

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

**Docket No. DE 11-250**

**PUBLIC SERVICE OF NEW HAMPSHIRE**

**Investigation of Scrubber Costs and Recovery**

**Memorandum of the Conservation Law Foundation**

The Conservation Law Foundation (“CLF”) hereby provides its memorandum in response to the Chair’s request that the parties submit a brief regarding whether Public Service Company of New Hampshire (“PSNH”) has obtained the permits it needs prior to obtaining cost recovery on a temporary basis including Industrial Wastewater Indirect Discharge Permits under the New Hampshire Department of Environmental Services (“NHDES”) regulations. This issue came to light due to PSNH’s inability or unwillingness to respond completely and truthfully to at least three separate data requests and other inquiries seeking such information, including during cross examination during the hearing in this proceeding. As set forth in greater detail below, PSNH’s evasiveness results from the fact that it has not and is apparently unable to demonstrate that the one of the four major components of the wet flue gas desulfurization system (the “Wet FGD System”) at Merrimack Station, specifically, the wastewater treatment system, is used and useful, and thus ripe for cost recovery.

**Background**

As part of discovery in this proceeding, various parties requested information from PSNH to determine whether PSNH has obtained all permits and approvals necessary to operate the Wet

FGD System. Data Request OCA-01, Question 2 (marked as Exhibit 4 at the hearing), stated that,

The achievement of this requirement is contingent upon obtaining all necessary permits and approvals from federal, state and local regulatory agencies and bodies[.]” Please provide the status of all necessary permits and approvals.”

As was clear from the answers of PSNH witness Smagula during the hearing, the response to OCA-01, Question 2 does not list a permit authorizing the disposal of wastewater from the wet FGD. Transcript page 63, line 16-20. Moreover, during the hearing, Mr. Smagula testified that “[t]here are no required permits necessary for disposal of wastewater from the scrubber.”

Transcript page 64, line 1-2.

Mr. Smagula’s testimony is misleading at best, if not outright untrue. While evasive in responding to cross examination by CLF, PSNH ultimately conceded that it is using publicly owned treatment works (“POTWs”) to dispose of its wastewater (Transcript page 136, lines 14-15) after it was not able to obtain a permit from EPA authorizing it to discharge treated wastewater into the Merrimack River (Transcript page 135). During the hearing, Mr. Smagula testified that wastewater is being shipped to municipal facilities in Hooksett, Allenstown, Lowell Massachusetts and the NHDES regional facility in Franklin. (Transcript at page 144).

Because PSNH did not disclose or otherwise provide materials regarding the permits it needs to dispose of the wastewater at these POTWs in the reports filed with the Commission (RSA 378:27) and because PSNH had not produced any evidence that it had obtained “all necessary permits and approvals from federal, state and local regulatory bodies and agencies” to operate the wet FGD system (RSA 125-O:13), PSNH failed to demonstrate that it is entitled to rate recovery, temporary or otherwise. See, RSA 125-O:18( allowing cost recovery for

“complying with the requirements of this subdivision” which includes the need to obtain all necessary permits); see also, Transcript page 160-166.

During the hearing, the Chair reserved as Exhibit 10 the response to a record request seeking an answer from PSNH as to whether it has sought, and secondly obtained a permit under the NH DES regulations addressing Industrial Wastewater Discharge Requests. (Transcript page 166). PSNH responded to the Data Request on March 15, 2012 and included no less than seven specific documents from NHDES or various municipalities that were entitled either “permit” or “approval” authorizing the disposal of industrial wastewater from the Wet FGD at various POTWs. Mr. Smagula and PSNH took great pains to prevent the disclosure of these permits -in response to data requests from the parties, at the technical session of January 23, 2012 and during the hearing on Temporary rates in this proceeding– during which Mr. Smagula repeatedly referred to PSNH’s wastewater arrangements as “agreements” rather than “permits” or “approvals.” See, e.g., Transcript page 63, line 16-24; page 64, line 1-17 (explaining that wastewater is being disposed of pursuant to “agreements” and not “permits” and that “agreements” for disposal of Wet FGD wastewater are “not a permit that is required for the operation of this facility”). In addition, Mr. Smagula and counsel for PSNH repeatedly asserted that its response to OCA-01, Question 2 was complete and truthful even though it did not disclose that PSNH had applied for and obtained at least seven permits from state and local regulatory bodies to dispose of Wet FGD wastewater. Transcript page 67, line 12-19.

What is most notable about Exhibit 10 is not the extent to which PSNH had assiduously avoided acknowledging the need for permits to dispose of Wet FGD System wastewater, rather it is the fact that PSNH is actively disposing of wastewater “with two out-of-state privately operated wastewater disposal facilities.” As set forth in greater detail below, PSNH’s lack of

candor in this matter raises a reasonable ground for questioning the statements in reports filed with the Commission regarding whether the Wet FGD System is “used and useful” and also whether the public interest requires the Commission to prescribe temporary rates during the duration of this proceeding. RSA 378:27.

### **Argument**

- A. PSNH has not demonstrated that the wastewater treatment facility built as part of the Wet FGD System is currently “used and useful.”

The general rate-making principle is that expenditures for an item may be included in a public utility's rate base only when the item is “used and useful” in providing service.” *Smart Grid Policy*, 128 FERC 61060, 61348 n.132 (July 16, 2009) (citing *NEPCO Municipal Rate Committee v. FERC*, 668 F.2d 1327, 1333 (D.C. Cir. 1981), cert. denied, 457 U.S. 1117 (1982)); see also *In re Public Service Co. of New Hampshire*, 114 B.R. 820, 846 (D.N.H. 1990) (“Whether an item will be permitted to be included in rate base will depend on whether and to what extent expenditures were “prudently incurred” and whether the resulting asset is “used and useful” in providing service to the public.”). While these statements about the used and useful standard indicate a somewhat narrow policy, the Commission has considerable discretion in deciding whether a rate base charge qualifies as used and useful, and the used and useful determination is fact-based. See *Appeal of Conservation Law Found. of New England, Inc.*, 127 N.H. 606, 637 (1986) (“Here again, there is no simple formulation that describes the standard of usefulness.”); *Legislative Util. Consumers' Council v. Pub. Serv. Co.*, 119 N.H. 332, 343-44 (1979) (“‘Used and useful’ is not a rigid concept; rather, it is an elastic one. . . . Allowing the Commission flexibility in applying the ‘used and useful’ test serves to promote the public interest . . . by allowing an energy policy that can achieve an adequate and reliable supply of

electric power.”) (citing *Pub. Serv. Comm'n v. Fed. Power Comm'n*, 511 F.2d 338, 353 (D.C. Cir. 1975); *Baltimore Gas & Elec. Co. v. McQuaid*, 220 Md. 373, 379 (Md. 1959)).

The new Wet FGD System wastewater treatment facility is one of four large project “islands” that make up the Wet FGD System. Exhibit 2, page 3. The facility was designed to treat Wet FGD System wastewater prior to it being discharged into the Merrimack River. Transcript page 135. Because PSNH was unable to obtain authorization from EPA for its initial plan, PSNH began to install additional equipment at its wastewater treatment facility “to reduce the waste stream volume.” Exhibit 2 page 5; Transcript page 135. In fact, the additional equipment and modifications being made to the wastewater treatment facility will not only reduce the discharge, but will eliminate the discharge. Exhibit 7 (“To process wastewater effluent going forward, additional treatment equipment is being installed to reduce the quantity of wastewater significantly resulting in one that does not need to discharge.”); see also Transcript page 124-129. In effect, PSNH is in the midst of modifying the wastewater treatment system into a zero liquid discharge (“ZLD”) system, one of the first in the country to be deployed.

PSNH’s progress in modifying the wastewater treatment facility is regularly addressed in quarterly reports prepared for the Commission by Jacobs Consultancy and included in the record in Docket DE 08-103. More recently, staff has proposed including them in this docket in accordance with Commission Order 25332, dated February 6, 2012.

It is apparent that PSNH is experiencing some difficulty in tying the new ZLD system into the already constructed Wet FGD wastewater treatment facility. The June 2011 Jacobs Consultancy Report (at page 66-67) states that work on the engineering, construction and procurement of the ZLD upgrade began in February 2011 when a PO was opened with Aquatech. The Jacobs Consultancy July 2011 Quarterly Report (dated September 20, 2011)(at page 9), and

the October 2011 Quarterly Report (dated December 22, 2011)(at page 9) both reference “coordination” and “interface issues” with the “base Wastewater Treatment System” being experience by PSNH. In effect, this strongly suggests that PSNH is in the midst of re-engineering and reconstructing the Wet FGD System wastewater treatment facility due to its failure to obtain a NPDES permit revision from EPA. Issues related to the prudence of PSNH’s activities with regard to Wet FGD System wastewater disposal will be addressed during the permanent rate portion of this proceeding. PSNH, however, is seeking to recover in temporary rates, the cost of the new existing wastewater treatment facility (Transcript page 144, line 17-24; page 145, line 1-14) which is now being extensively modified, and the cost of disposing of trucking and disposing of wastewater at private out-of-state facilities necessitated during times that the Wet FGD System wastewater treatment facility is not operational due to the ongoing reconstruction and re-engineering of the facility. Transcript page 122, line 16-24.

Based on recently provided Exhibit 10, it appears PSNH has obtained permits necessary to dispose of Wet FGD System wastewater at nearby POTWs. In order to lawfully dispose of such wastewater, it must conform to the water pollutant constituents and concentrations set forth in PSNH’s Industrial Discharge Request Application and in accordance with the Industrial Pretreatment Standards set forth in 40 CFR Part 423.16, which are either referenced or delineated in the various municipal permits PSNH has obtained, and in its application to NHDES for Industrial Wastewater Discharge Approval (which pages were not provided by PSNH). Having apparently obtained permits to dispose of wastewater at various nearby POTWs, PSNH should explain why it is necessary to ship wastewater for treatment and disposal at private, out-of-state facilities, the amount of wastewater being disposed of at such facilities and the cost. Upon information and belief, the only justification for such costs is that the wastewater fails to comply

with the industrial pretreatment standards set forth in 40 CFR Part 423.16 and in PSNH's permit applications for disposing of wastewater at POTWs.

### **Conclusion**

PSNH repeatedly concealed the arrangements it has made to dispose of wastewater after concluding that its original facility for such purposes was inadequate, and is concealing the details of its trucking wastewater out of state to private disposal facilities. It continues to withhold information regarding the quantity of wastewater being disposed at various facilities and the cost. Yet PSNH is seeking temporary rates to cover both the cost of the wastewater treatment facility and the disposal of wastewater at out of state at private facilities. These developments raise serious questions regarding the extent to which the Wet FGD System wastewater treatment facility is being used (i.e., is used and useful) and whether the public interest is served by providing recovery in temporary rates for such costs. Although these issues will be addressed during the permanent rate phase of this proceeding in accordance with Order No. 25,334, the foregoing facts and analysis provide reasonable grounds for questioning the figures in the reports filed by PSNH with the Commission under RSA 378:27.

Respectfully submitted,

CONSERVATION LAW FOUNDATION

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CERTIFICATE OF SERVICE

I hereby certify that on the 20<sup>th</sup> day of March 2012, a copy of the foregoing Memorandum was sent electronically or by First Class Mail to the service list.



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