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

DE 11-250

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

INVESTIGATION OF MERRIMACK STATION SCRUBBER PROJECT AND COST RECOVERY

CONSERVATION LAW FOUNDATION AND SIERRA CLUB'S OBJECTION TO PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE'S MOTIONS TO STRIKE TESTIMONY

NOW COMES the Conservation Law Foundation ("CLF") and the Sierra Club and hereby object to the four Motions (the "Motions") To Strike Testimony filed by Public Service Company of New Hampshire ("PSNH") with the Commission on December 31, 2013. In support of this objection, CLF and Sierra Club state as follows:

1. On December 23, 2013, in compliance with a procedural order of the Commission, PUC staff, the OCA, and intervenors CLF and Sierra Club submitted pre-filed testimony. In response, on December 31, 2013, PSNH filed four Motions to Strike. The Motions, in turn, seek to strike any testimony regarding: (1) whether or not PSNH should have sought a variance from the schedule or need to install the scrubber; (2) should have sought retirement of Merrimack Station rather than complete scrubber installation; (3) the used and useful rulemaking concept; and (4) efforts to support or block legislation relating to the scrubber. As set forth in greater detail below, the Motions must be denied. The Motions are not ripe for consideration pursuant to this Commission's Rules of Procedure; lack the requisite specificity to allow a ruling on the merits; and are incorrect as a matter of law.

2. First, PSNH's Motions must fail because they are not ripe for consideration. The NH Code of Adm. Rules, Chapter 200 (Puc 200), provides, in relevant part, that: "[a]ll testimony of parties and witnesses, including any pre-filed written testimony adopted by a witness at hearing, shall be made under oath or affirmation." Puc 203.23(b). In this case, none of the pre-filed testimony has been adopted by a witness at hearing under oath or affirmation. Until such time as the pre-filed testimony is adopted under oath at hearing and the subject of a motion to move it into the record, there is nothing to strike. *See* Order No. 24,667 at 6-7 (September 22, 2006) ("it is the Commission's longstanding practice to allow parties to offer exhibits, including prefiled testimony, over the course of a hearing, marking such exhibits for identification purposes but ruling on their admissibility only at the conclusion of the hearing, thus giving parties as full an opportunity as possible to consider bases for objecting to such evidence"); Puc 203.23(f) ("The commission shall entertain objections to evidence at hearing and note them in the record.") Because PSNH is raising its "objections" before hearing and before such time as the testimony is admitted into the record, the Commission must deny the Motions to Strike.

3. Second, the Commission should decline to consider the Motions because they lack sufficient detail to permit other parties to file meaningful objections and to allow the Commission to contemplate whether or not specific language should be stricken from the record. This Commission's administrative rules mandate that all motions shall include a clear and concise statement of the authorization or other relief sought; the statutory provision or legal precedent under which the authority or other relief is sought; a concise and explicit statement of the facts upon which the commission should rely in granting authorization or relief; and such other data as the petitioner considers relevant to the request for authority or relief. Puc 203.05.

4. Contrary to that directive, PSNH's Motions include the following generalized requests for relief:

> Motion to Strike Variance: "Rule that any discussion of the variance provision in the Scrubber Law, RSA 125-0:17, suggesting that PSNH had an opportunity to seek a schedule variation or an alternative emissions reduction requirement . . . is irrelevant" and "strike all testimony submitted by any witness relating to the ability of PSNH to seek a schedule or alternative emissions reduction requirement in lieu of proceeding with" installing the scrubber. Mtn to Strike Variance at 6.
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> Motion to Strike Retirement: "strike all testimony submitted by any witness relating to the ability of PSNH to seek retirement of Merrimack Station as an alternative to compliance with the provisions of RSA 125-0:18 . . . ." Mtn to Strike Retirement at 17.
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> Motion to Strike Used and Useful: "Rule that any testimony seeking to limit the mandate contained in RSA 125-0:18 providing for recovery of all prudent costs incurred by PSNH to comply with the Scrubber Law should be deemed irrelevant and outside the scope of this proceeding"; and ". . . strike all testimony submitted by any witness relating to the ability of the Commission to limit the mandate contained in RSA 125-0:18 providing for recovery of all prudent costs incurred by PSNH to comply with the Scrubber Law . . . ." Mtn to Strike Used and Useful at 4.
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> Motion to Strike Testimony Regarding Legislative Efforts: "strike or exclude all testimony submitted by any witness relating to [efforts to influence the legislature or the Commission and, pursuant to the Commission's Orders No. 25,566 and 25,592 is irrelevant and therefore outside the scope of this proceeding]." Mtn to Strike re Legislative Efforts at 10.

5. These generalized requests for relief fail to conform to the requirements of Puc 203.05. This is especially true with respect to the pre-filed testimony of CLF's witness, Elizabeth Stanton, who is only referenced by name in a single paragraph of the Motion to Strike Retirement. Mtn to Strike Retirement at 13. Without such specific detail, it is impossible for CLF or the other parties to prepare a proper objection addressing why specific testimony should not be stricken. Similarly, with regard to Sierra Club's witness, Ranajit Sahu, PSNH not only fails to specifically identify what testimony it wishes to see stricken, but also merely *speculates* about testimony that it suspects might occur. Concerning Sahu's testimony, PSNH muses that some arguments may be "implicit in his testimony," and proceeds to engage in a string of suppositions

(contemplating that since Sahu characterizes Merrimack as "already aging," it is therefore "unlikely" that Sahu "believes there would have been a willing purchaser of the Station if PSNH decided to divest it") to arrive at the conclusion that "it is expected that Dr. Sahu will opine on" the issue of "retirement." *Id.* at 16. Not only are divestment and retirement both issues properly considerable by this Commission (*see* paragraphs 7-14, *infra*), but if Puc 203.5 is to mean anything at all, PSNH must be required to limit its motion to strike to specifically identified testimony that has actually been offered. *See* Puc 203.5(6) (requiring "explicit statement" of facts, as opposed to speculation); *see also* Order No. 24,667 at Pgs 6-7 (September 22, 2006). PSNH has failed to do so in its Motions, and thus they must be denied.

6. Further, PSNH's vague motions leave the Commission in the position of reading through all the pre-filed testimony and making its own determination regarding whether or not and which testimony should be stricken. Such a process is clearly not contemplated by the Commission's administrative rules. Because the Motions fail to sufficiently comply with Puc 203.05, they must be denied. *See also* Puc 203.25 (burden on moving party to prove truth of factual assertions by preponderance of evidence).

7. Third, the Motions must fail as a matter of law. Only one of the four Motions explicitly seeks to strike portions of the pre-filed testimony of either CLF's witness, Elizabeth Stanton, or Sierra Club's witness, Ranajit Sahu. Mtn to Strike Retirement at p. 13; *id.* at 16. Accordingly CLF and Sierra Club will address why that Motion to Strike must fail as a matter of law. To the extent that any of the other Motions is directed toward CLF's or Sierra Club's witnesses, the Motions lack sufficient detail to inform us of the same. We therefore reserve the right to file additional objections and generally join in the objections filed by the OCA and TransCanada to those motions.

8. With respect to retirement, PSNH moves for an order striking "any testimony relating to whether PSNH could have, and therefore should have, retired Merrimack Station as an alternative to installing the Scrubber." Mtn to Strike Retirement at 1. PSNH erroneously argues that the "Commission's prior orders make clear that neither RSA 125-0:18 or RSA 369-B:3-a permits the Commission to consider plant retirement as part of the docket." *Id*. PSNH makes this argument despite very clear language from this Commission that its prudency review in this docket *would* contemplate PSNH's management discretion prior to completion of the scrubber to divest itself of or retire Merrimack Station under those very statutes. Namely, in its July 2013 Order, the Commission stated:

> . . . [T]he Scrubber Law does not allow PSNH to act irrationally with ratepayer funds. 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.

Order No. 25,546 at 8 (July 15, 2013) (emphasis added). The Commission reiterated this position the following month:

> . . . [T]he Legislature's public interest finding under RSA 125-O:11, VI regarding installation of Scrubber technology does not subsume a public interest finding by the Commission under RSA 369-B:3-a regarding PSNH's divestiture of Merrimack Station. . . . Further, *the statutory language expressly acknowledges that divestiture was a permissible decision for PSNH to make*, subject to a proceeding under RSA 369-B:3-a and an independent economic interest determination by this Commission.
> . . .
> *Retirement of Merrimack Station presents slightly different considerations, but the result is the same for this analysis*. . . [W]e reject PSNH's argument that we would have been precluded from making the findings necessary to permit PSNH to divest or retire Merrimack Station, prior to PSNH's completion of its Scrubber project.

Order No 25, 565 at 15-16 (August 27, 2013) (emphasis added). Indeed, the Commission specifically stated that PSNH's decision to continue operation of Merrimack station was to be explored at the upcoming hearing, noting that while it was not addressing the "prudence determination at this juncture regarding PSNH's decision to continue ownership of Merrimack Station . . . *the issue may be explored at hearing*." *Id.* at 15 n.7 (emphasis added).

9. PSNH seeks to get around this very clear directive that retirement would be considered during this prudency review, by arguing that "[t]he 'regulatory condition . . . in place' prior to September 2011 was that retirement of the facility was not an option available to PSNH to comply with RSA 125-0, as the Commission held back in September 2008, in Order No. 24, 898." Mtn to Strike Retirement at 5. PSNH's argument fails. In essence, PSNH argues that because a prudency review tests the degree of care required by the circumstances known or that reasonably could have been known at the time of the conduct, the Commission should disregard its orders in this docket ruling that it would consider retirement as part of its prudency review, because those orders postdate the installation of the scrubber. *See id*. PSNH argues that the Commission's Orders in this docket are tantamount to "regulatory conditions" that were put in place well after the scrubber was installed. *Id.*

10. PSNH's argument strains logic and confuses the law. PSNH's fundamental premise is that the "regulatory condition" in place prior to September 2011 was a PUC ruling in docket DE 08-103, which was opened when the costs of installing the scrubber escalated from an estimated $250 million to $457 million. Order No. 24,898 at p. 1 (September 19, 2008). The purpose of that docket was to determine whether the Commission had to pre-approve the scrubber modification pursuant to its authority under RSA 369-B:3 (which authorizes it to pre-approve modifications to PSNH fossil fuel stations) or whether RSA 125-0:11-18 stripped the

Commission of that authority. The Commission determined that RSA 125-0:11-18 usurped the Commission's authority to pre-approve scrubber installation but reserved its authority to determine "the prudence of the costs of complying" with RSA 125-0:11-18 and "the manner of recovery for prudent costs." Order No. 24,898 at pp. 11-13 (September 19, 2008). The Commission reasoned that the scrubber law mandated installation of that technology to achieve significant reductions of mercury pollution, and not installation of an alternative technology or retirement. *Id*. at p. 12. Nothing in that Order, however, limited the scope of the Commission's ability to later review the prudency of the scrubber project, as that issue was not before the Commission.

11. In fact, the relevant statutory law in effect during the course of the scrubber project was as follows. Under the scrubber law:

> *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.*

RSA 125-0:11-18 (emphasis added). This law clearly contemplated that ownership could change and retained PSNH's ability to divest or retire Merrimack Station under RSA § 369-B:3-a, which provided that:

> The sale of PSNH fossil and hydro generation assets shall not take place before April 30, 2006. Notwithstanding RSA 374:30, *subsequent to April 30, 2006, PSNH may divest its generation assets if the commission finds that it is in the economic interest of retail customers of PSNH to do so*, and provides for the cost recovery of such divestiture. *Prior to any divestiture of its generation assets, PSNH may modify or retire such generation assets if the commission finds that it is in the public interest of retail customers of PSNH to do so*, and provides for the cost recovery of such modification or retirement.

RSA § 369-B:3-a (emphasis added).

12. PSNH cannot ignore these laws and fail to consider them as part of the "regulatory condition" known to it over the course of the scrubber project. Black's Law Dictionary defines regulation as: "The act of regulating; a rule or order prescribed for management or government; a regulating principle; a precept." Law Dictionary: http://thelawdictionary.org/regulation/#ixzz2pjX0WHt9 (citing *Curry v. Marvin*, 2 Fla. 415; *Ames v. Union Pac. Ry. Co. (C. C.)*, 64 Fed. 178; *Hunt v. Lambertville*, 45 N. J. Law, 282.) "Regulatory compliance is an organization's adherence to laws, regulations, guidelines and specifications relevant to its business." http://searchcompliance.techtarget.com/definition/regulatory-compliance; *see also* http://www.thefreedictionary.com/regulatory (to regulate is to control or direct according to rule, principle, or law); http://www.merriam-webster.com/dictionary/regulation (a regulation is an official rule or law that says how something should be done).

13. Nor can PSNH disregard this Commission's prior rulings that the scope of its prudency review must be determined by the management discretion that PSNH had under existing law and is more comprehensive than a simple inquiry into whether PSNH did an adequate job managing the funds expended to build the scrubber. Order No. 25,546 at 7 (July 15, 2013). This Commission has repeatedly held that, under RSA § 369-B:3-a, PSNH retained the management discretion to retire or divest Merrimack Station. *Id*. at 8; Order No 25, 565 at 15-16 (August 27, 2013). PSNH cannot now avoid evidence regarding retirement by twisting language taken out of context from a prior docket to serve a strained purpose.[1]

[1] Indeed, PSNH's argument fails for the further reason that it is paradoxical: for this Commission's Orders in this docket to be novel "regulatory conditions" unknown or reasonably unknown to PSNH during the Scrubber Project, rather than enunciations of the governing statutes, they would have to unsupported by the statutes. But as the Commission ordered not once but twice, the ability of PSNH to seek divestiture or retirement of Merrimack flows directly from RSA § 369-B:3-a. S*ee, e.g*., Order No 25,546 at 8 (July 15, 2013); Order No 25, 565 at 15-16 (August 27, 2013). In effect, PSNH now argues that, although it has lost twice on its attempts to preclude the Commission from considering evidence concerning retirement or divestiture of Merrimack, its failure to anticipate those losses

14. Because the Commission has repeatedly ruled that it will consider evidence concerning whether PSNH should have contemplated retirement of Merrimack Station, and because the "regulatory condition" argument raised by PSNH in its Motion to Strike does not change that analysis, the Motion to Strike testimony regarding retirement must be denied.

WHEREFORE, for the reasons set forth above, CLF and Sierra Club respectfully request that the Commission:

A. Deny PSNH's Motions to Strike;

B. In the alternative, deem the Motions premature and reserve ruling on them; and

C. Grant such further relief as this Commission deems proper.

Respectfully submitted,

Dated: January 10, 2014

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means that it should, nonetheless, win. Such a theory would improperly give PSNH a "heads I win, tails you lose" situation in *any* prudency determination context, because even if PSNH loses on a question of statutory interpretation, it could then simply claim that the adverse Commission order was a novel "regulatory condition" that should not be applied to the prior action in question for which PSNH is seeking ratepayer money.

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of January 2014, a copy of the foregoing Objection was sent electronically or by First Class Mail to the service list.

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