STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DE 11-250

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Investigation of Scrubber Costs and Cost Recovery

Order on PSNH Motions in limine

O R D E R N O. 25,722

October 13, 2014

In this order we deny two motions PSNH filed to limit evidence at the upcoming hearing. We deny PSNH's motion to exclude evidence relating to the retirement of Merrimack Station as an option available to PSNH. We also deny PSNH's request that we bar CLF and the Sierra Club from contesting PSNH's claim that RSA 125-O mandated construction of the Scrubber.

I. PROCEDURAL HISTORY

This docket considers the prudence of the costs and cost recovery for the wet flue gas desulfurization system (Scrubber) installed by Public Service Company of New Hampshire (PSNH) at its coal-fired generation plant known as Merrimack Station. PSNH filed two motions on August 21, 2014, asking us to limit the scope of the upcoming hearing. They will be referenced as the Retirement Motion and the Collateral Estoppel Motion.

The Retirement Motion asked us "to exclude evidence from this proceeding relating to the potential retirement of Merrimack Station as a means of avoiding the installation of Scrubber technology." Retirement Motion at 1. The Collateral Estoppel Motion asked us to "enforce the findings of the New Hampshire Air Resources Council in its decision and order … regarding the Scrubber Law by prohibiting the Sierra Club … and the Conservation Law Foundation … from

challenging the existence of a legal mandate on PSNH to install scrubber technology at Merrimack Station." Collateral Estoppel Motion at 1.

The Sierra Club and the Conservation Law Foundation (CLF) objected to the Collateral Estoppel Motion on September 2, 2014. TransCanada Power Marketing, Ltd., and TransCanada Hydro Northeast, Inc. (the TransCanada Intervenors), Sierra Club, and CLF objected to the Retirement Motion on September 2, 2014.

II. POSITIONS OF THE PARTIES

A. PSNH

In the Retirement Motion, PSNH selected passages from prior Commission orders in support of its argument that the Scrubber law rendered the option of retiring Merrimack Station unavailable. The quote best capturing PSNH's position is from Order No. 24,898 (Sept. 19, 2008): "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." *Id.* at 12. PSNH stated that, "for the next three years, from September 19, 2008 … throughout the entire construction of the Scrubber … the Commission did not change [this] holding." Retirement Motion at 3. PSNH then discussed our treatment of the retirement issue through several orders beginning with Order No. 25,445 (Dec. 24, 2012), and continuing through Order No. 25,565 (Aug. 27, 2013). Retirement Motion at 3-7. PSNH argued that the net result of these orders is that "retirement of Merrimack Station was *not* an option available to PSNH to comply with the Scrubber Law, and it was also *not* a basis for seeking a variance under RSA 125-O:17." *Id.* at 7 (emphasis in original). PSNH thus asked us to exclude "testimony relating to the potential retirement of Merrimack Station." *Id.* PSNH specified the testimony it sought to exclude. *Id.* at 8-9.

PSNH based the Collateral Estoppel Motion on proceedings before the New Hampshire Air Resources Council (ARC). The Sierra Club and CLF separately appealed to the ARC a decision to issue a temporary air emissions permit that allowed PSNH to build the Scrubber. Collateral Estoppel Motion at 2. The ARC denied the appeals in a single September 10, 2010, order (ARC Order). *Id.* at 3-4.[1] PSNH principally relied on the following sentence from the ARC Order: "As a matter of law, PSNH is required to install and operate the Scrubber system. RSA 125-O:11 - :18." *Id.* at 4. No party appealed the ARC Order.

PSNH argued that the doctrines of *res judicata* and collateral estoppel "preclude[] re-litigation" of the finding quoted above. *Id.* at 5. PSNH asked us "to limit the participation" of the Sierra Club and CLF "only to issues involving the prudence of the [construction] of the Scrubber, and not whether PSNH should have installed the Scrubber at all." *Id.* at 13 (emphasis in original). PSNH also asked us to exclude the testimony of Drs. Stanton and Sahu, witnesses sponsored by the Sierra Club and CLF. *Id.*

B. The TransCanada Intervenors

The TransCanada Intervenors objected to the Retirement Motion arguing that we have consistently stated that PSNH "retained management discretion to retire Merrimack Station in advance of divestiture." TransCanada objection at 1. The TransCanada Intervenors argued that Order No. 24,898, on which PSNH relied, was merely a statement of our limited authority over the Scrubber *before* construction: "we conclude that the Commission lacks authority to pre-approve installation, but that it retains its authority to determine prudence." Order No. 24,898

[1] PSNH did not include a complete copy of the ARC Order with its motion, nor is a complete copy attached to Mr. Smagula's rebuttal testimony. The ARC Order is available here, starting on page 4 of the file: http://www2.des.state.nh.us/Legal/Documents/Appeals/Air%20Resources%20Council/Docket%20No.%2009-11%20ARC%20-%20Conservation%20Law%20Foundation%20Appeal/09-20-10%20-%20Decision%20and%20Order%20on%20Pending%20Motions%20and%20on%20Appeals.pdf

at 2; TransCanada objection at 2. The TransCanada Intervenors argued that PSNH failed to mention the order on reconsideration of Order No. 24,898, which stated that: "RSA 125-O:17 does, however, provide 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 in light of increased costs estimates and additional costs from other reasonably foreseeable regulatory requirements." Order No. 24,914 at 13-14 (Nov. 12, 2008). The TransCanada Intervenors argued that Order No. 24,914 put PSNH on notice of our intent to conduct a broad prudence review, and they cited Order No. 25,506 at 26 (May 9, 2013), which grants authority for a prudence review based on PSNH's general "obligation to engage at all times in good utility management." TransCanada objection at 4. The TransCanada Intervenors argued that "the issue is whether its scrubber expenditure was prudent, given PSNH's various management options," and that retirement was one of those options. *Id.* at 5.

C. The Sierra Club and CLF

The Sierra Club and CLF objected to both the Retirement Motion and the Collateral Estoppel Motion. In response to the Retirement Motion, the Sierra Club and CLF reviewed five orders in which we stated that an issue in this docket is whether PSNH should have retired Merrimack Station in the exercise of prudent utility management. Sierra Club and CLF Objection at 1-5; *see* Order No. 25, 445 at 25 (Dec. 24, 2012) ("PSNH's interpretation that the law required installation of the Scrubber irrespective of cost would have allowed PSNH, or another utility owner, to install scrubber technology costing many billions, a decision which flies in the face of common sense"); Order No. 25,506 at 17 (May 9, 2013) ("We do not go so far, however, as to conclude that PSNH had no management discretion in this matter …. PSNH, like any other utility owner, maintained the obligation to engage in good utility management at all

times"); Order No. 25,546 at 8 (July 15, 2013) ("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. 25,565 at 17 (Aug. 27, 2013) ("PSNH's true disagreement is with our conclusion that, despite our repeated statements that PSNH was under a legislative mandate to construct Scrubber technology, Section 18 of the Scrubber law retained PSNH's basic duty of prudence not to act irrationally with ratepayer funds"); and Order No. 25,640 at 13 (Mar. 26, 2014) ("Contrary to PSNH's characterizations of our orders, we have clearly stated that PSNH retained the management discretion to divest itself of Merrimack Station, if appropriate, [and] to retire Merrimack Station in advance of divestiture") (internal quotation omitted). The Sierra Club and CLF argued that the Retirement Motion is a mis-titled motion to reconsider the above orders which is not timely and which does not present any new arguments. Objection at 5.

In their objection to the Collateral Estoppel Motion, the Sierra Club and CLF first pointed to a preliminary ARC order that listed the issues to be addressed in that appeal.

> Based on review and consideration of the permit, the appeals of the New Hampshire Sierra Club and the Conservation Law Foundation, and the memoranda of law filed by the parties to this appeal in July 2009, the Council finds and concludes that the following issues have been raised on appeal and will be considered by the Council:
>
> a. Whether the MK2 [Merrimack Station, Unit 2] turbine modifications should have been included with and/or aggregated to the scrubber permit application.
>
> b. Whether DES made the proper "completeness" determination regarding the scrubber permit application before issuing the permit in question.
>
> c. Whether DES considered the proper baseline years in issuing the permit in question.
>
> d. Whether the MK2 turbine modifications should have undergone new source review.

Objection at 4 (quoting the ARC "Decision and Order Regarding Scope of Issues on Appeal"[2]). The Sierra Club and CLF then quoted from the final ARC Order that itemized "the issues on appeal" as follows:

> a. Whether the MK2 turbine modifications should have been included with and/or aggregated to the scrubber permit application.
>
> b. Whether DES made the proper "completeness" determination regarding the scrubber permit application before issuing the permit in question.
>
> c. Whether DES considered the proper baseline years in issuing the permit in question.

Id. at 5 (quoting the ARC Order at 4-5). The Sierra Club and CLF pointed out that neither list includes whether the Scrubber law was a mandate, that the mandate issue was not litigated by the parties before the ARC, and that the issue was not necessary to the ARC's decision. Therefore, the Sierra Club and CLF argued that PSNH did not establish the elements of the doctrine of collateral estoppel. They also argued that the related doctrine of *res judicata* does not apply.

III. COMMISSION ANALYSIS

We find both motions to be without merit. PSNH's Retirement Motion travels a well-worn path. Although PSNH has repeatedly tried to exclude from this docket our consideration of retirement of Merrimack Station as an option available to PSNH management, the only limit we have placed on retirement is that it could not have served as a "means of mercury compliance." Order No. 24,898 at 12. We made our position clear in granting a PSNH motion to reconsider: "To the extent that Order 25,445 interpreted the variance provision … to allow retirement of Merrimack Station rather than installation of scrubber technology *as a method of meeting the*

[2] This order is available on page 4 of the following document: http://www2.des.state.nh.us/Legal/Documents/Appeals/Air%20Resources%20Council/Docket%20No.%2009-11%20ARC%20-%20Conservation%20Law%20Foundation%20Appeal/09-11-09%20-%20Decision%20and%20Order%20Requests%20for%20Information%20and%20Regarding%20Scope%20of%20Issues%20on%20Appeal.pdf.

emissions reduction requirements, that portion of Order No. 25,445 alone is reversed." Order No. 25,506 at 17 (emphasis added). We have otherwise stated that PSNH always carried the obligation to exercise prudent utility management. Some of those statements are quoted above. Indeed, we immediately followed the above-quoted statement reconsidering Order 25,445 with the following: "We do not go so far, however, as to conclude that PSNH had no management discretion in this matter." Order No. 25,506 at 17.

PSNH refuses to acknowledge our distinction between retirement as a means to comply with the Scrubber law's mercury reduction mandate, which we will not allow, and retirement and divestiture as an option available in the exercise of its management discretion which we have permitted the parties to explore.

> PSNH's true disagreement is with our conclusion that, despite our repeated statements that PSNH was under a legislative mandate to construct Scrubber technology, Section 18 of the Scrubber Law retained PSNH's basic duty of prudence not to act irrationally with ratepayer funds, and authorized PSNH to consider its options under RSA 369-B:3-a in the event of changed circumstances.

Order No. 25,565 at 17. PSNH was on notice in 2008 that we would conduct "a later prudence review" and consider "arguments as to whether PSNH had been prudent in proceeding with" the Scrubber "in light of increased cost estimates and additional costs from other reasonably foreseeable regulatory requirements such as" environmental statutes. Order No. 24,914 at 13. We will do so at the upcoming hearing.

Turning to the Collateral Estoppel Motion, the governing legal standard[3] is well-known:

> Collateral estoppel precludes the relitigation by a party in a later action of any matter [1] actually litigated in a prior action in which he or someone in privity with him was a party. For it to apply in a particular proceeding, [2] the issue subject to estoppel must be identical in each action, [3] the first action must have

[3] Collateral estoppel, or issue preclusion, is the doctrine that best fits PSNH's argument. *Res judicata*, or claim preclusion, bars relitigation of the same cause of action decided in the earlier proceeding. PSNH moved to exclude Sierra Club and CLF from litigating the "issue" of whether the Scrubber law is a mandate, not the "cause of action" decided by the ARC that the temporary air emissions permit was valid.

> resolved the issue finally on the merits, and [4] the party to be estopped must have appeared in the first action, or have been in privity with someone who did so. Further, [5] the party to be estopped must have had a full and fair opportunity to litigate the issue, and [6] the finding must have been essential to the first judgment.

Warren v. Town of East Kingston, 145 N.H. 249, 252 (2000) (internal quotations and citations omitted). We adopted this standard in *Connecticut Valley Elec. Co.*, Order No. 23,939 at 63 (Mar. 29, 2002).

Although there may be privity, the circumstances of this case fail the other five requirements listed above. First, the parties did not "actually litigate" the question of whether the Scrubber law is a mandate, and second, the mandate issue litigated here is not "identical" to any issue before the ARC. The list of issues the ARC announced it would consider and did consider, quoted above, do not include interpretation of the Scrubber law. PSNH offered no evidence to show the identical issue was before each body or to show that the parties "actually litigated" the issue as they have done in this docket. The few and indirect references to the Scrubber law that PSNH quoted in its motion are insufficient.

Third, the ARC did not resolve the issue on the merits. The ARC Order upheld the temporary permit against challenges by the Sierra Club and CLF. A review of the ARC Order reveals no discussion of whether the Scrubber law was a mandate. The issue was simply not part of the ARC Order. Fourth, there was no opportunity to litigate the mandate issue in light of the ARC's statement of the issues early in the litigation. Indeed, in at least two pleadings, PSNH specifically asked the ARC *not* to address whether the Scrubber law was a mandate. Sierra Club and CLF Objection at 5-6. Fifth, since there was no finding by the ARC on the mandate issue, any such finding was necessarily not

essential to the ARC decision. PSNH failed to establish the basic elements of collateral estoppel.[4]

Based upon the foregoing, it is hereby

ORDERED, that PSNH's motion in limine to limit the participation of CLF and the Sierra Club due to collateral estoppel and *res judicata* is DENIED; and it is

FURTHER ORDERED, that PSNH's motion in limine to exclude evidence relating to the potential retirement of Merrimack Station as an option available to PSNH is DENIED.

By order of the Public Utilities Commission of New Hampshire this thirteenth day of October, 2014.

Martin P. Honigberg
Commissioner

Michael J. Iacopino
Special Commissioner

Attested by:

Kimberly Nolin Smith
Assistant Secretary

[4] We are troubled that PSNH even filed the Collateral Estoppel motion. The issue was plainly not addressed by the ARC, partly at PSNH's request. It is disingenuous for PSNH to argue in this docket that an issue was "actually litigated" in another proceeding when that other tribunal agreed with PSNH's argument not to litigate the issue. PSNH regularly complains about delays in this docket, yet filed this meritless prehearing motion, causing the intervenors, Staff, and the Commission to expend time and resources to answer and dispose of it.

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Executive.Director@puc.nh.gov
allen.desbiens@nu.com
amanda.noonan@puc.nh.gov
anne.pardo@mclane.com
barry.needleman@mclane.com
bill.glahn@mclane.com
catherine.corkery@sierraclub.org
Christina.Martin@oca.nh.gov
christine.vaughan@nu.com
christopher.goulding@nu.com
dhartford@clf.org
dpatch@orr-reno.com
elizabeth.tillotson@nu.com
eric.chung@nu.com
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heather.tebbetts@nu.com
ifrignoca@clf.org
jim@dannis.net
josh.stebbins@sierraclub.org
kristi.davie@nu.com
linda.landis@psnh.com
lois.jones@nu.com
lrosado@orr-reno.com
matthew.fossum@nu.com
mayoac@nu.com
miacopino@brennanlenehan.com
michael.sheehan@puc.nh.gov
mkahal@exeterassociates.com
MSmith@orr-reno.com
rgoldwasser@orr-reno.com
rick.white@nu.com
robert.bersak@nu.com
sarah.knowlton@libertyutilities.com
Stephen.Hall@libertyutilities.com
Stephen.R.Eckberg@puc.nh.gov
susan.chamberlin@oca.nh.gov
suzanne.amidon@puc.nh.gov
tcatlin@exeterassociates.com
tirwin@clf.org
tom.frantz@puc.nh.gov
william.smagula@psnh.com
zachary.fabish@sierraclub.org