

**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 Motions to Strike Testimony

ORDER NO. 25,640

March 26, 2014

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.

On December 31, 2013, PSNH filed four separate motions to strike portions of testimony filed by the Office of Consumer Advocate (OCA), TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast Inc. (TransCanada), the Conservation Law Foundation (CLF), and the Sierra Club. PSNH's motions sought to strike testimony that related to (1) the used and useful ratemaking concept (Used and Useful Motion), (2) PSNH's alleged duty to seek a variance pursuant to RSA 125-O:17 (Variance Motion), (3) PSNH's efforts to support or block legislation relating to the Scrubber (Legislative Motion), and (4) PSNH's ability to retire Merrimack Station in light of RSA 125-O:11-18 (Retirement Motion). The sponsors of the challenged testimony objected.

II. POSITIONS OF THE PARTIES

A. PSNH

PSNH began each motion with a legal proposition that PSNH claimed is settled in this docket, described with a varying degree of precision the prefiled testimony that PSNH argued is outside the scope of that proposition, and then asked the Commission to strike the challenged testimony as irrelevant. *See* Puc 203.23(d) (“[t]he Commission shall exclude irrelevant ... evidence”).

PSNH first moved to strike testimony that suggested the Commission should limit the recovery of Scrubber costs through the “used and useful” ratemaking concept of RSA 378:27 and 378:28. OCA witness Stephen R. Eckberg testified that the Scrubber net plant amount should be reduced, resulting in a reduced return on equity of about one-third, based on Merrimack Station’s capacity factor. December 23, 2013 Direct Testimony of Stephen R. Eckberg (Eckberg testimony) at 7-9. TransCanada witness Michael E. Hachey testified that PSNH should “have carefully assessed whether or not the scrubber would be ‘used and useful’ and as a consequence economically beneficial to its customers.” December 23, 2013 Pre-Filed Testimony of Michael E. Hachey (Hachey testimony) at 23. Relying upon *Investigation of PSNH’s Installation of Scrubber Technology at Merrimack Station*, Order No. 24,898 at 9 (Sept. 19, 2008), PSNH argued that RSA 125-O:18 allows recovery of “all prudent costs,” that RSA 125-O:18 is more recent and more specific than the general ratemaking statutes and, therefore, that the Scrubber law overrides the generic used and useful standard.

The Used and Useful Motion did not specify what testimony it sought to strike, but requested broad relief:

PSNH respectfully moves this Commission to ... strike all testimony submitted by any witness relating to the ability of the Commission to limit the

mandate contained in RSA 125-O:18 providing for recovery of *all* prudent costs incurred by PSNH to comply with the Scrubber Law.

Used and Useful Motion at 4 (emphasis in original).

Second, PSNH moved to strike testimony suggesting that PSNH should have sought a variance in the Scrubber's construction schedule or a variance in the Scrubber's mercury reduction requirement based on technological or economic infeasibility. PSNH discussed the history of the variance issue through several Commission orders and concluded with the following quote: "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." Variance Motion at 4 (*quoting Public Service Co. of N.H.*, Order No. 25,546 at 7 (July 15, 2013)).

Although PSNH identified two statements from Mr. Hachey that it found objectionable,¹ its prayer for relief broadly asked the Commission to "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 the mandated installation of scrubber technology at Merrimack Station." Variance Motion at 6.

The third motion asked the Commission to strike testimony that described "PSNH's motivation in supporting the original legislation that became ... the 'Scrubber law' or to oppose bills pending before the Legislature in 2009." Legislative Motion at 1. PSNH relied on the order that allowed the deposition of Gary Long, which stated: "We see no relevance to PSNH's, or

¹Mr. Hachey testified that PSNH "could have sought a variance in the schedule or an alternative reduction requirement based on technological or economic infeasibility (RSA 125-O:17)," and that the law "gives the plant owner the ability to request a variance from the mercury reduction requirements which could include an alternative schedule or an alternative reduction requirement based on technological or economic infeasibility, RSA 125- O:17." Variance Motion at 1-2 (*quoting* Hachey testimony at 4, 28).

Mr. Long's involvement in cooperating with the Legislature to pass the Scrubber law, or to Mr. Long's alleged attempts to block the Legislature or this Commission from looking further into whether PSNH should have proceeded with the Scrubber project." *Public Service Co. of N.H.*, Order No. 25,566 at 5 (Aug. 27, 2013). PSNH identified 12 passages of Mr. Hachey's testimony it sought to strike, which are quoted below. Legislative Motion at 2-3.

PSNH's fourth motion sought to strike testimony suggesting PSNH should have considered retiring Merrimack Station as an alternative to building the Scrubber. PSNH again reviewed a number of Commission orders and summarized them with the statement, "[r]etirement of Merrimack Station was *not* an option available to PSNH." Retirement Motion at 10. PSNH directed the Retirement Motion at the testimony of Mr. Hachey, Matthew I. Kahal on behalf of the OCA, CLF witness Elizabeth A. Stanton, and Sierra Club witness Dr. Ranajit Sahu. Those witnesses testified that PSNH knew or should have known that the Scrubber would not be economical, that PSNH should have considered retiring Merrimack Station, and that PSNH acted imprudently in not doing so. Hachey testimony at 28; December 23, 2013 Direct Testimony of Matthew I. Kahal (Kahal testimony) at 7-8; December 23, 2013 Pre-Filed Testimony of Elizabeth A. Stanton, Ph.D. (Stanton testimony) at 15-16; and December 23, 2013 Testimony of Dr. Ranajit Sahu (Sahu testimony) at 10. PSNH quoted objectionable statements from all four witnesses, discussed below. Retirement Motion at 12-16.

PSNH also asked the Commission to "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-O:11-18." Retirement Motion at 16, 17.

B. The Objecting Parties

All the objecting parties argued that PSNH's motions are premature because the witnesses have not adopted their testimony under oath at a hearing, and they argued that the motions did not sufficiently specify the text to be stricken, preventing them from articulating precise objections and preventing the Commission from making detailed rulings. Puc 203.07(d), Puc 203.23(b) and (f). TransCanada also asked the Commission to withhold judgment on the motions to strike until appointment of a third commissioner.

OCA and TransCanada objected to PSNH's legal argument that the used and useful concept has no place in this docket. They argued that PSNH opened the door to this concept through its prefiled testimony:

The purpose of our testimony is to provide an update to PSNH's September 23, 2011 Energy Service (ES) rate filing to reflect the addition of costs associated with the Merrimack Scrubber Project. Effective September 28, 2011, that project was declared in service. *As of that date, the project became used and useful in the provision of service to customers.*

October 14, 2011 Joint Testimony of Robert A. Baumann and William H. Smagula at 1-2 (emphasis added).

TransCanada also argued that the Order of Notice cited RSA 378:27 (which requires utility assets to be "used and useful" to be included in temporary rates), RSA 378:5 ("the commission may investigate the reasonableness" of "new and higher rates") and RSA 378:8 (the utility "shall have the burden of proving the necessity" of increased rates), which together incorporate the used and useful concept from RSA 378:28, the permanent rate statute: "The commission shall not include in permanent rates any return on plant ... which has not first been found by the commission to be prudent, used, and useful." TransCanada pointed to an order in this docket that quoted the used and useful language of RSA 378:28 after the sentence, "PSNH,

like any other utility owner, maintained the obligation to engage in good utility management at all times.” *Public Service Co. of N.H.*, Order No. 25,506 at 17-18 (May 9, 2013). TransCanada thus argued the scope of this docket includes the used and useful concept.

In objecting to the Variance Motion, TransCanada challenged PSNH’s characterization of the variance provisions of RSA 125-O. TransCanada quoted language from a prior order to argue Mr. Hachey’s testimony on that topic is relevant: “to read the variance provision as PSNH urges² would lessen from PSNH, or any other utility owner, the obligation to engage at all times in good utility management.” *Public Service Co. of N.H.*, Order No. 25,445 at 26 (Dec. 24, 2012).

TransCanada objected to PSNH’s Legislative Motion to strike Mr. Hachey’s testimony regarding PSNH’s conduct before the Legislature. TransCanada acknowledged the Commission’s prior order that there is “no relevance to PSNH’s, or Mr. Long’s involvement in cooperating with the Legislature to pass the Scrubber law, or to Mr. Long’s alleged attempts to block the Legislature or this Commission from looking further into whether PSNH should have proceeded with the Scrubber project.” *Public Service Co. of N.H.*, Order No. 25,566 at 5. Nonetheless, TransCanada noted the Commission’s further statement that, “information presented by PSNH and others before the legislature may be relevant to our determination of other facts in issue,” *Public Service Co. of N.H.*, Order No. 25,592 at 6 (Nov. 1, 2013). TransCanada argued that Mr. Hachey’s testimony falls into the latter category, not the former, and is thus relevant.

² “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 and would violate the principle of statutory interpretation that one avoid an illogical or absurd result when construing legislative language. It would not comport with the statute’s express understanding that the mercury reduction requirement was part of a balanced approach that could be accomplished at a reasonable cost to consumers.” *Public Service Co. of N.H.*, Order No. 25,445 at 25-26 (Jan. 29, 2013).

TransCanada also urged a broad interpretation of the latter category because “what PSNH knew about the economics of the scrubber, and who it told (or did not tell) goes directly to its prudence.” TransCanada objection at 9. “This evidence is important in determining whether PSNH acted prudently in providing correct and up-to-date information regarding the scrubber investment economics and alternatives while the Legislature was considering” Scrubber-related legislation. *Id.* at 11.

All the objecting parties took issue with PSNH’s claim in the Retirement Motion that retirement was not an option. Their objections are best summarized by the quotes they chose from recent Commission orders.

[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.

Public Service Co. of N.H., Order No. 25,546 at 8; *see* TransCanada objection at 5.

We emphasize here that we are making no prudence determination at this juncture regarding PSNH’s decision to continue ownership of Merrimack Station, only that the issue may be explored at hearing.

* * *

[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 the Scrubber project.

Public Service Co. of N.H., Order No. 25,565 at 15, n. 7, and 16 (Aug. 27, 2013); *see* CLF’s and Sierra Club’s joint objection at 5-6.

III. COMMISSION ANALYSIS

A. Procedural Objections

There are two preliminary matters. First, we deny as moot TransCanada's request to stay consideration of these motions until a third commissioner is appointed. In our order granting the motion to request appointment of a third commissioner, we wrote that the "Commission intends to take up PSNH's pending motions to strike testimony." *Public Service Co. of N.H.*, Order No. 25,622 at 3-4 (Jan. 23, 2014). Although the third commissioner has been confirmed, there is no disagreement among the quorum of two commissioners who issue this order and we do not think it necessary or appropriate to delay this order further to include the third commissioner. Thus, we address PSNH's motions.

The second preliminary matter is the argument that PSNH's motions are premature pursuant to *City of Nashua*, Order No. 24,667 at 6-7 (Sept. 22, 2006), where we said, "there is nothing to strike at this juncture because prefiled testimony does not become part of the evidentiary record until it is adopted under oath by a live witness at hearing."

In the *City of Nashua* matter, Pennichuck Water Works (PWW) claimed a due process violation in the pre-hearing phase of the case when Nashua filed rebuttal testimony five months before the scheduled hearing which PWW said was really Nashua's direct testimony. PWW complained that Nashua improperly waited to file its direct case as rebuttal testimony to frustrate PWW's ability to conduct discovery in violation of PWW's due process rights. Noting that the Commission's longstanding practice of submitting pre-filed testimony "is neither required nor precluded by the Administrative Procedure Act, RSA 541-A, nor our rules governing adjudicative proceedings," we held that PWW would have to show that its "ability to prepare for

hearing had been unfairly compromised.” *Id.* at 6, 7. We denied PWW’s request because we saw “little risk” that PWW would suffer constitutional harm. *Id.* at 5.

PSNH did not base its motions on alleged due process violations as in *City of Nashua*, but argued that the challenged testimony was irrelevant or outside the scope of this case. Therefore, the *City of Nashua* decision does not control here.

Even if we were to accept the notion that pre-filed testimony is not subject to a motion to strike until the witness takes the stand and adopts the pre-filed testimony written months before, we would nonetheless treat PSNH’s pending motions to strike as requests that we rein in testimony and discovery on issues clearly outside the scope of this docket. If the testimony is not relevant, it makes no sense to allow that testimony to stand and require further discovery on issues we have no intention of addressing at the hearing.

B. Used and Useful and Variance Motions

The objecting parties argued that the Used and Useful and Variance Motions are too vague to warrant relief, and that PSNH did not adequately specify the testimony it sought to strike. All pleadings filed with the Commission must contain a “clear and concise statement of the ... relief sought.” Puc 203.05. Similarly, all motions “shall clearly and concisely state ... the specific relief or ruling requested.” Puc 203.07(d)(2). Motions to strike testimony must be precise so that the witness can articulate objections and so that the Commission has a clear record upon which to make rulings. Generally, broad statements asking us to strike testimony from “any other witness seeking to limit the mandate contained in RSA 125-O:18,” Used and Useful Motion at 3, or testimony that “may also appear in other parties’ direct testimony, cross-examination testimony, or rebuttal testimony,” Variance Motion at 1, are not sufficient.

PSNH's prayers for relief in the two motions are not concise; they do not state the specific testimony to be stricken. This lack of precision prevents the other parties from articulating precise objections and prevents us from making clear rulings. PSNH's Used and Useful Motion and Variance Motion are thus denied without prejudice.³

C. Legislative Motion

PSNH's third Motion sought to strike Mr. Hachey's testimony related to "efforts to support or block legislation regarding the Scrubber" based on our prior orders involving the deposition of Gary Long. The parties largely agree the legal standard is set forth in the two orders related to Mr. Long's deposition. In the former we said what was not relevant:

We see no relevance to PSNH's, or Mr. Long's involvement in *cooperating with* the Legislature to pass the Scrubber law, *or ... alleged attempts to block* the Legislature or this Commission from looking further into whether PSNH should have proceeded with the Scrubber project.

Public Service Co. of N.H., Order No. 25,566 at 5 (emphasis added). In the latter we clarified what was relevant: "*information presented by PSNH and others before the legislature may be relevant to our determination of other facts in issue.*" *Public Service Co. of N.H.*, Order No. 25,592 at 6 (emphasis added).

With those standards in mind, PSNH listed the following twelve quotes from Mr. Hachey's testimony that it sought to strike:

[1] Material that Mr. Hachey contends explains "what PSNH was telling officials about the legislation." Hachey Testimony at 4 and at attachment 3.

[2] That Gary Long "took credit for 'spearheading' and 'crafting' the scrubber law, so clearly PSNH played a major role in drafting and then supporting the enactment of the law." Hachey Testimony at 6.

³ We note that the Variance Motion did cite two specific statements from Mr. Hachey's testimony, quoted in footnote 1 above. Aside from our blanket denial of the Variance Motion, we would nonetheless deny the motion to strike this testimony because it merely paraphrases RSA 125-O:17.

[3] “It is not as if PSNH had no role in the development and passage of the law, which its argument about the scrubber being a mandate suggests; in fact, PSNH by its own admission had a major role in the creation of its ‘mandate.’” Hachey Testimony at 6.

[4] “PSNH understood and was well aware that the Legislature was relying on it to provide updated and accurate information.” Hachey Testimony at 7.

[5] PSNH “essentially withheld critical information about the commodity prices that would be required for the project to ‘break even’ and create customer benefits” from the Commission. Hachey Testimony at 12.

[6] “PSNH appears to have withheld from Staff and the OCA critical information about the 15 year history of the price spread between gas and oil.” Hachey Testimony at 13.

[7] PSNH did not put certain information concerning the “price spread” in the filing it made with the PUC in September 2008. Hachey Testimony at 13.

[8] “I saw no indication that PSNH ever told the NH PUC at this time [September 2008] at this time or at any time subsequently that the basis for their economic analysis was flawed or outdated.” Hachey Testimony at 19.

[9] “In my view, the president and COO of PSNH fully understood the shortcomings of the analysis by his personnel, yet recommended proceeding with construction of the scrubber despite the high likelihood that it would not result in customer benefits.” Hachey Testimony at 22.

[10] PSNH “could have agreed to study whether proceeding with the project still made sense (for example, this could have included supporting rather than actively opposing SB 152, the Janeway bill, in 2009, or it could have included taking a different approach in DE 08-103, such as suggesting a more in depth study of the economics) .” Hachey Testimony at 28.

[11] “Furthermore, the company fought strenuously against the SB 152 legislation that would have required a study of the economics of the project. Gary Long argued to the Legislature in March 2009 that a vote to study the project was a vote to kill the project, presumably because he realized that a study would show that the economics of the project put default service customers at great risk and this would have led to the project being abandoned.” Hachey Testimony at 28-29.

[12] “PSNH failed to recognize and share with the Commission Staff, the OCA and the Commission, critical information about the economics of the scrubber project.” Hachey Testimony at 29.

Legislative Motion at 1-2.

PSNH's request to strike quotes 2, 3 and 4 are granted because they are statements that TransCanada offered to prove PSNH was "cooperating with" or "attempt[ing] to block" legislation, which we found to be irrelevant. Although TransCanada tacitly agreed that these statements may be objectionable, TransCanada urged us to find them relevant under the following argument:

The reality is that information provided to the Legislature and related positions that PSNH took on legislation were bound to have a significant impact on what the Legislature chose to do. The issue is not whether PSNH had the power to change history; this issue is instead whether PSNH acted prudently in its decision-making and dealings with the Legislature on the subject of scrubber economics.

TransCanada objection at 13. TransCanada argues that our prudence review should include whether PSNH was candid with the Legislature and Staff. We found to be relevant statements that PSNH made or documents PSNH provided to the Legislature and others (namely, Northeast Utility's board of directors, the Department of Environmental Services, and the Commission) because PSNH affirmatively made the statements or created the documents. We understand Mr. Hachey's testimony to suggest PSNH made inconsistent statements or provided inconsistent information depending on PSNH's audience. We will not strike Mr. Hachey's testimony insofar as it seeks to point out such inconsistencies.

Therefore, the requests to strike quotes 1, 5 through 9, and 12 are denied because they are statements TransCanada offered to establish the "information presented by PSNH and others before the legislature," which we find relevant.

As to quote 10, we grant the request to strike the parenthetical phrase because it tends to prove whether PSNH was "cooperating with the Legislature ... or ... attempt[ing] to block" legislation. PSNH's request to strike the balance of statement 10 is denied. Finally, we grant the request to strike the first sentence of statement 11 because it tends to prove whether PSNH was

“cooperating with the Legislature ... or ... attempt[ing] to block” legislation. We find the second sentence in statement 11 to be relevant, and we will not strike it.

D. Retirement Motion

In the Retirement Motion PSNH moved to strike testimony that suggested retirement of Merrimack Station was an option available to PSNH. 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.” *Public Service Co. of N.H.*, Order No. 25,546 at 8. Therefore, some testimony discussing retirement may be relevant. “We emphasize here that we are making no prudence determination at this juncture regarding PSNH’s decision to continue ownership of Merrimack Station, only that the issue may be explored at hearing.” *Public Service Co. of N.H.*, Order No. 25,565 at 15, n. 7 (Aug. 27, 2013).

The testimony PSNH sought to strike in the Retirement Motion has the potential to be relevant in light of our view that retirement may be an issue at hearing. Therefore, we deny the Retirement Motion.

Based upon the foregoing, it is hereby

ORDERED, that the motion to strike testimony based on the used and useful concept is hereby DENIED without prejudice; and it is

FURTHER ORDERED, that the motion to strike testimony related to the variance provision of the statute is DENIED without prejudice; and it is

FURTHER ORDERED, that the motion to strike testimony related to legislation is GRANTED in part and DENIED in part, as detailed above; and it is

FURTHER ORDERED, that the motion to strike testimony related to retirement of Merrimack Station is DENIED; and it is

FURTHER ORDERED, that any party to this proceeding that moves to strike testimony later in this proceeding shall identify the challenged testimony line by line and shall bear the burden of convincing the Commission to strike the testimony from the record.

By order of the Public Utilities Commission of New Hampshire this twenty-sixth day of March, 2014.



Amy L. Ignatius
Chairman



Martin P. Honigberg
Commissioner

Attested by:



Debra A. Howland
Executive Director