 17 Is Erroneous. The Order Is Internally Inconsistent and Conflicts With Prior Orders.

In addition to its incorrect analysis of Section 18, the Commission continues to advance an equally incorrect analysis of Section 17, asserting that it "provides a basis for [it] to consider, in the context of a later prudence review, arguments as to whether PSNH had been prudent in proceeding with installation of the Scrubber in light of increased cost estimates." July 15 Order at 9. The Commission states that it gave notice of this point in Order No. 24,898, and that the current docket is the "later prudence review" discussed in that prior order. Yet in May of this year, nearly five years after Order No. 24,898,[26] the Commission rejected this very same

[26] The Commission incorrectly identifies Order No. 24,898, issued on September 19, 2008, as having been issued in 2009 and notes that "[i]t is simply not possible, more than three and a half years later, to revisit that issue." Order at 7. In fact, it is nearly five years since that order was issued. PSNH was entitled to rely on that order in proceeding with construction of the Scrubber knowing that the Commission had stated that it had no ability whatsoever, to "pre-

interpretation of Section 17. Order No. 25,506 at 17. The Commission there recognized that its current interpretation was contrary to its prior statements in Order No. 24,898 at 12-13.

First and foremost, subsequent to the issuance of Order No. 24,898, the Legislature expressly exercised its retained control over the Scrubber project when it considered two bills during the 2009 Legislative session. The Legislature was well aware of the $457 million cost projection in the Fall of 2008. In January 2009 two bills (Senate Bill 152, "AN ACT relative to an investigation by the public utilities commission to determine whether the scrubber installation at the Merrimack station is in the public interest of retail customers," and House Bill 496, "AN ACT establishing a limit on the amount of cost recovery for the emissions reduction equipment installed at the Merrimack Station") were introduced. These bills were designed to delegate jurisdiction to the Commission to investigate the Legislature's public interest findings and to cap prudent costs at $250 million. Indeed, the purpose of SB 152 was expressly set forth in Section 1:

> The purpose of this legislation is to require the New Hampshire public utilities commission to investigate, in light of substantial cost increases now projected by Public Service Company of New Hampshire (PSNH), whether installation of the wet flue gas desulphurization system ("scrubber") at the Merrimack Station electric generating facility in Bow, as mandated by RSA 125-O:11 *et seq.*, is in the public interest of retail customers of PSNH.

The Legislature, with full knowledge of the $457 million project cost estimate, rejected both bills, and in so doing, reiterated (through the Report of the House Science, Technology, and Energy Committee) that RSA 125-O:11-18 did not place "a specific limit on the cost."[27] The

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approve" its construction. The Commission's current reversal of course is wrong on the law, unfair, arbitrary and capricious.

[27] The Majority Report of the House Science, Technology, and Energy Committee noted as follows:

> In 2006, the Legislature had required the plant owner to proceed with the installation *without placing a specific limit on the cost*. The majority believes that to choose now to place an absolute cap on the cost at

Legislature never once indicated that the increased cost did not justify an 80 percent reduction in mercury emissions, nor did the Legislature relieve PSNH from the legal mandate to construct the Scrubber. PSNH again reported the cost estimates to the Legislature in June 2009, and June 2010, with the same result. PSNH then completed the Scrubber at a cost of $421 million – nearly ten percent less than the estimate before the Legislature.

The Commission's July 15 Order is internally inconsistent. On the one hand it concludes, as it did in 2008, that *nowhere* in RSA Ch. 125-O does the Legislature even *suggest* that an alternative to compliance with the Scrubber law may be considered by "retirement of the facility." Order at 6. On the other hand, it concludes exactly the opposite, namely, that Section 17 permits it to determine whether PSNH engaged in "imprudent management of its generation fleet" if it failed to petition for retirement of its assets. *Id* at 8-9.[28]

The Commission's reasoning is suspect. If RSA Ch. 125-O does not even *suggest* that retirement is an alternative to constructing the Scrubber, how can Section 17 be read to provide that option? Moreover, what authority does the Commission, as an agency of limited jurisdiction, have to address an issue the Legislature didn't even suggest it could consider, and which the Legislature expressly decided *not* to grant when it rejected Senate Bill 152?

> this time would pose significant problems. While the majority recognizes that the increase in projected costs is significant, it is the role of the PUC….to decide the amount of the funds to be recovered *after completion of the project* in a legal process known as a prudency review. This means that before the Company can be granted cost recovery it must provide justification for each expense before the PUC.
>
> Additionally, the majority believes that placing a cap on cost recovery at this time would be arbitrary and unconstitutional as it could amount to a taking. The majority was also concerned that the passage of this bill would lead to a pause or cancellation of the project. This would not only have significant environmental ramifications, but would also lead to the loss of several hundred short and long term jobs associated with the Project.

N.H.H.R. Jour. 899 (2009) (emphases added).

[28] See footnote 9 for the "Hobson's Choice" the Commission's July 15 Order presents to PSNH.

Apart from this unexplained inconsistency, the Commission's logic is wrong as a matter of law. First, the Variance provisions in Section 17, as PSNH argued in the Motion for Rehearing that the Commission granted by Order No. 25,506, do not permit PSNH to avoid constructing the Scrubber. *See* PSNH Motion for Rehearing of Order No.25,445 at 12-19. Rather, Section 17 allows PSNH to seek a variance only in two limited circumstances: if it is necessary to vary the *schedule* for meeting the mercury reduction requirements by extending the date for compliance and to vary the *level* of reduction where achieving that level is, among other reasons, "economically infeasible." *Id.* If, as the Commission previously found, *nowhere* in the statute did the Legislature suggest that PSNH could avoid construction of the Scrubber by retirement, then surely the Variance provisions in Section 17 cannot be read to the contrary.

Second, the Commission now says that Section 17 gives it jurisdiction to consider whether PSNH was prudent in construction of the Scrubber "in light of increased cost estimates." But the Commission has previously found that the Legislature "did not set any cap on costs or rates" and that the Legislature retained jurisdiction in RSA 125-O:13, IX to review costs during construction. Order No. 24,898 at 10 and 12. Since it also found in Order No. 24,898 that in RSA Ch. 125-O, the Legislature "rescind[ed] the Commission's authority to pre-approve the Scrubber installation under RSA 369-B:3-a" Section 17 presents no basis to reassert jurisdiction.

Based on the language of Section 17 itself and the Commission's prior orders, the Commission has no authority under Section 17 to revisit these issues and consider whether the Scrubber should have been built, whether the overall cost of the Scrubber was "too high," or whether PSNH should have considered retiring or divesting Merrimack Station in lieu of installing the Scrubber as mandated by law. As a result, in addition to the analysis of Section 18

above, it has no jurisdiction as part of its Section 18 prudence review to consider either the Variance provisions in Section 17, or retirement of the facility.

Conclusion

In 2006, the Legislature ordered that the Scrubber shall be built and operational in a very short time frame for a project of this size and complexity, and imposed significant disincentives and harsh penalties for failure to comply. In 2008, when the Commission first considered its jurisdiction to undertake any review of the project prior to completion, it found that RSA Ch. 125-O divested it of any jurisdiction to pre-approve the construction of the Scrubber or its overall costs, and that the Legislature did not even suggest that an alternative to constructing the Scrubber could be considered by the Commission. The Commission was quite clear: the Legislature had expressly limited its jurisdiction, as it was entitled to do.

Despite these very clear rulings, and only by applying suspect logic to one sentence of one section of RSA Ch. 125-O - a section that directs the methodology for recovery of the costs of complying with this mandated public interest project - the Commission now revisits its early decisions and attempts to reassert jurisdiction after the fact, when the Scrubber is complete. Seemingly, the Commission asserts that it may deny PSNH some or all of the costs of constructing the Scrubber (even prudent costs) if it finds that economic conditions or regulatory requirements at some unspecified point should have allowed PSNH an ability to escape the construction mandate - an authority the Commission previously claimed it did not have.

The Commission's constantly changing decisions regarding RSA Ch. 125-O demonstrate incorrect reasoning which is inconsistent with the law, is arbitrary, capricious, and constitutes a denial of Due Process protections. The Commission's theory of how it could deny recovery of the prudent costs of complying with the requirements of the Scrubber Law would result in an

unconstitutional taking contrary to Part I, Art. 12 of the New Hampshire Constitution and the takings clause of the Fifth Amendment to the U.S. Constitution.

Discussing the duties of this Commission, the Supreme Court has stated, "If this agency is to serve a judicial function, it will have to comport itself accordingly." The Court continued, "By such a standard, we avoid turning utility matters into a political football, as often can occur in the twelve States where public utility commissioners are elected." *Appeal of Pub. Serv. Co. of New Hampshire*, 122 N.H. 1062, 1074-75 (1982). The Commission's constant revisiting and changing of decisions and legal interpretations regarding the Scrubber Law has turned its decision-making process into the very "political football" which the Supreme Court stated must be avoided.

In this case, the Commission is acting in a judicial capacity concerning significant property rights. It is the Commission's duty to interpret and uphold the Scrubber Law as it exists - not try to re-write and revise that law years after the Scrubber has been built and placed into service. The Scrubber Law uses plain and ordinary language; it mandated installation and operation of Scrubber technology at Merrimack Station by July 1, 2013. PSNH complied. The Scrubber Law requires that the Commission shall allow the recovery of all prudent costs of complying with the law. The Commission's independent engineering expert, Jacobs Consultancy, Inc. found PSNH's conduct of the Scrubber project to be prudent.[29] Just as PSNH

[29] "The New Hampshire Clean Air Project at Merrimack Power Station was a well-defined and documented effort. The PSNH team did a thorough analysis of the technical requirements prior to initiating the project, availing themselves of various industry specialists to strengthen their findings. PSNH followed rigid corporate procedures to ensure compliance with both regulatory and prudent business requirements." *New Hampshire Clean Air Project Final Report*, Jacobs Consultancy, Inc., Sept. 10, 2012 at 10, filed in Docket No. DE 11-250. Even this independent expert found that, "This Act, as amended in June 2006, *specifically required PSNH* to reduce mercury emissions by 80 percent using wet flue gas desulphurization (FGD) technology." (Emphasis added).

complied with the law, it is now the Commission's legal duty to likewise comply by providing PSNH recovery of its costs of compliance.

For all these reasons, the July 15 Order should be reconsidered and revised to avoid unconstitutional results and to reflect the unequivocal intent, findings, and mandates the Legislature clearly enacted into law.

Respectfully submitted this 9th day of August 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2013, I served an electronic copy of this filing with each person identified on the Commission's service list for this docket pursuant to Rule Puc 203.02(a).

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APPENDIX

Table of NHPUC Decisions Cited

Order No.	Docket	Date	Utility	Docket Title	Order Title
23,443	DE 99-099	04/19/2000	PSNH	Proposed Restructuring Settlement	Order Approving Settlement with Modifications
23,549	DE 99-099	09/08/2000	PSNH	Proposed Restructuring Settlement	Order Addressing Motions for Clarification and Rehearing, Amended Settlement Agreement and Financing Issues
24,898	DE 08-103	09/19/2008	PSNH	Investigation of PSNH Installation of Scrubber Technology Station	Decision Concerning Statutory Authority
24,914	DE 08-103	11/12/2008	PSNH	Investigation of PSNH Installation of Scrubber Technology Station	Order Denying Motions for Rehearing
24,940	DE 08-053	02/06/2009	PSNH	Class IV Renewable Energy Certificate Eligibility Application for Certain Existing Small Hydroelectric Facilities	Order Consolidating Dockets and Annulling Class IV Source Certification for Certain Hydroelectric Facilities

24,966	DE 07-108	05/01/2009	PSNH	2007 Least Cost Integrated Resource Plan	Order Denying Motions for Rehearing
24,979	DE 09-033	06/19/2009	PSNH	Petition for Approval of the Issuance of Long Term Debt Securities	Order Defining Scope of Proceeding
25,008	DE 08-145	09/01/2009	Freedom Logistics/Halifax-American Energy	Petition for Investigation into Modifications at Merrimack Station	Order Denying Petition
25,050	DE 09-033	12/08/2009	PSNH	Petition for Approval of the Issuance of Long Term Debt Securities	Order Denying Motions for Rehearing
25,332	DE 08-103 DE 11-250	02/06/2012	PSNH	Investigation of PSNH Installation of Scrubber Technology Station/ Investigation of Scrubber Costs and Cost Recovery	Order on Motion for Protective Order and Confidential Treatment,
25,346	DE 11-250	04/10/2012	PSNH	Investigation of Scrubber Costs and Cost Recovery	Order Granting Temporary Rates
25,398	DE 11-250	08/07/2012	PSNH	Investigation of Scrubber Costs and Cost Recovery	Order Regarding TransCanada Motion to Compel
25,445	DE 11-250	12/24/2012	PSNH	Investigation of Scrubber Costs and Cost Recovery	Order Regarding TransCanada's Motions to Compel

25,506	DE 11-250	05/09/2013	PSNH	Investigation of Scrubber Costs and Cost Recovery	Order Granting Motion for Rehearing in Part
25,546	DE 11-250	07/15/2013	PSNH	Investigation of Scrubber Costs and Cost Recovery	Order Denying Second Motion for Rehearing and Clarifying Scope