SUPREME COURT DOCKET NO. _____

APPEAL OF STONYFIELD FARM, INC.,
H & L INSTRUMENTS, LLC, AND GREAT AMERICAN DINING, INC
UNDER RSA 541:6 AND RSA 365:21
FROM ORDER OF PUBLIC UTILITIES COMMISSION
(Supreme Court Rule 10)

A. PARTIES:

1. Parties seeking review:

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B. ORDERS TO BE REVIEWED; MOTION FOR REHEARING AND OBJECTION THERETO:

Annexed hereto are the following: **(1)** the Order of the Public Utilities Commission ("PUC") ("Order") dated September 19, 2008 ruling that the PUC lacks authority to determine whether it is in the public interest for Public Service Company of New Hampshire ("PSNH") to install certain air-pollution control equipment, known as "scrubber technology," at its Merrimack Station in Bow (p. 14 hereto); **(2)** the Motion for Rehearing dated October 17, 2008 by Stonyfield Farm, Inc., H & L Instruments, LLC, and Great American Dining, Inc. (p. 28 hereto); **(3)** PSNH's Objection to Motion for Rehearing[1] dated October 23, 2008 (p. 37 hereto); and **(4)** the PUC's Order dated November 12, 2008 ("Order on Rehearing") denying the Motion for Rehearing (p. 49 hereto).

C. QUESTIONS PRESENTED FOR REVIEW:

1. In ruling that under RSA 125-O:11, VI, the Legislature had found that installation of scrubber technology at Merrimack Station is in the "public interest of the citizens of New Hampshire and the customers of the affected sources," did the PUC erroneously treat that finding as "unconditional" (p. __ hereto), when in fact it was conditional — conditional upon "reasonable costs to consumers" (RSA 125-O:11, V), and conditional "upon [PSNH's] obtaining all necessary permits and approvals from federal, state, and local regulatory agencies" (RSA 125-O:13, I)?

2. On the meaning of "reasonable costs to consumers" under RSA 125-O:11, V, did

[1] PSNH's Objection also addressed motions filed by TransCanada Hydro Northeast, Inc. and Edward M. B. Rolfe.

the PUC erroneously disregard legislative history revealing the cost of the scrubber technology was estimated to be $250 million in 2013 dollars, whereas it is now estimated to be almost double that amount — i.e., $457 million?

3. In ruling that it lacks authority under RSA 369-B:3-a to make a finding of public interest on the installation of scrubber technology at Merrimack Station, did the PUC: **(a)** ascribe too little weight to RSA 369-B:3-a, which was enacted only 3 years before RSA 125-O:11-18, and which provides, "PSNH may modify …[its] generation assets if the commission [PUC] finds that it is in the public interest of retail customers of PSNH to do so"; **(b)** ascribe too little weight to RSA 125-O:13, I, which not only makes installation of scrubber technology "contingent upon" regulatory approvals, but also "encourage[s]" regulatory agencies to give "due consideration" to the Legislature's finding of public interest; and **(c)** fail to harmonize RSA 125-O:11-18 with RSA 369-B:3-a?

4. In ruling that under RSA 125-O:11-18 the PUC is "limited" to determining at a "later time" the prudence of the costs of complying with the requirements of RSA 125-O:11-18 (p. 26 hereto), did the PUC erroneously insert a timing limitation into the statute that neither appears on its face nor may be reasonably inferred?

5. In ruling that it lacks authority under RSA 369-B:3-a to determine whether or not installation of scrubber technology at Merrimack Station is "in the public interest of retail customers of PSNH," and in failing to conduct an adequately noticed public hearing thereon, did the PUC act contrary to RSA 369-B:3-a, and also act contrary to N. H. Constitution, Pt. 1, Art. 12 (due process), RSA 365:19, and RSA 541-A:31, I?

6. In a proceeding under RSA 369-B:3-a to determine whether or not installation of scrubber technology at Merrimack Station is "in the public interest of retail customers of PSNH,"

must the PUC consider all issues relevant to costs raised by such customers and other affected parties, including: **(a)** the cost of the installation itself; **(b)** the cost of related compliance obligations, such as those under the Clean Air Act (42 U.S.C. §7401 et seq.) and Clean Water Act (33 U.S.C. §1251 et seq.); and **(c)** the cost of reasonable alternatives?

D. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED:

The Constitutional provision involved is N. H. Constitution, Pt. 1, Art. 12 (due process). App., 1. The statutory provisions involved are: RSA 125-O, particularly §§ 11-18 (App., 2, 8-13); RSA 369-B, particularly §3-a (App., 20, 26); RSA 365:19 (App., 33); and RSA 541-A:31, I. (App., 34).

E. DOCUMENTS INVOLVED:

The documents involved include: **(1)** the PUC's letter to PSNH dated August 22, 2008 (App., 36); **(2)** PSNH's letter to PUC dated September 2, 2008 (App., 38); **(3)** PSNH's Report to PUC submitted on September 2, 2008 (App., 43); **(4)** the transcript and record of hearing before the Senate Committee on Energy and Economic Development on April 11, 2006 (App., 80); and **(5)** the letter of the Commissioner of the Department of Environmental Services ("DES") to the Chairman of the Senate Committee on Energy and Economic Development dated April 11, 2006 (App., 153).

F. STATEMENT OF THE CASE:

RSA 125-O, effective as of 2002, establishes a program to reduce emissions of various air pollutants. The program is administered by the DES (§§6-8).[2] Sections 11 through 18, effective as of 2006, deal specifically with "mercury emissions at the coal-burning electric power

[2] As of October 1, 2008, under §5-a, a newly created Energy Efficiency and Sustainable Energy Board has powers to "promote and coordinate" energy programs. Under §4, V, the PUC

plants in the state" (§11, I) — more specifically, Merrimack Units 1 and 2 in Bow and Schiller Units 4, 5, and 6, in Portsmouth (§12, I), all operated by PSNH. This appeal focuses on the Merrimack Units, also known as Merrimack Station (§11, I, III, and IV).

One of the key provisions of RSA 125-O is §13 ("Compliance"), whose ¶I provides in pertinent part:

> 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**. The achievement of this requirement is **contingent** upon obtaining **all necessary permits and approvals** from federal, state, and local **regulatory agencies** and bodies; however, **all** such regulatory agencies and bodies are **encouraged** to give **due consideration** to the general court's finding that the installation and operation of scrubber technology at Merrimack Station is in the **public interest**.... App. at 9-10 (emphasis added).

Another key provision is §11 ("Statement of Purpose and Findings"), which provides in pertinent part:

> The general court **finds** 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. The requirements of this subdivision will prevent, at a minimum, 80 percent of the aggregated mercury content of the coal burned at these plants from being emitted into the air by no later than the year 2013. To accomplish this objective, the best known commercially available technology **shall be installed** at **Merrimack Station** no later than **July 1, 2013**.
>
> II. The department of environmental services has determined that the best known commercially available technology is a wet flue gas desulphurization system, hereafter "**scrubber technology**," as it best balances the procurement, installation, operation, and plant efficiency costs with the projected reductions in mercury and other pollutants from the flue gas streams of **Merrimack Units 1 and 2**. Scrubber technology achieves significant emissions reduction benefits, including but not limited to, cost effective reductions in sulfur dioxide, sulfur trioxide, small particulate matter, and improved visibility (regional haze).
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>
> V. The installation of scrubber technology will not only reduce mercury emissions

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oversees the recovery of "all prudent costs associated with compliance in a manner consistent with RSA 374-F, RSA 369-B, and the Agreement to Settle PSNH Restructuring."

> 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. [App. at 8-9 (emphasis added).]

As to what the Legislature specifically meant by its finding of "reasonable costs to consumers" (§11, V), the legislative history reveals the facts on which that finding was based. The bill that gave rise to RSA 125-O:11-18 was 2006 HB1673-FN. On April 11, 2006, Terry Large of PSNH testified on this bill before the Senate Committee on Energy and Economic Development, and indicated the estimated cost of installing the scrubber technology at Merrimack Station would be $250 million. Mr. Large characterized this amount "as an awful lot of money in PSNH's view." App. at 110. Further, on the same date to the same Committee, the DES reported as follows: "Based on data shared by PSNH, the total capital cost for this full redesign **will not exceed $250 million dollars (2013$) or $197 million (2005$).**" App. at 154 (letter of DES Commissioner to the Chairman of the Senate Energy and Economic Development Committee, dated April 11, 2006 (emphasis added)).

Just two years later, however, the cost had almost doubled, growing to $457 million. On August 22, 2008, the PUC wrote to PSNH, citing the 10-Q filed on August 7, 2008 with the United States Securities and Exchange Commission by Northeast Utilities (NU), PSNH's parent company. App. at 36. As stated in the PUC's letter, "In its 10-Q, NU identified an estimated project cost of **$457 million** [for installation of the scrubber technology at Merrimack Station], which represents approximately an **80 percent increase** over the original estimate of $250 million." *Id.* (emphasis added). PSNH responded by letter dated September 2, 2008, saying, "It should surprise no one that the **costs** of this project have **increased significantly** over the original preliminary estimates made in late 2004-2005." App. at 40 (emphasis added). On the

same date, PSNH filed a Report with the PUC, saying in pertinent part:

> • The initial estimated cost of the project was based on a Sargent & Lundy estimate performed in 2005. There have been **significant increases** in the cost of raw materials, steel, labor and energy, since this estimate was made. [App. at 48 (emphasis added).]
>
> • PSNH, in conjunction with URS, has developed a **revised** project estimate of **$457 million**." [App. at 50 (emphasis added).]

The Legislature's concern with "reasonable costs to consumers" for electricity generated by Merrimack Station is evidenced not only by RSA 125-O:11, V and VI, but also by RSA 369-B. RSA 369-B took effect in 2000, and deals with "restructuring" (§1, I) — i.e., the "divestiture of electric generation by New Hampshire electric utilities" (§1, II). App. at 20. One of its principal objectives is the establishment of "**retail electric service at lower costs.**" Section 1, I (*Id.* (emphasis added)). The statute is administered by the PUC. In 2003, it was amended to permit PSNH to retain its "fossil and hydro generation assets." Section 3-a (App. at 26.) One such fossil generation asset is Merrimack Station. In keeping with the overall objective of "retail electric service at lower costs," (§1, I), §3-a provides in pertinent part: "Prior to any divestiture of its generation assets, PSNH **may modify** or retire such generation assets if the commission [PUC] 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." *Id.* (emphasis added).

By its letter of August 22, 2008 to PSNH, the PUC opened an investigation into whether a conflict existed between RSA 125-O:11 and RSA 369-B:3-a. App. at 36. The PUC directed PSNH to file a memorandum of law on the issue, and invited the Office of Consumer Advocate to do the same. App. at 37. Both did so. The appellants here did not receive any notice from the PUC of

any opportunity to be heard concerning the PUC's investigation.[3]

After receiving a brief from PSNH and an opposing brief from the Office of Consumer Advocate, the PUC ruled as follows on September 19, 2008:

> **DECIDED**, that, as a result of the Legislature's mandate that the owner of Merrimack Station install scrubber technology by a date certain, and its finding pursuant to RSA 125-O:11 that such installation of scrubber technology at PSNH's Merrimack Station is in the public interest of the citizens of New Hampshire and the customers of the station, the Commission **lacks the authority** to make a determination pursuant to **RSA 369-B:3-a** as to whether this particular modification is in the public interest. [P. 26 hereto (emphasis in original in line 1; emphasis added otherwise).]

The PUC also ruled that, through the enactment of RSA 125-O:11, VI, "The Legislature has already made an **unconditional** determination that the scrubber project is in the public interest." P. 25 hereto (emphasis added).) It further ruled, "the Commission's authority is limited to determining at a **later** proceeding the prudence of the costs of complying with the requirements of RSA 125-O:11-18 and the manner of recovery for prudent costs." P. 26 hereto (emphasis added).

On October 17, 2008, Stonyfield Farm, Inc., H & L Instruments, LLC, and Great American Dining, Inc.[4] (collectively, "Commercial Ratepayers") timely moved for rehearing. P. 28 hereto. As stated in their Motion, "As ratepayers for electricity generated by ... [PSNH], the Commercial Ratepayers will be directly affected by the materially increased costs of installation of scrubber technology at Merrimack Station, and by the Commission's Order." *Id.* In addition to the issues of statutory construction, referenced above, the Commercial Ratepayers raised a

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[3] Between September 5 and 12, 2008, Senator Gatsas, the New Hampshire State Building and Construction Trades Council, and Governor Lynch filed letters with the PUC urging expeditious review. P. 15 hereto. On September 12, 2008, the Conservation Law Foundation, the Campaign for Ratepayer Rights, and TransCanada Hydro Northeast, Inc. filed letters requesting the matter be noticed for public participation. *Id.*

procedural issue: that they had not received prior notice of the underlying proceeding, and thus were deprived of meaningful participation, contrary to the requirements of N. H. Constitution, Pt. 1, Art. 12 (due process), RSA 365:19, and RSA 541-A:31, I. They also raised an issue about the scope of any hearing under RSA 369-B:3-a:

> The Commercial Ratepayers are aggrieved by the Commission's failure to make a determination on public interest, as required by RSA 369-B:3-a. Any such determination, moreover, should not be confined to the issue of scrubber technology. The Commission should not undertake a fragmented analysis. Rather, in making a determination of public interest under RSA 369-B:3-a, the Commission should also take into account all other pertinent issues bearing on the proposed modification. These issues would include, but not be limited to, anticipated increased costs concerning: (A) compliance obligations under the Clean Air Act (Title V — 42 U.S.C. §7401 et seq.): (B) compliance obligations under the Clean Water Act (NPDES — 33 U.S.C. §1251 et seq.); and (C) reasonable alternatives — in terms of environmental protection, public health, costs, and long-term energy benefits. [P. 34 hereto.]

Following an Objection by PSNH (p. 37 hereto), the PUC denied the Commercial Ratepayers' Motion on November 12, 2008. P. 49 hereto. This appeal followed within 30 days. RSA 541:6.

G. JURISDICTIONAL BASIS FOR APPEAL:

The jurisdictional basis for this Appeal is RSA 541:6 and RSA 365:21.

H. STATEMENT OF REASONS WHY A SUBSTANTIAL BASIS EXISTS FOR A DIFFERENCE OF OPINION ON THE QUESTIONS AND WHY ACCEPTANCE OF THE APPEAL WOULD PROTECT A PARTY FROM SUBSTANTIAL AND IRREPARABLE INJURY, OR PRESENT THE OPPORTUNITY TO DECIDE, MODIFY, OR CLARIFY AN ISSUE OF GENERAL IMPORTANCE IN THE ADMINISTRATION OF JUSTICE:

1. As to why a substantial basis exists for a difference of opinion on the questions, the Commercial Ratepayers contend there are at least 3 reasons.

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[4] Great American Dining, Inc. is the managing entity of the Common Man family of restaurants, at least 7 of which buy power from PSNH. P. 28 hereto.

First, RSA 369-B:3-a and RSA 125-O:11, VI may be rationally harmonized, and therefore must be. *Associated Press v. State of New Hampshire*, 153 N.H. 120 (2005). RSA 369-B:3-a requires the PUC to make a determination of whether or not installation of scrubber technology at Merrimack Station is "in the public interest of retail customers of PSNH." Certainly, RSA 125-O:11, VI does not expressly repeal this requirement. Nor should one readily infer that the Legislature would impliedly repeal a requirement enacted only 3 years earlier. Yet that is the upshot of the PUC's decision. Even apart from the mere 3-year separation between the statutes' enactments, the PUC's decision overlooks the fact that "[i]n this state the climate for repeal by implication is frosty and inhospitable. The law does not favor repeal by implication if any other reasonable construction may avoid it." *Opinion of the Justices*, 107 N.H. 325, 328 (1966) (internal quotation marks omitted). One such reasonable construction is the following: RSA 369-B:3-a must be read in light of RSA 125-O:13, I, which "**encourage**[s]" regulatory agencies, including the PUC, to give "**due consideration**" to the Legislature's finding of public interest under RSA 125-O:11, VI. This provision confirms that the Legislature did **not** intend that its finding of public interest under RSA 125-O:11, VI be given preemptive effect. Rather, it was simply to be given "due consideration"; and impliedly, such consideration would take into account the circumstances under which the finding was made.

Second, one such circumstance is the actual cost-estimate underlying the Legislature's finding that installation of the scrubber technology would be accomplished at "reasonable costs to consumers." RSA 125-O:11, V. This finding was based on information from PSNH and DES that "the total capital cost for this full redesign will not exceed **$250 million dollars (2013$) or $197 million (2005$).**" App. at 154 (emphasis added). Just two years later, however, the cost had almost doubled, growing to $457 million. App. at 36, 50.

The Legislature's finding of "reasonable costs to consumers" under RSA 125-O:11, V informs its finding of "public interest to ... customers" under RSA 125-O:11, VI, the very next statutory paragraph. Together, the two findings provide:

> 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. [App. at 9 (emphasis added).]

"Such" technology means technology with "reasonable costs to customers," which in turn means costs that "will not exceed 250 million dollars (2013$) or 197 million (2005$)." App. at 154. It is that $250 million (2013$) technology — **not** $457 million technology — that the Legislature found to be in the "public interest of the citizens of New Hampshire and the customers of the affected sources." RSA 125-O:11, VI.

Third, in ruling that through the enactment of RSA 125-O: 11, VI "The Legislature has already made an **unconditional** determination that the scrubber project is in the public interest," (p. 25 hereto (emphasis added)), the PUC overlooked two important conditions. One condition, as explained above, is that the technology come with "reasonable costs to consumers" (RSA 125-O:11, V and VI) — i.e., costs that "will not exceed 250 million dollars (2013$) or 197 million (2005$)." App. at 154. The other condition is explicitly set forth in RSA 125-O — §13 ("Compliance"), whose ¶I provides in pertinent part:

> 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. The achievement of this requirement is **contingent** upon obtaining **all necessary permits and approvals** from federal, state, and local **regulatory agencies** and bodies; however, **all** such regulatory agencies and bodies are **encouraged** to give **due consideration** to the general court's finding that the installation and operation of scrubber technology at Merrimack Station is in the **public interest**.... App. at 9-10 (emphasis added).

As explained above, it is through this provision that RSA 125-O:11-18 may be harmonized with the PUC's obligation under RSA 369-B:3-a to determine whether or not installation of the scrubber technology is "in the public interest of retail customers of PSNH."

2. As to why acceptance of the appeal would protect a party from substantial and irreparable injury, it is the Commercial Ratepayers and other retail customers of PSNH — the very persons whose interests are the focus of RSA 369-B:3-a and RSA 125-O:11, VI — who will suffer irreparable and substantial injury. They are virtually certain to bear the ultimate full burden of the installation costs, costs which the Commercial Ratepayers contend are not only too high but misdirected. Moreover, it is not only the installation costs that they will bear, but also the costs of related compliance obligations, such as those under the Clean Air Act (42 U.S.C. §7401 et seq.) and Clean Water Act (33 U.S.C. §1251 et seq.). In a proceeding under RSA 369-B:3-a, the Commercial Ratepayers would contend that their money would be far more wisely spent on cleaner and more efficient technology. To have that opportunity foreclosed to them only exacerbates their injury.

3. As to why acceptance of the appeal would present the opportunity to decide an issue of general importance in the administration of justice, the Commercial Ratepayers contend that appropriate regulation of PSNH's expenditures under RSA 369-B:3-a and RSA 125-O:11-18 is obviously in the public interest. Indeed, these very statutes make the point explicitly. Furthermore, as stated in the preceding paragraph, the Commercial Ratepayers contend that their money would be far more wisely spent on cleaner and more efficient technology.

I. ISSUES PRESERVED FOR APPELLATE REVIEW

Every issue specifically raised has been presented to the administrative agency and has been properly preserved for appellate review by a properly filed pleading.

Respectfully submitted,
STONYFIELD FARM, INC.,
H & L INSTRUMENTS, LLC, and
GREAT AMERICAN DINING, INC
By their Attorneys,
Sheehan Phinney Bass & Green, P.A.

Dated: December 11, 2008

By: _____

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing were mailed this date to the attached Service List.

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STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DE 08-103

INVESTIGATION OF PSNH'S INSTALLATION
OF SCRUBBER TECHNOLOGY AT MERRIMACK STATION

Decision Concerning Statutory Authority

ORDER NO. 24,898

September 19, 2008

I. BACKGROUND

This investigation was opened by Secretarial Letter on August 22, 2008, following a quarterly earnings report filed by Northeast Utilities[1] with the Securities and Exchange Commission on August 7, 2008. The earnings report disclosed that the cost of installing a wet flue gas desulphurization system, commonly referred to as scrubber technology, at Public Service Company of New Hampshire's (PSNH's) Merrimack Station had increased from an original estimate of $250 million to $457 million. 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.

Pursuant to RSA 365:5 and 365:19, the Commission directed PSNH to file by September 12, 2008, "a comprehensive status report on its installation plans, a detailed cost estimate for the project, an analysis of the anticipated effect of the project on energy service rates, and an analysis of the effect on energy service rates if Merrimack Station were not in the mix of fossil and hydro facilities operated in New Hampshire." The Commission also noted that there was a potential statutory conflict as to the nature and extent of its authority relative to the scrubber

[1]Northeast Utilities is the parent company of Public Service Company of New Hampshire.

project. In particular, it cited RSA 125-O:11, VI, which states that it is in the public interest for PSNH to install scrubber technology at the Merrimack Station, and RSA 369-B:3-a, which states that PSNH may modify its generation assets only if the Commission finds that it is in the public interest to do so. Consequently, the Commission directed PSNH to file a memorandum of law on the issues by September 12, 2008, and also invited the Office of the Consumer Advocate (OCA) to file a memorandum of law by the same date.

PSNH moved on August 25, 2008 to accelerate the dates of the required filings and on the same date the OCA objected to accelerating the deadline for filing its memorandum of law. On August 28, 2008, the Commission denied the motion as it applied to the OCA's filing. PSNH filed its status report and memorandum of law on September 3, 2008, and the OCA filed its memorandum of law on September 11, 2008. In addition, Senator Theodore L. Gatsas, the New Hampshire State Building and Construction Trades Council, and Governor John H. Lynch filed letters, on September 5, 2008, September 9, 2008, and September 12, 2008, respectively, urging an expeditious review. On September 12, 2008, the Conservation Law Foundation, the Campaign for Ratepayer Rights and TransCanada Hydro each filed letters requesting that this docket be noticed for public participation.

II. MEMORANDA OF LAW

A. Public Service Company of New Hampshire

PSNH contends that, because the Legislature found in RSA 125-O:11, VI that the installation of scrubber technology is in the public interest, it is not necessary for the Commission to make a determination pursuant to RSA 369-B:3-a as to whether the installation is in the public interest. The essence of PSNH's argument is that the Legislature unambiguously mandated that PSNH install scrubber technology as soon as possible. PSNH asserts as well that

there is no conflict between RSA 125-O:11 and RSA 369-B:3-a, but that, to the extent such a conflict did exist, the later, more specific statute controls, which in this case means that RSA 125-O:11 would control. As a result, according to PSNH, the Legislature's public interest finding would prevail and the Commission would lack the authority to make a public interest determination.

Coincident with this line of argument, PSNH also concludes that the requirement of RSA 125-O:13, I that PSNH obtain all necessary approvals does not include Commission approvals inasmuch as the Legislature has already determined that it is in the public interest to install scrubber technology. In other words, PSNH takes the position that it is not necessary for the Commission to approve anything in the first instance. PSNH contends that the Commission's authority is limited in accord with RSA 125-O:18 to an after-the-fact prudence review of PSNH's design and installation of the scrubber. Finally, PSNH argues that RSA 125-O:13, IX evidences the Legislature's intent to reserve the power and authority to oversee the installation of the scrubber to itself.

B. Office of Consumer Advocate

The OCA contends that, because the Legislature did not expressly repeal RSA 369-B:3-a, PSNH may not modify the Merrimack Station unless the Commission first determines that the modification is in the public interest. Therefore, the OCA asserts that Commission approval is a necessary approval consistent with RSA 125-O:13. In rebuttal to PSNH's argument that there is no need for a Commission determination under RSA 369-B:3-a, the OCA states that PSNH overlooks the fact that PSNH's cost estimates for the scrubber project have increased by 80 percent.

In addition, the OCA contends that PSNH cannot proceed without Commission approval, pursuant to RSA 369:1, of the long term financing that the OCA believes will be required to complete the scrubber project. It argues that with any PSNH financing the Commission must conduct an "Easton" review and consider whether the planned uses to which the loan proceeds would be applied, and the affect on rates, are consistent with the public good. *See, Appeal of Easton*, 125 N.H. 205, 211 (1984). Furthermore, the OCA opines that the Commission has the lawful authority to conduct this investigation.

III. COMMISSION ANALYSIS

The central question of law here concerns the interpretation of two statutory provisions, namely, RSA 369-B:3-a and RSA 125-0:11.

RSA 369-B:3-a, which was enacted in 2003, states:

> **Divestiture of PSNH Generation Assets.** 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.** [Emphasis added.]

RSA 125-O:11, which was enacted in 2006, states:

> **Statement of Purpose and Findings.** The general court finds 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. The requirements of this subdivision will prevent, at a minimum, 80 percent of the aggregated mercury content of the coal burned at these plants from being emitted into the air by no later than the year 2013. To accomplish this objective, the best known commercially available technology shall be installed at Merrimack Station no later than July 1, 2013.
>
> II. The department of environmental services has determined that the best known commercially available technology is a wet flue gas desulphurization system, hereafter "scrubber technology," as it best balances the procurement, installation, operation, and

plant efficiency costs with the projected reductions in mercury and other pollutants from the flue gas streams of Merrimack Units I and II. Scrubber technology achieves significant emissions reduction benefits, including but not limited to, cost effective reductions in sulfur dioxide, sulfur trioxide, small particulate matter and improved visibility (regional haze).

III. After scrubber technology is installed at Merrimack Station, and after a period of operation has reliably established a consistent level of mercury removal at or greater than 80 percent, the department will ensure through monitoring that that level of mercury removal is sustained, consistent with the proven operational capability of the system at Merrimack Station.

IV. To ensure that an ongoing and steadfast effort is made to implement practicable technological or operational solutions to achieve significant mercury reductions prior to the construction and operation of the scrubber technology at Merrimack Station, the owner of the affected coal-burning sources shall work to bring about such early reductions and shall be provided incentives to do so.

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. [Emphasis added.]

VII. Notwithstanding the provisions of RSA 125-O:1, VI, the purchase of mercury credits or allowances to comply with the mercury reduction requirements of this subdivision or the sale of mercury credits or allowances earned under this subdivision is not in the public interest.

VIII. The mercury reduction requirements set forth in this subdivision represent a careful, thoughtful balancing of cost, benefits, and technological feasibility and therefore the requirements shall be viewed as an integrated strategy of non-severable components.

It is often the case in disputes as to the interpretation of a statute or a contract that both sides to the dispute contend that the statutory or contractual language is clear on its face, yet they come to diametrically opposed conclusions about the meaning of the relevant provisions. That is the situation here.

PSNH contends that RSA 125-O:11 et seq. is "clear, straightforward, and unambiguous in its mandate." PSNH Memorandum, p.4. It states as well that interpretation of the statute is

"not difficult." *Id.*, p.7. It further contends that there is no conflict between RSA 125-O:11 and RSA 369-B:3-a because the Legislature has already made in RSA 125-O:11 the "precise finding" as to the public interest of the scrubber technology that would have been the subject of a proceeding under RSA 369-B:3-a. *Id.*, p. 12-13. Thus, PSNH asserts that the Legislature has superseded the Commission's authority to make a public interest finding inasmuch as the "finding has been made, and is clearly and definitively embodied in the law." *Id.*, p.14.

At the same time, the OCA contends that there is no conflict between RSA 369-B:3-a and RSA 125-O:11 and that the two statutes must be taken together. OCA Memorandum, p.7. It argues that PSNH may not proceed with the modifications required by RSA 125-O:11 "until it obtains the PUC approvals required by statutes including RSA 369-B:3-a and RSA 369." *Id.* The OCA further asserts that "the Legislature clearly contemplated and required review by the PUC." *Id.*, p.8.

Obviously, the arguments made by PSNH and the OCA as to the nature and extent of the Commission's authority with regard to the installation of scrubber technology are irreconcilable. PSNH says we do not have the authority to determine whether the scrubber project is in the public interest, while the OCA says that we do. We must decide which formulation is correct. 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).

RSA 369-B:3-a states that prior to divestiture PSNH may modify a generation asset "if the commission finds that it is in the public interest of retail customers of PSNH to do so." RSA 125-O:11, VI states that the installation of scrubber technology by PSNH at the Merrimack Station "is in the public interest of the citizens of New Hampshire and the customers of the affected sources." It appears on their face that these two provisions are mutually exclusive and cannot logically co-exist. In the former, the Commission must make a determination of the public interest before PSNH can go forward with the scrubber project, while in the latter 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. Accordingly, these provisions conflict inasmuch as one requires Commission approval and the other does not.

Nevertheless, there are two possible arguments which could lead to the conclusion that the statutes can co-exist. The first argument concerns whether "modification" and "installation" are equivalent concepts. If the concepts concerned different subject matter or activities, it could be argued that, despite the Legislature's finding that installation of scrubbers is in the public interest, PSNH also needs a Commission finding that a modification is in the public interest in order for PSNH to install scrubbers. The second argument concerns whether the "public interest of retail customers of PSNH" and the "public interest of the citizens of New Hampshire and the customers of the affected sources" are equivalent standards. If the standards concerned entirely distinct target populations, it could be argued that, despite the Legislature's finding that installation of scrubbers is in the public interest of the customers of affected sources, PSNH also needs a Commission finding regarding whether installation is in the public interest of PSNH's retail customers.

With respect to the first argument, we find that the installation of scrubber technology constitutes a modification to the Merrimack Station, and therefore the statutes concern the same subject matter or activities. This finding is consistent with our finding in *Public Service Company of New Hampshire*, 89 NH PUC 70, 90 (2004) Order No. 24,276 that the construction of a boiler at the Schiller Station to burn wood chips was a modification to the existing facility subject to the Commission's authority pursuant to RSA 369:3-a.

As for the second argument, we find that the "public interest of retail customers of PSNH" is the same as the "public interest of...the customers of the affected sources" because the customers of the affected sources are, in fact, PSNH retail customers. The standard or target population in RSA 369-B:3-a is a subset of the standard or target population in RSA 125-O:11, VI. Therefore, the Legislature's finding under RSA 125-O:11, VI subsumes any finding the Commission might make under RSA 369-B:3-a.

Having disposed of arguments that the provisions are reconcilable, the inquiry then shifts to which of the two conflicting statutes prevails. PSNH argues that RSA 125-O:11 prevails, while the OCA argues that RSA 369-B:3-a prevails. PSNH notes that when two statutes conflict, the more recent and specific statute controls over the older statute of general application. *See, Bel Air Associates. Dept. of Health and Human Services*, 154 N.H. 228, 233 (2006), *citing Petition of Public Serv. Co. of N.H.*, 130 N.H. 265, 283 (1988). PSNH states that RSA 369-B:3-a, enacted in 2003, deals with general, undefined potential modifications to its generation assets, while RSA 125-O:11, enacted in 2006, deals with a specific modification to a specific generating station, i.e., the installation of scrubbers at Merrimack Station.

The OCA observes that the Legislature "is not presumed to waste words or enact redundant provisions." OCA Memorandum, p. 7 *citing, Town of Amherst v. Gilroy*, 950 A.2d

193, 197, ___ N.H. ___ (2008). OCA further argues that the legislature is presumed to be "familiar with all existing laws applicable to the subject matter, whether constitutional, statutory, or common, and intended the statute to harmonize completely with those laws and aid in the effectuation of the general purpose and design of the same." *Id.*, p.8, *citing, Presumptions in Aid of Construction,* 82 C.J.S. Statutes §310. Finally, the OCA states that if the "Legislature wanted to repeal or limit the effectiveness of RSA 369-B:3-a...it could have done so expressly." *Id.*

As noted above, we cannot harmonize RSA 369-B:3-a and RSA 125-O:11. If we proceed under RSA 369-B:3-a as the OCA proposes, then we would be effectively ignoring the Legislature's finding that the installation of the scrubber is in the public interest. On the other hand, if we do not proceed under RSA 369-B:3-a, we would arguably be allowing PSNH to ignore the Legislature's directive to secure from the Commission a finding as to the public interest prior to modifying its generation asset. Thus, in our view, the Legislature has enacted incompatible provisions.

We conclude that the proper interpretation of the conflicting statutes in this situation is that the Legislature intended the more recent, more specific statute, RSA 125-O:11, to prevail. 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.[2] If we concluded otherwise, we would be nullifying the Legislature's public interest finding and rendering it meaningless.

[2] The OCA urges that we proceed expeditiously with a review pursuant to RSA 369-B:3-a. Such an undertaking would be an adjudicative proceeding allowing for the full range of due process requirements, including testimony by

Furthermore, RSA 369-B:3-a provides that "... PSNH ***may*** modify or retire such generation assets if the commission finds that it is in the public interest ..." (emphasis added). This permissive clause allows PSNH to propose and then undertake a modification of a generation asset if the Commission makes a finding that it is in the public interest. 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. Accordingly, based upon our reading of RSA 125-O as a whole, we find that the Legislature did not intend that PSNH be required to seek Commission approval pursuant to RSA 369-B:3-a for a modification that the Legislature has required and found to be in the public interest. Thus, we conclude that an RSA 369:3-a proceeding has been obviated by the Legislature's findings in RSA 125-O:11.

Our finding that the Legislature intended its findings in RSA 125-O:11 to foreclose a Commission proceeding pursuant to RSA 369-B:3-a is supported by the overall statutory scheme of RSA 125-O:11 et seq. as well as its legislative history. A review of the Senate Journal for April 20, 2006, at p. 935 et seq., shows that the members of the Senate Finance Committee were focused largely on the timing of installation and the prospect that PSNH could install the scrubber technology in advance of the July 1, 2013 deadline. 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. Finally, RSA 125-O:13, IX directs PSNH to report annually to the legislative oversight committee on electric utility restructuring the

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PSNH and other interested parties, discovery, cross-examination of witnesses, briefs, issuance of a decision, motions for rehearing and appeals. The only proceeding held pursuant to RSA 369-B:3-a took a year and a half. PSNH filed its petition to modify the Schiller Station on August 28, 2003. The Commission issued its decision on February 6, 2004. The Supreme Court issued its opinion upholding the Commission's decision on April 4, 2005.

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.

The OCA also makes a collateral argument based on RSA 125-O:13 that PSNH must obtain "all necessary permits and approvals from federal, state, and local regulatory agencies and bodies." It contends that the Commission is one such agency and that RSA 369-B:3-a is one such approval. In opposition, PSNH argues that an approval pursuant to RSA 369-B:3-a is not necessary because the Legislature has already made the public interest finding that would be the subject of such a proceeding. Since we find that the Legislature has presumptively determined the scrubber to be in the public interest, we conclude that Commission approval pursuant to RSA 369-B:3-a is not a necessary approval under RSA 125-O:13.

The OCA posits as well that Commission approval pursuant to RSA 369:1 of the financing needed to install the scrubber technology is a necessary approval required by RSA 125-O:13. OCA states that it "is not aware of the extent of PSNH's outstanding debt at this time, but it seems clear that with... [its] current debt limits, PSNH will require additional financing to complete the scrubber project." OCA Memorandum, p.4. The OCA also asserts that it would be prudent for PSNH to seek financing approval now and that it would be unfair to ratepayers to wait for a financing proceeding. We find that financing approval pursuant to RSA 369:1 is not necessary prior to the start of construction. We note that as a general matter public utilities are not required to seek pre-approval of financing before undertaking a construction project. The OCA does point out, however, the important issue of prudence, which we discuss further below. We observe here that the timing of obtaining financing and the resulting effects on rates, terms and conditions of such financing are issues that may fairly be raised in a prudence proceeding.

PSNH asserts that the nature and extent of the Commission's authority with respect to the installation of the scrubber project is described in RSA 125-O:18, which states:

> **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.

Consistent with our findings above, we conclude that the Commission lacks authority to pre-approve installation, but that it retains its authority to determine prudence. 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 expressly 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.

We are sensitive to the OCA's point that the cost estimates for the scrubber project have increased approximately 80 percent from $250 million to $457 million in a relatively short time. In fact, that circumstance is what prompted us to open this investigation. However, 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. 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.

IV. CONCLUSION

The Commission has only those powers delegated to it by the Legislature. *See, Appeal of Public Service Co. of N.H.*, 122 N.H. 1062, 1066 (1982). 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.

Based upon the foregoing, it is hereby

DECIDED, that, as a result of the Legislature's mandate that the owner of Merrimack Station install scrubber technology by a date certain, and its finding pursuant to RSA 125-O:11 that such installation of scrubber technology at PSNH's Merrimack Station is in the public interest of the citizens of New Hampshire and the customers of the station, the Commission lacks the authority to make a determination pursuant to RSA 369-B:3-a as to whether this particular modification is in the public interest.

By the Public Utilities Commission of New Hampshire this nineteenth day of September, 2008.

Thomas B. Getz	Graham J. Morrison	Clifton C. Below
Chairman	Commissioner	Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary

STATE OF NEW HAMPSHIRE
BEFORE THE
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

Docket No. DE 08-103

INVESTIGATION OF PSNH'S INSTALLATION OF SCRUBBER TECHNOLOGY AT MERRIMACK STATION

MOTION FOR REHEARING BY CERTAIN COMMERCIAL RATEPAYERS

Pursuant to RSA 541:3 and 4 and RSA 541-A:31, I, Stonyfield Farm, Inc., (10 Burton Drive, Londonderry, NH 03053), H & L Instruments, LLC (PO Box 580, Hampton, NH 03862), and Great American Dining, Inc.[1] (PO Box 581, Ashland, NH 03217) (collectively, "Commercial Ratepayers") respectfully move for rehearing of the Commission's Order dated September 19, 2008 ("Order"). In support of this Motion, the Commercial Ratepayers say:

1. The Commercial Ratepayers have standing to file this Motion. As ratepayers for electricity generated by Public Service of New Hampshire ("PSNH"), the Commercial Ratepayers will be directly affected by the materially increased costs of installation of scrubber technology at Merrimack Station, and by the Commission's Order. RSA 541:3. *Appeal of Richards*, 134 N.H. 148 (1991). Moreover, the question of the public interest allegedly served by such installation is contested by the Commercial Ratepayers, requiring the Commission to commence an adjudicative proceeding under RSA 541-A:31, I.

2. The Commercial Ratepayers specify the following as grounds for rehearing (RSA 541:3 and 4):

2.1 Having properly invoked RSA 365:19 to conduct an inquiry into the installation costs of the scrubber technology and related issues, the Commission should have adhered to the

[1] Great American Dining, Inc. is the managing entity of the Common Man family of restaurants, at least 7 of which buy power from PSNH.

requirement of RSA 365:19 that "any party whose interests may be affected [such as the Commercial Ratepayers] **shall** be afforded a reasonable opportunity to be heard with reference thereto or in denial thereof." (Emphasis added.)

2.2 The Commission's decision that as a result of RSA 125-O it "lacks authority to pre-approve installation" (Order, at 12) effectively denies the Commercial Ratepayers due process on issues for which it will have to pay significant costs. N. H. Constitution, Pt. 1, Art. 12. Although the Commission's "retains its authority to determine prudence" of costs (Order, at 12), that post-installation determination is a belated, and therefore inadequate, opportunity for the Commercial Ratepayers to be heard.

2.3 In deciding that as a result of RSA 125-O it "lacks authority to pre-approve installation," the Commission observed that, were it to conclude otherwise, it "would be effectively ignoring the Legislature's finding that the installation of the scrubber is in the public interest." Order, at 9. Not only is the Commission incorrect (for the reasons set out in ¶2.4 below), but its decision violates constitutional principles of separation of powers. N. H. Constitution, Pt. 1, Art. 37. *See, e.g., McKay v. N.H. Compensation Appeals Bd.*, 143 N.H. 722 (1999). That is, the Commission's decision has the effect of ascribing to the Legislature a power that properly resides only in the Commission in the exercise of its executive powers and/or quasi-judicial powers.

2.4 In deciding that as a result of RSA 125-O it "lacks authority to pre-approve installation," the Commission has misconstrued RSA 125-O, particularly RSA 125-O:11, V and VI, which provide:

> 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. [Emphasis added.]

A. RSA 125-0:11 took effect on June 8, 2006.

B. As of June 8, 2006, the estimated cost of installation of the scrubber technology at Merrimack Station was **$250 million**. Commission letter of August 22, 2008 to PSNH, citing the 10-Q filed on August 7, 2008 with the United States Securities and Exchange Commission by Northeast Utilities (NU), PSNH's parent company. As stated in the Commission's August 22 letter, "In its 10-Q, NU identified an estimated project **cost of $457 million** [for installation of the scrubber technology at Merrimack Station], which represents approximately an **80 percent increase over the original estimate of $250 million**." (Emphasis added.) *See also, e.g.*: **(1)** PSNH's letter to the Commission of September 2, 2008, saying (at 3), "It should surprise no one that the **costs** of this project have **increased significantly over the original preliminary estimates made in late 2004-2005**." (Emphasis added.); **(2)** PSNH's Report to the Commission of September 2, 2008, saying (at 7), "**Initial engineering** was completed by Sargent and Lundy ("S&L") based upon information provided in **2005**.... **Budgetary quotes** and lead times were solicited from major scrubber vendors, also during **2005**." (Emphasis added.); **(3)** *Id.*, saying (at 11), "The **initial estimated cost** of the project was based on a Sargent & Lundy estimate performed in **2005**. There have been **significant increases in the cost of raw materials, steel, labor and energy, since this estimate was made**...." (Emphasis added.); and **(4)** *Id.*, saying (at 13), "PSNH, in conjunction with URS, has developed a **revised project**

estimate of $457 million." (Emphasis added.)

C. Consistent with the foregoing is the legislative history underlying the enactment of RSA 125-O:11, which was part of HB 1673. Terry Large of PSNH testified on HB 1673 before the Senate Committee on Energy and Economic Development on April 11, 2006, and indicated that the estimated cost of the scrubber technology would be **$250 million**. Further, on the same date and to the same Committee, the Department of Environmental Services reported as follows: "Based on data shared by PSNH, the total capital cost for this full redesign **will not exceed $250 million dollars (2013$) or $197 million (2005$)**." Letter of Michael P. Nolin to the Honorable Bob Odell, Chairman NH Senate Energy and Economic Development Committee, dated April 11, 2006 (emphasis added).

D. Hence, the "reasonable costs" to which RSA 125-O:11, V refers is **$250 million**. Necessarily, therefore, when the Legislature provided in RSA 125-0:11, VI that "The installation of **such** technology is in the public interest" (emphasis added), it was referring to a technology that had a cost of **only $250 million**. It was **not** referring to technology having a cost of **$457 million**. If a counterargument is advanced that the reference to "such technology" would include a cost as high as $457 million, then that same counterargument could be used to support a cost as high as $1 billion or even $10 billion. The result is absurd — and thus could not have been what the Legislature intended. *See, e.g., Soraghan v. Mt. Cranmore Ski Resort*, 152 N.N. 399 (2005).

E. Even if it could be plausibly argued that the Legislature has already determined that a cost of $250 million is "reasonable" for "such" technology

(RSA 125-O:11, V and VI), it **cannot** be plausibly argued that the Legislature has also already determined that a cost of $457 million is likewise "reasonable" for "such" technology.

F. As a result, the Commercial Ratepayers respectfully submit that the Commission erred in deciding that that as a result of RSA 125-O it "lacks authority to pre-approve installation."

G. Further support for this conclusion in embodied in RSA 125-O:13, I, which provides:

> I. 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. The achievement of this requirement is **contingent** upon obtaining **all necessary permits and approvals from federal, state, and local regulatory agencies** and bodies; however, **all** such regulatory agencies and bodies are **encouraged** to give **due consideration** to the general court's finding that the installation and operation of scrubber technology at Merrimack Station is in the public interest. The owner shall make appropriate initial filings with the department and the public utilities commission, if applicable, within one year of the effective date of this section, and with any other applicable regulatory agency or body in a timely manner.[2] [Emphasis added.]

This provision is strong evidence that the Legislature did not expect PSNH to receive an "automatic pass" on the issue of "public interest." By "encourag[ing]" regulatory bodies to give "due consideration" to the Legislature's finding of "public interest," the Legislature was making it clear that those regulatory bodies were **not** barred from making a related decision. Rather, they were merely required to take into account the Legislature's own finding. Furthermore, it would be fair to infer that the Legislature also contemplated that regulatory bodies

[2] The Commercial Ratepayers simply do not know whether PSNH has timely complied with the final sentence of this provision. If PSNH has not done so, the Commercial Ratepayers specify that failure as a further ground for this Motion for Rehearing.

would take into account the **circumstances** under which the Legislature made its finding — for example, the fact that at the time of the Legislature's finding (2006) the related costs were estimated not to exceed $250 million.

2.5 The Commission erred in concluding that as a result of RSA 125-O:18 it is "**limited** to determining at a **later time** the prudence of the costs of complying with the requirements of RSA 125-O:11-18." No such limitation appears on the face of RSA 125-O:18. Nor may any such limitation be reasonably inferred. *See* ¶2.4, above.

2.6 The Commission erred in concluding that RSA 125-O: 11 and RSA 369-B:3-a conflict, and that RSA 125-O:11, as "the more recent, more specific statute" (Order, at 9) "prevail[s]" (*id.*). RSA 369-B:3-a was enacted in 2003, 3 years earlier than the enactment of RSA 125-O:11. RSA 369-B:3 provides:

> 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. [Emphasis added.]

A. Again, for the reasons stated in 2.4, above, RSA 125-O:11 does **not** bar the Commission from making a determination of public interest.

B. Even apart from those reasons, the upshot of the Commission's decision is that, with respect to the scrubber technology at Merrimack Station, RSA 125-O:11 impliedly repeals RSA 369-B:3-a. It emphatically does not. "In this state the climate for repeal by implication is frosty and inhospitable. The law does not favor repeal by implication if any other reasonable construction may avoid it."

Opinion of the Justices, 107 N.H. 325, 328 (1966) (internal quotation marks omitted). Here, a reasonable construction does avoid repeal by implication; and that reasonable construction is set out in ¶2.4, above. RSA 125-O:11 and RSA 369-B:3-a may be rationally harmonized, and therefore must be. *Associated Press v. State of New Hampshire*, 153 N.H. 120 (2005). RSA 125-O:11 does **not bar** the Commission from making a determination on public interest; it merely "encourage[s]" the Commission to give "due consideration" to the Legislature's finding and, impliedly, the circumstances under which the Legislature made that finding. At the same time, RSA 369-B:3-a **requires** the Commission to make a determination on public interest. This, the Commission has failed to, and now must do. And it must do so after an adjudicative hearing that affords due process to the Commercial Ratepayers and other affected parties.

2.7 The Commercial Ratepayers are aggrieved by the Commission's failure to make a determination on public interest, as required by RSA 369-B:3-a. Any such determination, moreover, should not be confined to the issue of scrubber technology. The Commission should not undertake a fragmented analysis. Rather, in making a determination of public interest under RSA 369-B:3-a, the Commission should also take into account all other pertinent issues bearing on the proposed modification. These issues would include, but not be limited to, anticipated increased costs concerning: (A) compliance obligations under the Clean Air Act (Title V — 42 U.S.C. §7401 et seq.): (B) compliance obligations under the Clean Water Act (NPDES — 33 U.S.C. §1251 et seq.); and (C) reasonable alternatives — in terms of environmental protection, public health, costs, and long-term energy benefits.

2.8 As further grounds for this Motion for Reconsideration, the Commercial

Ratepayers incorporate by reference: (A) the points raised by the Office of the Consumer Advocate in its Memorandum of September 11, 2008; (B) the points raised by the Conservation Law Foundation in its letter to the Commission of September 12, 2008; and (C) the points raised by TransCanada Hydro Northeast Inc. in its Motion for Rehearing and Reconsideration of October 17, 2008.

WHEREFORE, the Commercial Ratepayers respectfully request that the Commission enter and Order:

A. Granting this Motion; and

B. Granting the Commercial Ratepayers such other relief as is just.

Date: October 17, 2008

Respectfully submitted,
STONYFIELD FARM, INC., H & L INSTRUMENTS, LLC, and GREAT AMERICAN DINING, INC.
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CERTIFICATE OF SERVICE

I certify that copies of the foregoing were mailed this date to:

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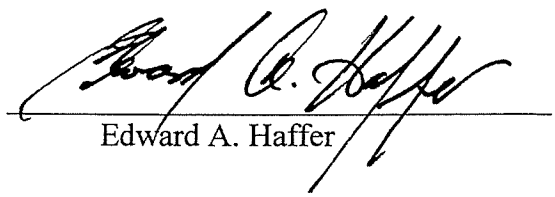

Edward A. Haffer

THE STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

Public Service Company of New Hampshire
Merrimack Station Scrubber Project
Request for Information

Docket No. DE 08-103

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE'S OBJECTION TO MOTIONS FOR REHEARING OF TRANSCANADA HYDRO NORTHEAST, INC. AND CERTAIN COMMERCIAL RATEPAYERS

Pursuant to Rule Puc §203.07(f), Public Service Company of New Hampshire (hereinafter "PSNH" or "the Company") hereby objects to the Motion for Reconsideration and Rehearing filed by TransCanada Hydro Northeast, Inc. (hereinafter "TransCanada") and the Motion for Rehearing filed by Certain Commercial Ratepayers. Neither Motion alleged sufficient good reason for rehearing or reconsideration; therefore they should be denied. RSA 541:3. In support of this Objection, PSNH says the following:

I. Introduction

This docket involves the mandate placed on PSNH by 2006 N.H. Laws Chapter 105 to install scrubber technology at its Merrimack Station. The Commission correctly found in Order No. 24,898, dated September 19, 2008, (the "Order"), that it "lacks the authority to make a determination pursuant to RSA 369-B:3-a as to whether this particular modification is in the public interest." Order, slip op. at 13. The Commission's legal analysis leading to that conclusion was detailed and comprehensive. There is no basis for the Commission to assert authority in a matter where the law plainly does not call for it and where the Commission itself has correctly determined that it lacks such authority.

Virtually all of the grounds for rehearing contained in the two Motions for Rehearing were previously addressed by PSNH in its Memorandum of Law. PSNH incorporates the contents of its Memorandum of Law into this objection to address those matters.

II. PROCEDURAL ISSUES

A. Standing

1. General

It should be noted that one Motion for Rehearing was filed by a merchant generator and the other by certain commercial retail customers of PSNH. However, both groups state that the underlying basis for their Motions is the fact that the actual as-bid cost of the scrubber is higher than initial cost estimates made approximately three years earlier. If the higher price for the scrubber is the underlying reason for the Motions, PSNH cannot understand how both a merchant generator AND customers are harmed. The motivation for TransCanada's interest in this proceeding is suspect, as a higher price for the scrubber would benefit unregulated competitors, not harm them. The Commercial Ratepayers' alleged harm is also illusory, as they have the ability and right to purchase their electricity from a competitive supplier if they deem the costs of this significant emissions reduction project to outweigh the benefits that the Legislature specifically enumerated. *See*, RSA 125-O:11. The ability of a party to participate in a proceeding just because it is interested in doing so was addressed in detail by both the U.S. District Court and the U.S. Court of Appeals for the First Circuit in *PSNH v. Patch*, 173 F.R.D. 17 (D.N.H., 1997) and 136 F.3d 197 (1st Cir, 1998), respectively.

2. TransCanada

TransCanada Hydro Northeast, Inc. is neither a party nor a person directly affected by the decision. RSA 541:3. By letter dated August 22, 2008, the Commission opened this investigation:

> to inquire into the status of PSNH's efforts to install scrubber technology; the costs of such technology; and the effect installation would have on energy service rates (previously referred to as default service charge) for PSNH customers.

Letter from Executive Director, Debra Howland to Robert A. Bersak, August 22, 2008, at 1.

TransCanada is an owner of hydroelectric generating facilities. TransCanada Motion, at ¶ 1. TransCanada does not allege that it is a customer of PSNH, but even if it was, being a

customer does not automatically confer status as a person suffering injury in fact. See discussion below. TransCanada correctly admits that it is not a party to this proceeding, but alleges that it is directly affected by the decision. TransCanada complains that the statute is not fair because PSNH is a regulated utility and TransCanada is not. TransCanada Motion, ¶ 9. In its Motion, TransCanada correctly notes that a requirement for an entity to have standing to file a Motion for Rehearing under RSA 541:3 is that the entity must be "directly affected" by the Order in question. TransCanada fails to meet this requirement. It alleges that it has standing to file a rehearing motion because

> ...TransCanada and other merchant generators in NH have no...assurance that they will be paid for any investments and capital improvements they make to their generating facilities. In other words, unlike PSNH, TransCanada assumes the risk of any poor decisions or cost overruns associated with operating and maintaining its assets.

TransCanada Motion, ¶ 9

The "harm" that TransCanada alleges it may suffer (*i.e.*, being treated differently than a regulated public utility with cost-of-service based generation) was voluntarily accepted by it when it acquired its generation assets. As noted in its Motion, TransCanada purchased its generating assets from USGen New England, Inc. in April of 2005. RSA 369-B:3-a, requiring PSNH to retain, rather than divest, its generating assets, was enacted into law two years earlier, during the 2003 legislative session. 2003 N.H. Laws, Chapter 21. At the time TransCanada agreed to purchase its generating assets, TransCanada knew, or should have known, the state of the law. Nothing has changed that alters the state of the market in New Hampshire that TransCanada voluntarily accepted when it purchased its generating assets. Moreover, TransCanada's ability to do business is not limited solely to New Hampshire; it has the right and ability to sell its generating output throughout New England, as well as to other markets (such as New York and PJM).

TransCanada misstates the public utility regulatory environment under which PSNH operates. PSNH is not immune from disallowance of costs for poor decisions or cost overruns. PSNH is only allowed to recover its actual, prudent and reasonable costs through the default energy service charge, including the prudent costs of complying with RSA 125-O:11, *et seq.* RSA 369-B:3, IV(b)(1)(A); RSA 125-O:18. Those prudent costs are limited by the competitive market for the requisite scrubber technology. PSNH will ultimately have to show that it took reasonable and prudent actions to achieve the best combination of

technology and performance for the price. PSNH is only allowed an opportunity to earn a regulated rate of return, which by definition is not the same as what could be expected in the competitive environment in which TransCanada operates. TransCanada is not directly affected by the Commission's decision because it suffers and will suffer no injury in fact. *Appeal of Richards,* 134 N.H. 148, 155 (1991). TransCanada does not gain standing to file a motion for rehearing merely because it alleges potential harm to others. *Id.,* 134 N.H. at 157, *citing Blanchard v. Railroad*, 86 N.H. 263, 264-266 (1933).

If TransCanada truly is desirous of being treated in a manner identical to PSNH, it has the right to seek public utility status under RSA 362:4-c, II if it so chooses. TransCanada's failure to seek such status under RSA 362:4-c, II shows that its complaint is not about disparate treatment; instead, it is attempting to use this proceeding to manipulate PSNH's continued ownership of low cost generation to facilitate its sale of higher-cost generation to New Hampshire consumers. Thus, TransCanada has no legitimate basis for its claims, and it therefore lacks standing to request rehearing of the Commission's decision.

3. The Commercial Ratepayers

The Commercial Ratepayers also suffer no injury in fact now or in the future. PSNH will be permitted to recover only its prudent investment and reasonable operating costs through its default energy service charge. RSA 125-O:18. The Commercial Ratepayers already have the option of avoiding PSNH's default energy service charge entirely by purchasing energy from a competitive, unregulated energy supplier. There are nearly two dozen competitive suppliers listed on the Commission's web site as of the date of this objection, with all but two indicating a readiness and willingness to serve customers of PSNH. *See,* http://www.powerischoice.com/pages/supplier.html. One of those competitive suppliers, TransCanada Power Marketing Ltd., is an affiliate of TransCanada Hydro Northeast, Inc. (Perhaps the Commercial Ratepayers and TransCanada could meet and resolve their respective alleged harms via a mutually satisfactory energy supply arrangement.)

The Commercial Ratepayers may not gain standing when asserting injury to the public at large without demonstrating a direct injury. *Appeal of Richards, supra* at 157-158 citing *Blanchard v. Railroad*, 86 N.H. 263, 264-266 (1933). As a result of the deregulation of the electric utility industry in New Hampshire and the advent of competitive choice, the situation today is unlike what John Victor Hillberg and the members of the Campaign for Ratepayers

Rights faced in 1991 in *Appeal of Richards*. At that time, those consumers only had one monopoly supplier of electric energy. *Appeal of Richards, supra* at 157-158. Since that decision, rates have been unbundled; if the Commercial Ratepayers are dissatisfied for any reason with PSNH's default energy service, they have the legal right to obtain their electricity from numerous competitive suppliers. Thus, they have a choice as to whether they will share the costs of an environmentally beneficial project which the Legislature has determined is unequivocally in the public interest of the State of New Hampshire. *See,* Commercial Ratepayers' Motion at ¶ 2.2.

"In order to have standing to appeal a decision of an administrative agency denying a motion for rehearing, an appellant must demonstrate that the appellant has suffered or will suffer an injury in fact." *In re Londonderry Neighborhood Coalition*, 145 N.H. 201, 203 (2000), citing to *Appeal of Richards*. Because the harm that the Commercial Ratepayers allege is merely speculative, they lack standing to seek rehearing.

B. Procedural Scope

According to the Commission's Letter from Executive Director, Debra Howland to Robert A. Bersak, dated August 22, 2008, the Commission initiated its inquiry in this matter under RSA 365:5 and 365:19:

> **RSA 365:5 Independent Inquiry.**
> The commission, on its own motion or upon petition of a public utility, may investigate or make inquiry **in a manner to be determined by it** as to any rate charged or proposed or as to any act or thing having been done, or having been omitted or proposed by any public utility; and the commission shall make such inquiry in regard to any rate charged or proposed or to any act or thing having been done or having been omitted or proposed by any such utility in violation of any provision of law or order of the commission. (Emphasis added)
>
> **RSA 365:19 Independent Investigation.**
> In any case in which the commission may hold a hearing it may, before or after such hearing, make such independent investigation **as in its judgment the public good may require**; provided, that, whenever such investigation shall disclose any facts which the commission shall intend to consider in making any decision or order, such facts shall be stated and made a part of the record, and any party whose rights may be affected shall be afforded a reasonable opportunity to be heard with reference thereto or in denial thereof. (Emphasis added)

The Commission is specifically empowered by RSA 365:5 to determine the manner in which it conducts an inquiry. The manner in which the Commission determined to conduct

this inquiry under RSA 365:5 included a request for legal memoranda from both PSNH and the Office of Consumer Advocate ("OCA") on the threshold issue of whether the Commission had the authority to conduct a public interest review under RSA 369-B:3-a given the later enactment of RSA 125-O:11, *et seq*.

The Commission found it "lacks the authority to make a determination pursuant to RSA 369-B:3-a as to whether this particular modification is in the public interest." Order, slip op. at 13. TransCanada and the Commercial Ratepayers have offered no new grounds in their motions beyond the arguments that the OCA supplied in its memorandum concerning the Commission's authority to conduct a public interest review. The Commission conducted and concluded its inquiry under relevant statute in the manner that it determined. No substantive grounds for rehearing have been made. RSA 541:3.

Order No. 24,898 did not "disclose any facts which the commission shall intend to consider in making any decision or order." RSA 365:19. The Order was a legal analysis involving a "question of law...concern[ing] the interpretation of two statutory provisions, namely, RSA 369-B:3-a and RSA 125-0:11." Order, slip op. at 4. No due process rights attach to an investigation under RSA 365:19 under these circumstances. In such an inquiry, the Commission is free to conduct the investigation "as in its judgment the public good may require." Once again, the Commission conducted and concluded its inquiry under relevant statute in the manner as in its judgment the public good may require. No substantive grounds for rehearing have been made. RSA 541:3.

TransCanada complains that the proceeding has risen to the level of a contested case, and that therefore, the Commission must conduct an adjudicatory hearing under RSA 541-A:31. A "'[c]ontested case' means a proceeding in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after notice and an opportunity for hearing." RSA 541A:1, IV. The Commission merely opened an inquiry under RSA 365:5 in a manner it has clear discretion to determine, and found that it has no legal authority to conduct a public interest inquiry into the installation of scrubber technology at Merrimack Station.

PSNH's duty to install scrubber technology was <u>not</u> determined by the agency – that duty is mandated unequivocally by law. As noted in PSNH's Memorandum of Law, "The Scrubber Law, codified at RSA 125-O:11 through 125-O:18, is clear, straightforward, and unambiguous in its mandate." PSNH is required to construct and install the scrubber technology as mandated by RSA 125-O:11, *et seq*. Therefore, no rights, duties, or privileges

were determined by the Commission; as noted in the Order, the Commission has no authority to make such determinations. There is simply no basis under law to request an adjudicatory proceeding for this matter, nor any authority granted to the Commission by the Legislature to hold such a proceeding.

C. The Motion of the Commercial Ratepayers fails to comply with the requirements of RSA 541:4

In its Motion at ¶ 2.8, the Commercial Ratepayers state that they are incorporating the points raised by the OCA, Conservation Law Foundation, and TransCanada as further grounds to support its Motion. Such a general "incorporation by reference" of unidentified issues does not comply with the requirements of RSA 541:4. RSA 541:4 requires that a motion for rehearing "shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable. In *Re Public Service Company of New Hampshire*, 88 NHPUC 52, 54 (2003), the Commission, citing to *Appeal of Coffey*, 144 N.H. 531, 534 (1999), noted, "ambiguous and unfocussed references in a rehearing motion are insufficient to preserve these issues for appeal."

To the extent that the Commercial Ratepayers have failed to "set forth *fully every ground* upon which [they] claimed that the...order was unlawful or unreasonable," it has failed to properly preserve those claims for appeal. *In re Walsh*, 156 N.H. 347, 352 (2007) (emphasis in original). The law does not require either the Commission or PSNH to guess at what other claims the Commercial Ratepayers might be referring to, but which they did not set forth fully in their Motion.

III. Substantive Issues

A. Scope of the Commission's Authority in this Matter

The substance of Order No 24,898 is that the Commission lacks authority over the installation of scrubber technology at Merrimack Station. The Order correctly notes "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." Order, slip op. at 13. The Commission therefore has no authority to act further regarding this matter at this point in time.

In its Motion for Rehearing, TransCanada declared that the Commission has "plenary authority" over PSNH and thereby has the legal ability to exert authority over PSNH

whenever and wherever it deems appropriate. As demonstrated in PSNH's Memorandum filed on September 2, 2008, the Commission's authority is not plenary. The Commission, in Order No. 24,898 and many times before, has acknowledged that its authority is limited to that delegated to it by the Legislature. As noted in PSNH's Legal Memorandum:

> [P]recedents clearly and consistently note that "the regulation of utilities...is the unique province of the legislature"; the Commission "derives its authority from powers delegated by the legislature"; "[t]he...commission is an agency of limited powers and authority"; and, "the authority of the PUC...is limited to that specifically delegated or fairly implied by the legislature and may not be derived from other generalized powers of supervision." These holdings detail the limits of the Commission's authority and form the bases for any discussion concerning the nature and extent of the Commission's authority relative to the Merrimack Station scrubber project.

The Commission essentially performs a legislative function and is granted no other powers than those prescribed by law.

The confusion over the scope of the Commission's authority perhaps comes from the fact that the New Hampshire Supreme Court has noted that in matters relating to ratemaking, the Commission has plenary authority.[1] "The statutory scheme dictates that *the commission's ratemaking power* 'is plenary save in a few specifically excepted instances.'" *Legislative Utility Consumers' Council v. Public Service Co.*, 119 N.H. 332, 341 (1979); *Lorenz v. Stearns*, 85 N.H. 494, 506 (1932) (emphasis added). "Except in narrowly defined instances, *the ratemaking power of the commission* is plenary." *Bacher v. Public Service Co.*, 119 N.H. 356, 357 (1979). The limitation to ratemaking matters for "plenary" authority held by the Commission was perhaps best set forth in *State v. New England Telephone & Telegraph Co.*, 103 N.H. 394, 397 (1961): "*While the authority of the Commission 'does not extend beyond expressed enactment or its fairly implied inferences'* (*Petition of Boston & Maine R. R.*, 82 N.H. 116), as was pointed out in *State v. N. H. Gas & Elec. Co.*, [86 N.H. 16], 30 [(1932)], the authority of the Commission to regulate rates 'is plenary save in a few specifically excepted instances.'" (Emphasis added.)

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[1] Even the Commission's ratemaking powers have specific limits. The New Hampshire Supreme Court was faced with a situation analogous to this case in *Petition of Public Service Company*, 130 N.H. 265 (January 26,1988). The court found that the Commission could not entertain PSNH's request for emergency rate relief under RSA 378:9 because the basis for the emergency was PSNH's construction works in progress. Even with so-called plenary ratemaking powers, the Commission could not employ the earlier enacted emergency rate statute to supersede the later enacted specific anti-CWIP statute. PSNH filed for bankruptcy protection on January 28, 1988.

This docket does not pertain to ratemaking. This docket involves an inquiry into the Commission's authority to weigh-in on actions mandated by law. The repeated references to, and reliance upon, the Commission's "plenary" authority is misplaced. The Commission correctly noted in its decision, "the Commission lacks the authority to make a determination pursuant to RSA 369-B:3-a as to whether this particular modification is in the public interest." Order, slip op. at 13.

B. Separation of Powers

The Commercial Ratepayers' Motion at ¶ 2.3 states that the Commission's "decision violates constitutional principles of separation of power....That is, the Commission's decision has the effect of ascribing to the Legislature a power that properly resides only in the Commission in the exercise of its executive power and/or quasi-judicial powers." This proposition of the Commercial Ratepayers' is just plain wrong. The law could not be clearer. As noted by the New Hampshire Supreme Court,

> The PUC is a creation of the legislature and as such is endowed with ***only*** the powers and authority which are ***expressly granted or fairly implied by statute***. *Petition of Boston & Maine Railroad*, 82 N.H. 116, 116, 129 A. 880, 880 (1925). ***Consequently, the authority of the PUC...is limited to that specifically delegated or fairly implied by the legislature and may not be derived from other generalized powers of supervision.***
>
> *Appeal of Public Service Co., 122 N.H. 1062, 1066 (1982)* (emphases added).

The Commission is granted limited authority by the Legislature, performs a Legislative function, and cannot exceed those powers expressly granted or fairly implied by statute. As noted in PSNH's Memorandum of Law, the United States Supreme Court has held that the regulation of public utilities is a function of the legislative branch of government: "Subject to acknowledged constitutional limitations, the regulation of utilities and the setting of appropriate rates to be charged for public utility products and services is the unique province of the legislature. *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 313 (1989); *The Minnesota Rate Cases*, 230 U.S. 352, 433 (1913); *LUCC v. Public Serv. Co. of N.H.*, 119 N.H. 332, 340 (1979)." It is incontrovertible that the Commission may not contravene express mandates or findings of the Legislature. The Commission takes its direction from the statutes enacted by the Legislature and can exercise no power other than what has been specifically delegated to it or fairly implied there from.

C. If the Legislature had wanted the Commission to review the public interest of the installation of the scrubber, it would have said so.

The scrubber law, RSA 125-0:11, *et seq.*, does not call for the Commission to make any public interest determinations. As noted in PSNH's Memorandum of Law at p. 17:

> In RSA Chapter 362-C, the General Court specifically delegated authority to the Commission to make a determination whether the cited agreement [relating to the bankruptcy reorganization of PSNH] "would be consistent with the public good." RSA 362-C:3. In the Scrubber Law, no such delegation of authority to the Commission is included; the General Court itself has determined that installation of a scrubber "is in the public interest of the citizens of New Hampshire and the customers of the affected sources." Had the Legislature intended to delegate such authority to the Commission, it certainly knew how to do so, as it had done in the past....

The Commission's decision in Order No. 24,898 was correct and consistent with the intent of the Legislature.

IV. Conclusion

The Motions for Rehearing provide no legal basis for the Commission to revise its legal conclusion regarding its limited authority concerning installation of scrubber technology at Merrimack Station. The law's mandate requiring PSNH to install scrubber technology as soon as possible, and the public interest findings made by the Legislature in support of that mandate, are clear and unequivocal. For the reasons set forth in its original decision in Order No. 24,898, the Commission should deny the two Motions for Rehearing.

Respectfully submitted this 23rd day of October, 2008.

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

By: _____

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CERTIFICATE OF SERVICE

I certify that on this date I caused the attached Memorandum of Law to be served pursuant to N.H. Code Admin. Rule Puc 203.11. I have also served Douglas L. Patch, Esq., Edward A. Haffer, Esq., and Mr. Edward M. B. Rolfe who are not on the Commission's service list for this docket.

October 23, 2008

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STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DE 08-103

INVESTIGATION OF PSNH'S INSTALLATION OF
SCRUBBER TECHNOLOGY AT MERRIMACK STATION

Order Denying Motions for Rehearing

ORDER NO. 24,914

November 12, 2008

I. BACKGROUND

This investigation was opened following a quarterly earnings report filed by Northeast Utilities[1] with the Securities and Exchange Commission on August 7, 2008. The earnings report disclosed that the cost of installing a wet flue gas desulphurization system, commonly referred to as scrubber technology, at Public Service Company of New Hampshire's (PSNH's) Merrimack Station had increased from an original estimate of $250 million to $457 million. RSA 125-O:11 et seq. requires PSNH to install the scrubber technology at Merrimack Station in order to reduce mercury emissions.

At the outset, the Commission identified a potential statutory conflict as to the nature and extent of its authority relative to the scrubber project. In particular, RSA 125-O:11, VI, which states that it is in the public interest for PSNH to install scrubber technology at the Merrimack Station, and RSA 369-B:3-a, which states that PSNH may modify its generation assets only if the Commission finds that it is in the public interest to do so, on their face create conflicting mandates. The Commission directed PSNH to file a memorandum of law on the issues by September 12, 2008, and also invited the Office of the Consumer Advocate (OCA) to file a memorandum of law by the same date.

[1]Northeast Utilities is the parent company of Public Service Company of New Hampshire.

2. Commercial Ratepayers

The Commercial Ratepayers assert standing for their request for rehearing based upon rate impacts that they allege will occur as a result of increased costs for the installation of a scrubber at Merrimack Station.

3. Mr. Rolfe

Mr. Rolfe describes his interest in this docket as that of a PSNH ratepayer.

B. Procedural Issues

1. TransCanada

TransCanada claims that the Commission's failure to open the proceeding to all other interested parties deprived it of the opportunity to be heard on issues that may have "ramifications to competitors in the marketplace for electricity." TransCanada's Motion for Rehearing, p.7. Further, TransCanada asserts that the Commission should have commenced a full adjudicative proceeding, pursuant to RSA 541-A:1, IV and 541-A:31, I, and that failure to commence such a proceeding violated due process.

2. Commercial Ratepayers

The Commercial Ratepayers argue that the Commission should have commenced a proceeding under RSA 365:19 which included all potentially interested parties. They claim that failing to allow them to be heard in such a proceeding denies them due process "on issues for which [they] will have to pay significant costs." Commercial Ratepayers' Motion for Rehearing, p.2.

review by the Commission of more than just the terms of the financing. *See*, RSA 369; and *Appeal of Easton*, 125 N.H. 295 (1984).

2. Commercial Ratepayers

The Commercial Ratepayers take the position that the Commission's interpretation of RSA 125-O is in error. They claim that 125-O:11, V and IV were based upon a much lower cost of installation, i.e., $250 million rather than current estimates of $457 million. The Commercial Ratepayers argue that RSA 125-O:13 requires that the Commission determine the public interest under RSA 369-B:3-a, giving due consideration to the Legislature's public interest finding under RSA 125-O:11. According to the Commercial Ratepayers, such due consideration should include consideration of the change in cost estimates for the scrubber installation.

The Commercial Ratepayers argue that by ascribing to the Legislature the power to determine the public interest of the scrubber installation, the Commission has relinquished the proper exercise of its executive powers and/or quasi judicial powers. *See,* N.H. Constitution, Pt. 1, art. 37. *See, e.g., McKay v. N.H. Compensation Appeals Bd.*, 143 N.H. 722 (1999).

The Commercial Ratepayers claim that the Commission erred in finding that its review was limited to a prudence review under RSA 125-O:18 and further erred in finding that RSA 125-O:11 and RSA 369-B:3-a conflict. They argue that these two provisions can be read together to allow a Commission public interest review of the scrubber prior to construction. Moreover, they argue that the Commission's public interest review under RSA 369-B:3-a should consider the costs of future compliance with other environmental laws including the Clean Air Act[2] and the Clean Water Act.[3] Finally, the Commercial Ratepayers argue that the Commission

[2] 42 U.S.C. § 7412(d)
[3] 33 U.S.C. § 1326(b)

TransCanada has not shown that it will suffer any injury in fact. *Appeal of Richards*, 134 N.H. 148, 155 (1991).

2. Commercial Ratepayers

PSNH argues that the Commercial Ratepayers will not suffer any injury for two reasons. First, PSNH will only recover its prudent costs of construction and operation of the scrubber through its default energy charges. Second, the Commercial Ratepayers now have a choice of their electric supplier and therefore may avoid any costs imposed by the scrubber simply by choosing another supplier. PSNH observes that there are numerous suppliers listed on the Commission's website as ready and willing to serve New Hampshire electric customers. As a result, PSNH argues that the Commercial Ratepayers' claims of injury are merely speculative and they lack standing to request a rehearing of the Order. *In re Londonderry Neighborhood Coalition,* 145 N.H. 201, 203 (2000).

B. Procedural Issues

In response to due process claims, PSNH asserts that the Commission is free to determine the manner in which it conducts an inquiry. *See*, RSA 365:5. PSNH argues that since the Commission determined that it did not have the authority to conduct a public interest review under RSA 369-B:3-a, and reached that legal conclusion without the necessity of relying upon any specific facts, the Commission's process was sufficient and appropriate. PSNH points out that the Commission did not determine whether PSNH should install scrubber technology at Merrimack Station, but instead found that RSA 125-O:11-18 mandated the installation. PSNH concludes that by finding it had no authority to consider the public interest of the scrubber

Legislature and are not derived from any other generalized powers of supervision. PSNH claims that it is well established that ratemaking is a legislative function. *See, Duquesne Light Co. v. Barash*, 488 U.S. 299, 313 (1989). PSNH argues that there is no separation of power constraint from the Commission taking its direction from the Legislature. Finally, PSNH takes the position that the Legislature did not direct the Commission to review the scrubber installation and argues that the Commission's legal analysis was correct and consistent with the Legislature's intent.

IV. COMMISSION ANALYSIS

A. Standing

We find that TransCanada, the Commercial Ratepayers and Mr. Rolfe[4] each have stated a sufficient interest in this case to request rehearing pursuant to RSA 541:3. TransCanada may be affected economically by a significant capital investment in PSNH's Merrimack station insofar as it has an impact on TransCanada's ability to compete in the electricity marketplace in New Hampshire. The Commercial Ratepayers and Mr. Rolfe may be affected financially by changes in PSNH's default energy service rate either as customers taking default energy service, or as customers of competitive electric suppliers. The electric supply market in PSNH's service territory is influenced by PSNH's default service rate because that rate is the backstop for all other competitive offerings. If PSNH's default service rate increases, competitive offerings may also increase.

B. Procedural Issues

The parties filing motions for rehearing have claimed that their rights to due process have been denied because we did not commence a full adjudicative proceeding to determine the scope of the Commission's authority with respect to PSNH's installation of scrubber technology at

[4] As explained below, for other reasons we have not considered Mr. Rolfe's motion in reaching our decision.

process may require something more than a filing. *Id.* In this case, however, we are faced with a question of law, not questions of fact. As a result, the motions for rehearing filed in this case, which contain extensive analyses of the statutes at issue, comprise an adequate opportunity to present legal arguments for our consideration, and therefore afford due process. We also observe that, in the event any party ultimately seeks review of our legal conclusion, the process that we have employed has very likely provided the timeliest path to appellate review.

Finally, with respect to PSNH's argument that we should not consider Mr. Rolfe's motion for rehearing as a result of his failure to serve it on other parties, PSNH is correct that Mr. Rolfe did not comply with Puc 203.11(c). Furthermore, as the Commission noted in *Re Connecticut Valley Electric Company,* 88 NHPUC 355 (2003), failure to comply with service requirements constitutes sufficient grounds to determine that a motion for rehearing has not been properly made. While we have not considered Mr. Rolfe's motion as a basis for reaching our decision, we nevertheless observe that his arguments are largely duplicative of various arguments made by TransCanada and the Commercial Ratepayers, which we have considered.

C. Statutory Interpretation

The threshold issue to be determined in this case is the extent of the Commission's authority to determine in advance whether the installation of a scrubber at PSNH's Merrimack Station is in the public interest. The Commission's authority is derived legislatively and therefore this case requires statutory interpretation. 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

Based upon the foregoing, it is hereby

ORDERED, that the motions for rehearing are denied.

By order of the Public Utilities Commission of New Hampshire this twelfth day of November 2008.

Thomas B. Getz
Chairman

Graham J. Morrison (KWS)
Commissioner

Clifton C. Below
Commissioner

Attested by:

Lori A. Davis
Assistant Secretary