

**THE STATE OF NEW HAMPSHIRE**

**SUPREME COURT**

No. \_\_\_\_\_

**APPEAL OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE**

**FROM ORDERS OF THE PUBLIC UTILITIES COMMISSION**

**APPEAL FROM ADMINISTRATIVE ORDERS BY PETITION**  
**OR ALTERNATIVELY,**  
**PETITION FOR ORIGINAL JURISDICTION**

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September 25, 2013

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**Parties**

Public Service Company of New Hampshire (“PSNH”) appeals the orders of the Public Utilities Commission (“PUC”) listed below. The other parties to PUC Docket DE 11-250 are TransCanada Power Marketing, Ltd. and TransCanada Hydro Northeast, Inc., the Office of the Consumer Advocate, the Conservation Law Foundation, the Sierra Club, the New England Power Generators Association, and James and Sandy Dannis. Pursuant to Rule 10(a), all counsel of record are included in the Appendix filed herewith (cited herein as “A.”) at 1.

**PUC Orders Subject to this Appeal**

25,445 – Order regarding TransCanada’s motions to compel (December 24, 2012, the “Christmas Eve Order”), A.2;

25,506 – Order on Motion for Rehearing of Order 25,445 (May 9, 2013, the “First Rehearing Order”), A.83;

25,546 – Order on Second Motion for Rehearing (July 15, 2013, the “Second Rehearing Order”), A.125; and

25,565 – Order on Motion for Rehearing of Order 25,546 (August 27, 2013, the “Third Rehearing Order”), A.241.

### **Questions Presented for Review**

1. Are the actions of the PUC, an agency of limited jurisdiction with only those powers granted by the Legislature, *ultra vires* as a result of its ruling, contrary to RSA Ch. 125-O, that it has authority and jurisdiction to determine whether Public Service Company of New Hampshire (“PSNH”) should have installed a wet flue gas desulphurization system (“scrubber”) at its Merrimack Station?
2. Do the statutory findings in RSA 125-O:11 preclude the PUC from making conflicting findings under RSA 369-B:3-a?
3. Has the PUC violated PSNH’s due process rights under Part 1, Article 12, Part 1, Article 15 and Part 2, Article 5 of the New Hampshire Constitution, or the 14th Amendment of the U.S. Constitution, as a result of agency actions and decisions which exceed the Commission’s authority, fail to observe the law, demonstrate an abuse of discretion, and which are arbitrary, unreasonable, or capricious?

### **Statutes and Constitutional Provisions**

RSA 125-O:11; RSA 125-O:13; RSA 125-O:17; RSA 125-O:18; RSA 369-B:3-a; New Hampshire Constitution Part I, Article 12; Part I, Article 15; Part II, Article 5; and the United States Constitution Amendment XIV. The pertinent text of these statutory and constitutional provisions is set out at A.262.

### **Statement of the Case**

This is an appeal from a series of orders issued by the PUC concerning the installation of a scrubber<sup>1</sup> at PSNH’s Merrimack Station as mandated by the Legislature’s Mercury Emissions Program, RSA 125-O:11-18 (the “scrubber law”). The first of these orders, the Christmas Eve Order (No. 25,445, A.2), was issued on December 24, 2012, and the First, Second, and Third Rehearing Orders (A.83, A.125 and A.241) were respectively issued on May 9, 2013, July 15, 2013, and August 27, 2013 (collectively, the “Orders”). Each of these Orders was issued in PUC Docket No. DE 11-250, “Investigation of Scrubber Costs and Cost Recovery.”

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<sup>1</sup> See RSA 125-O:12,V.

In 2006, the Legislature ordered that the scrubber be installed at Merrimack Station. From 2008 through 2012, the PUC issued multiple decisions expressly finding that PSNH was *required* to build the scrubber; that the PUC had *no jurisdiction* to review the construction or the overall costs of the scrubber; and that specific Legislative findings that installation of the scrubber was in the public interest of the citizens of New Hampshire, and the customers of PSNH in particular, *prevented the PUC* from making contrary findings. In 2009 and again in 2011, this Court described PSNH's obligation to build the scrubber as a mandate.

Now, nearly two years after the scrubber was completed, the PUC has concluded that installation of the scrubber was *not* mandated, that it *has* the authority to determine whether PSNH failed to exercise prudent management discretion by building the scrubber, that it *does have* the authority to determine whether PSNH can recover any of the costs of doing so, even if the project was otherwise prudently managed, and thus has the authority to make public interest findings under RSA 369-B:3-a contrary to those of the Legislature in RSA 125-O:11. The PUC's actions are so arbitrary and capricious that they deny PSNH due process of law and have turned this matter into a "political football."<sup>2</sup> Accordingly, PSNH seeks this Court's guidance on whether these arbitrary and untimely reversals exceed the PUC's jurisdiction.

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<sup>2</sup> "Due process is a flexible standard in the administrative law context. We expect and will require meticulous compliance with its mandates, however, in the case of the PUC because as long ago as 1929 this court recognized that the PUC was created by the legislature as a 'state tribunal, imposing upon it important judicial duties.' *Parker-Young Co. v. State*, 83 N.H. 551, 556, 145 A. 786, 789 (1929). When it is not acting in a rule-making capacity but in an adjudicative one, see 3 K. DAVIS, \*\*513 *supra* § 14:5, at 24-28, the procedural posture of the PUC is different. 'If private rights are affected by the board's decision the decision is a judicial one.' *Petition of Boston & Maine Corp.*, 109 N.H. 324, 327, 251 A.2d 332, 336 (1969) (decision of PUC, closing railroad grade crossing, was judicial). ... If this agency is to serve a judicial function, it will have to comport itself accordingly." *Appeal of Pub. Serv. Co. of New Hampshire*, 122 N.H. 1062, 1074 (1982). "By such a standard, we avoid turning utility matters into a political football, as often can occur in the twelve States where public utility commissioners are elected." *Id.* at 1075.

## **Docket DE 11-250 and the Scrubber Law**

The PUC established Docket No. DE 11-250 to determine, pursuant to RSA 125-O:18, the costs PSNH is entitled to recover through rates for complying with the statutory mandate in RSA 125-O:11-18 to install and have operational by July, 2013, scrubber technology at Merrimack Station. That section, entitled “Cost Recovery,” provides in part, that “[i]f the owner [of Merrimack Station] 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.” (emphasis added.) Based on its reading of Section 18, the PUC now concludes that construction of the scrubber was “discretionary,” that PSNH could have avoided that mandate, and that it has jurisdiction to decide whether PSNH acted “prudently” by complying with the mandate at all.

RSA 125-O:11-18 codified “AN ACT relative to the reduction of mercury emissions,” a law mandating installation and operation of scrubber technology at Merrimack Station not later than July 2013.<sup>3</sup> Laws 2006, Ch. 105. RSA 125-O:11 includes, among others, the following Legislative findings:

- 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.
- 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.

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<sup>3</sup> RSA 125-O:13. See *Appeal of Stonyfield Farm*, 159 N.H. 227, 229 (2009); *Appeal of Campaign for Ratepayers' Rights*, 162 N.H. 245, 247 (2011).

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.

These findings not only mandated the installation of the scrubber, they also resolved the issue of whether its installation at Merrimack Station was in the public interest generally, and in the economic interest of PSNH's customers in particular.

As an environmental statute (codified in Title X, "Public Health" of the RSAs), the Department of Environmental Services ("DES") has primary authority over implementation and compliance with this law.<sup>4</sup> The Legislature delegated to the PUC only one duty under the scrubber law – to determine the manner of recovery through PSNH's rates of all prudent costs of complying with the requirements of the scrubber law. RSA 125-O:18, A.267.

Because the law made clear that time was of the essence, PSNH began compliance with the law immediately upon its enactment.<sup>5</sup> DES issued the requisite construction permit on March 9, 2009. PSNH placed the scrubber into commercial service in September 2011 (19 months before the mandated compliance date), thereby successfully meeting the scrubber law's mandate for reducing emissions of mercury, sulfur oxides, and other pollutants as soon as possible. The final cost was approximately \$422 million.

Throughout the scrubber's construction, PSNH faced constant litigation. Proceedings challenging nearly every aspect of the project took place at the PUC, the New Hampshire Site Evaluation Committee, the Air Resources Council, the federal Environmental Protection

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<sup>4</sup> RSA 125-O:2, IV. *See also* amicus brief to this Court in 2009 in *Appeal of Stonyfield Farm*, 159 N.H. 227 (2009), by the Attorney General on behalf of the State of New Hampshire at 11 ("By law, DES is the agency charged with implementing the regulatory aspects of the multi-pollutant program.") A copy of the brief is included in the Appendix at A.392.

<sup>5</sup> Order No. 24,898 at 10 (A.285) ("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.").

Agency, and this Court. Significantly, during construction, the Legislature exercised its retained jurisdiction and also reconsidered the scrubber law.<sup>6</sup> During those challenges, every forum affirmed the conclusion that the Legislature had mandated that PSNH install the scrubber.<sup>7</sup>

### **The PUC's Prior Orders**

In 2008, the PUC opened investigatory docket DE 08-103 to determine whether it had any jurisdiction to pre-approve construction of the scrubber.<sup>8</sup> Between September 2008 and

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<sup>6</sup> During the 2009 session, after the estimated scrubber price of \$457 million was known, the Legislature considered the higher cost and decided not to change the law's mandate for installation of scrubber technology. *See* New Hampshire General Court, 2009, S.B. 152 "relative to an investigation by the PUC to determine whether the scrubber installation at the Merrimack station is in the public interest of retail consumers" (deemed inexpedient to legislate); H.B. 496 "establishing a limit on the amount of cost recovery for emissions reduction equipment installed at Merrimack Station" (also deemed inexpedient to legislate).

<sup>7</sup> N.H. Supreme Court: "*The installation of such a [scrubber] system was mandated by the legislature in 2006.*" *In re Campaign for Ratepayers' Rights*, 162 N.H. 245, 247 (2011) (emphasis added) (internal citation omitted); "[T]he legislation specifically requires PSNH to install 'the best known commercially available technology . . . at Merrimack Station,' which the New Hampshire Department of Environmental Services (DES) has determined is scrubber technology." *Appeal of Stonyfield Farm*, 159 N.H. 227, 228 (2009) (emphasis added) (internal citation omitted); "According to the legislature, installing the scrubber technology 'is in the public interest of the citizens of New Hampshire and the customers of [PSNH].'" *Id.* at 229. N.H. DES: Air Resources Council: "*As a matter of law, PSNH is required to install and operate the Scrubber system.*" State of N.H., Air Resources Council, Decision & Order on Appeals, Nos. 09-10, -11, Findings of Facts & Conclusions of Law, No. 107 (Sept. 20, 2010) (emphasis added). N.H. Site Evaluation Committee: "*The statute mandates significant reductions (80%) in mercury emissions at coal burning electric power plants in the state. The statute also requires the installation of a wet flue gas desulfurization system (Scrubber Project) otherwise known as a 'Scrubber' at the Merrimack Station facility no later than the year 2013.*" State of N.H., Site Evaluation Committee, No. 2009-01, Order Denying Motion For Declaratory Ruling, \*2 (Aug. 10, 2009) (emphases added). "In addition, because *the Legislature specifically required the installation of the scrubber*, it could not be found that the project is inconsistent with the state's energy policy as established by the Legislature." State of N.H., Site Evaluation Committee, No. 2009-01, Order Denying Motion For Declaratory Ruling, \*11 (Aug. 10, 2009) (emphasis added). "The equipment is being installed to meet an environmental mandate, and a state and federal mandate to comply with certain requirements for air pollution emissions." State of N.H., Site Evaluation Committee, No. 2009-01, Public Meeting and Hearing Day 3,57 (Statement of Harry Stewart, Director, DES- Water Division); U.S. Environmental Protection Agency: "In addition, it should be understood that any emissions increases would be limited by applicable air pollution standards, and that *the State of New Hampshire has mandated that Merrimack Station install new scrubbers* to substantially reduce the facility's air pollutant emissions." U.S. EPA, Clean Water Act NPDES Permitting Determinations for the Thermal Discharge and Cooling Water Intake Structures at Merrimack Station in Bow, NH, NPDES Permit No. NH 0001465 (Sep. 30, 2011, at 158) (emphasis added). Even staunch scrubber opponents (who originally supported scrubber installation) note the mandate contained in the scrubber law. Conservation Law Foundation: "*A 2006 New Hampshire law required owner PSNH to install a scrubber at the plant before 2013 to reduce mercury emissions.*" *Conservation Matters: The Journal of the Conservation Law Foundation*, Spring 2010, at 6 ) (emphasis added). Sierra Club: "*The NH Legislature has mandated (RSA 125-O et seq.) the installation of the wet flu gas desulphurization system ("scrubber") at the Merrimack Station electric generating facility in Bow, NH.*" Upper Valley Sierra Club website at <http://uppervalleysierraclub.org/legislation/205-new-hampshire/207-public-service-new-hampshire>) (emphasis added).

<sup>8</sup> Docket DE 08-103 was the subject of the appeal to this Court in *Appeal of Stonyfield Farm*, 159 N.H. 227 (2009).

December 2012, the PUC repeatedly held that that it had no jurisdiction to pre-approve installation of the scrubber or over its overall costs under RSA 369-B:3-a, which gives the PUC general jurisdiction to consider whether modification of PSNH's assets is in "the public interest of retail customers of PSNH." More specifically, those orders concluded that: (1) the Legislature mandated that PSNH construct the scrubber and removed any management prerogative by PSNH to choose a different course of action; (2) time was of the essence in the completion of the scrubber; (3) the Legislature did not set any limit on the overall cost of the scrubber, retained jurisdiction to review those costs, and divested the PUC of any jurisdiction in that area; and (4) the Legislature's public interest findings in RSA 125-O:11 superseded the public interest findings in RSA 369-B:3-a so that the PUC had no authority to revisit those findings. See Order No. 24,898, September 19, 2008, "Decision Concerning Statutory Authority (A.276); Order No. 24, 914, November 12, 2008, "Order Denying Motions for Rehearing"(A.290); and Order No. 24,979, June 19, 2009, "Order Defining Scope of Proceeding" (A.305).

### **The PUC's 2012-2013 Orders**

Despite the PUC's prior decisions between 2008-2012, in its Christmas Eve Order, the PUC arbitrarily and inexplicably changed course. This reversal occurred *after* PSNH had complied with the scrubber law, had invested the necessary \$422 million, and well over a year after PSNH had completed the project and placed the scrubber on-line, thereby providing environmental benefits for the public good. Disregarding its knowledge since 2008 that the estimated cost of the scrubber was \$457 million, as well as the Legislature's decision (with full knowledge of the estimated cost) *not* to change the scrubber law's mandate in 2009, the PUC now determined that it had jurisdiction to review PSNH's installation of the scrubber.

Relying on RSA 125-O:17, the so-called “Variance” provision of the law, the PUC found that PSNH was *not* mandated to construct the scrubber and had discretion whether to pursue the installation of scrubber technology by seeking what amounts to a waiver of the law. The PUC stated, “when the Scrubber cost projections rose to nearly double the cost presumed by the Legislature when enacting the statute, PSNH, citing economic infeasibility, could have requested a variance from the 80% reduction requirement, and could have sought a lesser level of reduction, even down to no reduction at Merrimack Station, while pursuing a request to retire Merrimack Station pursuant to RSA 369-B:3-a.” Order No. 25,445 at 25 (A.26). The PUC also ruled in the Christmas Eve Order that it now had jurisdiction to determine whether PSNH should have installed the scrubber and thus whether it may recover the costs of doing so. Each of these findings was directly contrary to the PUC’s prior orders and contrary to the express provisions of Section 17, which allowed for variances only where the timetable for installing the scrubber could not be met or where, following construction, the 80 percent level of mercury reduction could not be met.

In an addendum (“Add.”) attached to this Appeal, PSNH demonstrates the extent to which the Christmas Eve Order and the subsequent three rehearing orders are inconsistent with the PUC’s prior orders concerning: (1) whether PSNH was mandated to construct the scrubber (and whether PSNH had any discretion to exercise in fulfilling that mandate); (2) whether the PUC had jurisdiction to review the overall costs of installation; and (3) whether the PUC had any authority to contradict the Legislature’s public interest findings in RSA 125-O:11.

PSNH timely sought rehearing of the Christmas Eve Order. On May 9, 2013, the PUC issued the First Rehearing Order, granting rehearing in part. A.83. The PUC held:

On rehearing, PSNH points out that we previously opined that “[n]owhere 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.” Order No. 24,898 at 12. Only after PSNH raised this issue in its motion did we recognize the apparent contradiction, and we grant limited rehearing on this point. After reconsideration, we will not disturb the prior Commission ruling in Order No. 24,898. To the extent that Order No. 25,445 interpreted the variance provision, RSA 125-O:17, to allow retirement of Merrimack Station rather than installation of the scrubber technology as a method of meeting the emissions reduction requirements, that portion of Order No. 25,445 alone is reversed.

Order No. 25,506 at 17, A.99. But despite this reversal, the PUC continued: “We do not go so far, however, as to conclude that PSNH had no management discretion in this matter.” *Id.*

Other parties then sought rehearing of the May, 2013, order on rehearing. On July 15, 2013, the PUC issued the Second Rehearing Order, “Order Denying Second Motion for Rehearing and Clarifying Scope.” A.125. In that Order, the PUC said:

Order No. 24,898, which was issued on September 18, 2009, confirmed for PSNH that retirement of Merrimack Station was not recognized as a method of compliance with the mercury reduction requirements of RSA 125-O. It is simply not possible, more than three and a half years later, to revisit that issue. Therefore, we continue to find that our interpretation of RSA 125-O:17 and the inability of PSNH to use retirement as a means of obtaining a variance from the requirements of RSA 125-O in the Rehearing Order is the correct interpretation. As a result, we will deny the Motion for Rehearing. This does not mean, however, that the possibility of retirement of Merrimack Station is immaterial to our analysis.<sup>9</sup>

Order No. 25, 546 at 6-7, A.130-131. Thus, while denying rehearing on the RSA 125-O:17 variance issue for the second time, the Second Rehearing Order nonetheless disregarded the PUC’s earlier orders to the contrary and found that PSNH *had discretion* regarding whether to pursue the installation of the scrubber, stating, “The scope of our prudence review is determined by the management discretion that PSNH had under existing law and, as a result, must be more

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<sup>9</sup> The PUC’s dates were wrong. The referenced Order (No. 24,898) was actually issued in 2008, more than *four* and a half years earlier.

comprehensive than a simple inquiry into whether PSNH did an adequate job of managing the funds expended to construct the Scrubber.” *Id.* at 7, A.131.

In addition, after devoting nearly a year to an effort to assert jurisdiction under RSA 125-O:17, the Commission abandoned that effort and in July, 2013, decreed, for the first time, that it had jurisdiction to review the overall cost of the scrubber (as opposed to reviewing whether the individual costs of construction were prudently incurred) and to decide whether PSNH should have built it at all, not under RSA 125-O:17, but under RSA 125-O:18 (“Section 18, Cost Recovery”). The basis for this untimely assertion of jurisdiction was that the “Cost Recovery” section of the scrubber law “makes clear that PSNH retained the management discretion to divest itself of Merrimack Station, if appropriate. Likewise, under RSA 369-B:3-a, PSNH retained the management discretion to retire Merrimack Station in advance of divestiture.” *Id.* at 8, A.132. This was the first time in the five years of PUC proceedings that the PUC even suggested, let alone stated, that Section 18 gave it jurisdiction to overturn the scrubber law’s entire, integrated, non-severable, statutory scheme by considering whether PSNH could have avoided installation by seeking the PUC’s permission to retire or sell the plant.

Hence, in its July 2013 Order No. 25,546, the PUC simultaneously:

- Ratified its September, 2008, Order No. 24,898, “Decision Concerning Statutory Authority,” issued more than four and a half years earlier, in which it had concluded that PSNH was mandated to install the scrubber, that the Legislature viewed time to be of the essence, that the Legislature intended to retain for itself duties that it would otherwise expect the Commission to fulfill, that the PUC had no jurisdiction to contradict Legislative findings, and that 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;
- Ratified that retirement of Merrimack Station by PSNH would *not* comply with the mercury reduction requirements of the scrubber law;

- Decided, contrary to Order No. 24,898 (which it had just ratified), as well as contrary to the other orders cited herein, that pursuant to RSA 125-O:18, PSNH *had discretion* to install the scrubber, and that the law *did not* include a mandate requiring PSNH to install and have operational scrubber technology;
- Decided that despite the fact that retirement of Merrimack Station by PSNH would *not* comply with the requirement of the scrubber law, PSNH retained the management discretion *to retire* Merrimack Station; and,
- Decided, for the first time, that Section 18 resurrected the PUC’s jurisdiction under RSA 369-B:3-a to consider whether construction of the scrubber was in the public interests, jurisdiction the PUC had disavowed since September 2008.

PSNH timely sought rehearing of the Second Rehearing Order. On August 27, 2013, the Commission issued the Third Rehearing Order, “Order Denying Third Motion for Rehearing,” A.241. Denying rehearing, the PUC stated, “PSNH’s arguments demonstrate a misunderstanding of RSA 125-O:11-18 and our prior orders, including the Second Rehearing Order [the July 2013 Order].” Order No. 25,565 at 6, A.246. The PUC refused to consider PSNH’s argument that the PUC’s reliance on Section 18 was both unexpected and unfounded. Instead, it contended that its claim of jurisdiction under Section 18 was foreshadowed by a reference to a different statute – RSA 125-O:17 – in Order No. 24,914, issued nearly five years earlier in November, 2008. Incredibly, the PUC claimed (in 2013) that some (but not all) of its citations to RSA 125-O:17 in Order No. 24,914 from 2008 were typos and that PSNH should have known that the PUC had actually intended (at times) to reference RSA 125-O:18. In an effort to justify this claimed “elaboration and refinement” of its “reading of the statutes...from the outset” (Order No. 25,565 at 19, A.259), the PUC stated:

We [the PUC] were conscious that we had incorrectly referenced RSA 125-O:17 as the section relevant to prudence in Order 24,914 when we quoted that order on pages 8-9 of the Second Rehearing Order. This was the reason for our use of the Latin “Sic.” in our quotations of Order 24,914.

Order No. 25,565 at 7, fn. 2, A.247.<sup>10</sup>

Thus, despite years of unambiguously holding that the scrubber law *required* PSNH to install the scrubber (Add. at 23-25), and PSNH's investment backed reliance on those decisions, the August Order departed from the PUC's prior determinations and held that "[f]rom the outset of proceedings before this Commission, we have characterized PSNH as having made a decision to proceed with the Scrubber project." Order No. 25,565 at 8, A.248.<sup>11</sup> Relying on one sentence in Section 18, (see below at 17) the PUC reasoned that "as a matter of law, RSA 369-B:3-a explicitly permitted PSNH to divest its remaining generation assets, including Merrimack Station, beginning May 1, 2006, and no section of the Scrubber Law, RSA 125-O:11-18, altered PSNH's ability to do so." *Id.* In making this assertion, the PUC not only ignored its earlier orders discussing the interplay between the scrubber law and RSA 369-B:3-a, it also ignored the scrubber law's statutory findings that preclude the PUC from making the findings called for in RSA 369-B:3-a. Add. at 28-30. The PUC had previously been quite clear that its authority under RSA 369-B:3-a was limited by the Legislature's public interest findings in RSA 125-O:11. In Order No. 24,898 (the Order ratified by the PUC in July, 2013) the PUC held "we cannot harmonize RSA 369-B:3-a and RSA 125-O:11. If we proceed under RSA 369-B:3-a ... then we

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<sup>10</sup> The context and discussion in the referenced portion of Order No. 24,914 was wholly unrelated to Section 18. The discussion related to Section 17 and the PUC's response to a moving party's claim that the PUC had jurisdiction under Section 17. ("We do, however, deem it useful to address TransCanada's argument that the Legislature, by providing PSNH the opportunity of seeking, *pursuant to RSA 125-O:17*, a variance from the mercury emissions reductions requirements, was somehow signaling that the Commission has the authority under certain circumstances to determine, in advance, whether the scrubber project is in the public interest.") Order No. 24,914 at 13, A.302 (emphasis added). The PUC does not explain how PSNH could have known that almost five years earlier, the PUC had made not one, but a pair of typographical mistakes, particularly when the PUC had never once mentioned that PSNH should be considering divestiture or that divestiture proceedings would revive jurisdiction the PUC denied existed five years earlier. In addition, the current PUC Commissioners (Commissioners Ignatius and Harrington) were not on the Commission when the prior order was issued (Commissioners Getz, Below and Morrison). Thus, it is unclear how they would have known the intent of the prior reference. Finally, if the PUC was "conscious that [it] had" made those typos, it is unclear why it waited nearly five years to inform PSNH of those errors, during which time the scrubber was designed, procured, installed, and placed into service.

<sup>11</sup> "It is well established that...any agency's 'unexplained departure from prior agency determinations' is inherently arbitrary and capricious in violation of APA § 706(2)(A). *American Federation of Government Employees, Local 2761 v. FLRA*, 866 F.2d 1443, 1446 (D.C.Cir.,1989).

would be effectively ignoring the Legislature's finding that the installation of the scrubber is in the public interest." Order No. 24,898 at 9, A.284.

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. If we concluded otherwise, we would be nullifying the Legislature's public interest finding and rendering it meaningless.

*Id.* (internal footnote omitted.) Now, it does conclude otherwise, effectively relying on RSA 369-B:3-a to reverse the later enacted RSA 125-O:11 and reinvesting the PUC with jurisdiction and PSNH with management discretion, nearly five years after it first held otherwise. As an agency of limited jurisdiction having only that authority delegated to it by the Legislature, and insofar as the Legislature had already determined that the scrubber was in the public interest, the PUC could *not* have made its own contrary and inconsistent findings under RSA 369-B:3-a as to these conditions precedent to any authority by PSNH management to retire or divest Merrimack Station.

This untimely exercise of jurisdiction well over a year *after* PSNH completed its investment of \$422 million and successfully placed the scrubber in-service exceeds the PUC's authority. The PUC's determination that PSNH both can and cannot retire Merrimack Station; that the PUC did not have but now does have jurisdiction over the project; that it cannot and can make public interest determinations contrary to those included in the law; and that PSNH should be prescient regarding typographical errors in orders issued five years in the past, all demonstrate arbitrary and capricious decision-making in violation of PSNH's due process rights under the

New Hampshire and United States Constitutions and would lead to an unconstitutional taking of property under both Constitutions.<sup>12</sup> Accordingly, PSNH requests that the Court accept this appeal in order to review the PUC's exercise of jurisdiction now, in order to prevent an unnecessary and costly hearing before the PUC concerning matters over which the PUC has no jurisdiction.<sup>13</sup>

**Jurisdictional Basis for the Appeal: RSA 378:31; RSA 541:6;  
Rule 10(1)(g), or Alternatively Rule 11**

This appeal is filed pursuant to RSA 378:31 and RSA 541:6, which provides for an "appeal by petition." Rule 10 of this Court's Rules provides for appeal from "an order of an administrative agency" without specifying whether the order must be final. However, RSA 541:2 provides that "any order or decision of the commission may be the subject of a motion for rehearing or of an appeal... ." By contrast, Rule 3 of this Court's Rules defines the term "appeal from administrative agency by petition" as "appellate review of a party's grounds for asserting that an administrative agency's final order or decision on the merits is unlawful or unreasonable."

The Orders from which PSNH appeals are interlocutory to the extent that they define only the breadth of the PUC's authority under the scrubber law and the scope of the hearings in its Docket DE 11-250 without deciding whether PSNH will ultimately be denied some or all of

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<sup>12</sup> The majority report of the House Committee on Science, Technology and Energy, in recommending that the H.B. 496 in 2009, "A bill establishes (sic) a limit on the amount of cost recovery for the emissions reduction equipment installed at the Merrimack Station" be deemed inexpedient to legislate stated: "In 2006, the legislature had required the plant owner to proceed with construction without placing a specific limit on the cost. The majority believes that to choose now to place an absolute cap on the cost at this time would pose significant problems... [I]t is the role of the PUC... to decide the amount of funds to be recovered *after the completion of the project* in a legal process known as prudence review.... [T]he majority believes that *placing a cap on cost recovery at this point would be arbitrary and unconstitutional as it could amount to a taking.*" House Record No. 25, March 24, 2009, p. 899 (emphases added).

<sup>13</sup> Consistent with RSA 125-O:18, the hearing before the PUC should be limited to a determination of whether PSNH prudently managed the means and methods of construction and the expenditures necessary to comply with the mandate to install the scrubber.

the overall costs of constructing the scrubber, even if otherwise prudently incurred. However, the Orders are final since they determine that the PUC has jurisdiction to decide that question. Conducting discovery and a lengthy hearing on issues over which the PUC has no jurisdiction would be expensive, inefficient and wasteful. PSNH therefore respectfully requests that the Court accept this appeal under Rule 10 either as an appeal governed by RSA Ch. 541 or as a petition for certiorari.

Alternatively, PSNH respectfully requests that the Court accept the appeal as a petition for original jurisdiction under Rule 11 of this Court's Rules. As shown below, the PUC has asserted jurisdiction based on an erroneous and illogical reading of one sentence in RSA 125-O:18, and then only after repeated rulings to the contrary over a five-year period. The PUC's reversals (or alleged clarifications) of its prior orders, and the fact that within the last year it has asserted jurisdiction under one statute only to then reverse itself (twice) and assert jurisdiction under another, demonstrates that the PUC itself is unclear about its jurisdiction and that it has decided a question of substance – its jurisdiction – contrary to the Legislature's narrow grant of jurisdiction, and contrary to the decisions of this Court holding that the PUC is an agency of limited jurisdiction empowered to address only those subjects delegated to it by the Legislature. *Appeal of Public Service Company of New Hampshire*, 122 N.H. 1062, 1066 (1982). In addition, this Court has described PSNH's obligation to build the scrubber as a mandate, which is also contrary to the PUC's current orders. *Appeal of Stonyfield Farm*, 159 N.H. 227, 229 (2009); *In re Campaign for Ratepayers' Rights*, 162 N.H. 245 (2011). The Commission's reversals, and its strained attempt to justify them, also demonstrate that it has so far departed from the accepted and usual course of quasi-judicial proceedings in its adjudicative proceeding involving significant (\$422 million) property rights as to call for the exercise of this Court's supervision.

This Court has already considered two appeals relating to this project and an appeal regarding the PUC's authority in this docket appears inevitable. In *In re Campaign for Ratepayers' Rights*, this Court held that questions implicating the tribunal's subject matter jurisdiction may be raised at any time. 162 N.H. at 250. Absent direction from this Court as to the proper jurisdiction of the PUC, substantial resources may be expended unnecessarily by all parties to this Docket. Moreover, the extended administrative proceedings (which may be avoided by this Court's near-term decisions) are causing additional financing charges to accrue at a rate of over \$5 million per year – costs that may ultimately be borne by ratepayers. Accordingly, should the Court determine that an appeal does not lie under Rule 10, PSNH requests that the Court exercise its original jurisdiction to clarify this important issue of New Hampshire law.

**Substantial Basis for Difference of Opinion and  
Protection from Substantial and Irreparable Injury**

There is a substantial basis for a difference of opinion on the PUC's interpretation of Section 18 and the scope of its jurisdiction. First, standing alone, the PUC's change of direction from its prior orders demonstrates that a substantial basis exists for a difference of opinion on the interpretation of RSA 125-O:11-18 requiring the guidance of this Court.<sup>14</sup>

Second, the New Hampshire Attorney General disagrees with the PUC's interpretation of its powers. Speaking to this issue in an *amicus* brief to this Court in 2009 in *Appeal of Stonyfield Farm*, 159 N.H. 227 (2009), the Attorney General stated as follows:

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<sup>14</sup> As noted earlier, the scrubber law is an environmental statute and DES is charged with its administration. Therefore, the PUC's interpretations of that law are not entitled to any deference. *Appeal of Morrissey*, 70 A.3d 465, 470 (N.H. 2013). As pure questions of law, this Court's intervention is necessary. *See Frost v. Commsr. N.H. Banking Dept.*, 163 N.H. 365, 371 (2013) ("Where [ , however, ] the issue or issues . . . involve purely questions of law, the matter will not be referred to an agency." 73 C.J.S. Public Administrative Law and Procedure § 77, at 270 (2004).")

Under the PUC's decisions, RSA 369-B:3-a remains effective with respect to all PSNH divestitures, retirements, and modification related to any of its fossil fuel and hydroelectric generation assets *other than the installation of scrubber technology at Merrimack Station as described in RSA 125-O:13*. These requirements would not apply to the Scrubber project because it is the one modification where the legislature has already made a definitive finding of public benefit. In other words, RSA 369-B:3-a establishes a general rule with many applications and the provisions of RSA 125-O establish a narrow exception to this general rule.

Brief of the Attorney General as Amicus Curiae at 9, A.404 (emphasis added). The Attorney General was correct. The PUC has no authority to overturn the Legislature's express statutory findings that installation of the scrubber was in the public interest of "the customers of the affected sources" and that this installation will reduce mercury emissions "without jeopardizing electric reliability and with reasonable costs to consumers." RSA 125-O:11, V and VI, A.263. The PUC has already found the "customers of affected sources" (referenced in RSA 125-O:11) and the "retail customers of PSNH" (referenced in RSA 369-B:3-a) are the same groups, and that the Legislature's public interest findings in RSA 125-O:11 "subsumes any finding [it] might make under RSA 369-B:3-a." Order No. 24,898 at 8, A.283. Now, it changes its mind.

Third, the PUC's decision misconstrues Section 18. RSA 125-O:18, entitled "Cost Recovery" provides as follows:

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 PUC. 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.

A.267. The PUC bases its July and August orders on the third sentence of Section 18, which it interprets as granting PSNH the authority to seek divestiture of Merrimack Station at any time since in the PUC's view, the sentence contains no temporal restriction. Order No. 25,546 at 8,

A.132. Because it concludes that PSNH could have sought divestiture, the PUC also concludes

that this sentence “places in the PUC’s hands the mechanism for cost recovery for compliance” where divestiture is sought – or to deny cost recovery if it is not sought. *Id.* Put simply, the PUC claims that this sentence gives it the authority to make a finding under RSA 369-B:3-a that it would have been in the economic interests of PSNH’s ratepayers not to build the scrubber or to halt construction, despite the Legislature’s express contrary findings in RSA 125-O:11 that installation of the scrubber was in the public interest and would be accomplished at reasonable costs to consumers.

The PUC thus converts Section 18’s mandate for the recovery of prudent costs incurred in complying with the scrubber law into a vehicle for invalidating that mandate and for restricting the recovery of those costs. A more logical and straightforward reading of Section 18 (and one that is consistent with the mandates contained throughout the statute to complete construction), is that the first sentence *requires recovery of the costs of complying with the mandate* subject only to prudence review, while the second and third provide the *means for recovering* those costs, with the third providing the mechanism for recovering those costs in a particular circumstance, namely, *if at some point in the future and after the Scrubber is completed*, PSNH divests its assets when *it has not fully recovered that cost*. The first sentence of Section 18 is a directive to the PUC by the Legislature that PSNH *shall* be allowed to recover the mandated cost of constructing a specific project, in a specific way, in a specific time frame, in order to fulfill the public interest.<sup>15</sup> Rather than diminishing this mandate, the second and third sentences simply contrast the manner of recovery of the costs of compliance in one situation “[d]uring ownership and operation” (second sentence) with a different situation namely, “in the

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<sup>15</sup> *City of Rochester v. Corpening*, 153 N.H. 571, 574 (2006) (“The general rule of statutory construction is that “the word ‘may’ makes enforcement of a statute permissive and that the word ‘shall’ requires mandatory enforcement.” *Town of Nottingham v. Harvey*, 120 N.H. 889, 895 (1980)). Lest there be any doubt that the scrubber law imposed a mandate on PSNH, the Legislature used the word “shall” 60 times!

event of divestiture” by the owner (third sentence). Nothing in the Section can be read to give the PUC the authority to deny PSNH the recovery of the costs of complying with the law – *i.e.*, of the installation of the Scrubber. Reading the third sentence to undermine the entire integrated and non-severable<sup>16</sup> mandates of the Multiple Pollution Reduction Program in Chapter 125-O is contrary to the plain language of Section 18.<sup>17</sup>

Fourth, the PUC’s interpretation of Section 18 creates impractical, illogical and absurd results.<sup>18</sup> PSNH was legally prevented from seeking divestiture during construction under RSA 369-B:3-a because of the public interest findings in RSA 125-O:11. As a prerequisite to divestiture, the PUC would have had to determine that divestiture of Merrimack Station was in the “economic interest of retail customers of PSNH.” RSA 369-B:3-a, A.268. In that situation, the PUC would be faced with two problems. As the PUC has previously found, the Legislature retained jurisdiction to review the cost of the Scrubber during construction and the PUC’s decision conflicts with that retention.<sup>19</sup> Add. at 26-27. In addition, the Legislature had already made statutory findings that are controlling and that are directly contrary to what the PUC would be required to find under RSA 369-B:3-a. In an effort to avoid this problem, the PUC now asserts, contrary to its prior orders, that the Legislature’s public interest findings in RSA 125-

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<sup>16</sup> RSA 125-O:10. *See also* RSA 125-O:1, V; RSA 125-O:11, VIII.

<sup>17</sup> If the Legislature had intended to allow the PUC to consider the prudence of PSNH going forward with Scrubber installation (as opposed to the costs of compliance), it could have said so. Instead, the Legislature *rejected* such a change in law during its 2009 session.

<sup>18</sup> The statute required the construction of a complex multi-million dollar project before July 1, 2013, created incentives for early compliance, and imposed administrative and criminal penalties – up to and including felony conviction – for violations of its provisions. Given those timetables and the severity of the penalties for non-compliance, no one other than the 2006 owner (PSNH) could possibly have complied with the mandate, nor was it likely that any entity would be willing to take on the costs, risks, and potential criminal penalties by purchasing Merrimack Station prior to the successful completion of the scrubber project.

<sup>19</sup> In 2009, when the Legislature exercised its retained authority to consider the Scrubber Law’s mandate, and refused to amend, modify or repeal it, the estimated scrubber cost was \$457 million. The final cost was approximately \$422, or \$35 million less than the cost considered by the Legislature. Yet the PUC now claims authority to second-guess the Legislature’s decision to allow the scrubber construction to proceed if it finds that the cost was too high.

O:11 are different from the required findings in RSA 369-B:3-a in the case of divestiture, while admitting that “[t]his concept requires explanation.” Order 25,565 at 14, A.254.<sup>20</sup> It certainly does. Try as the PUC might to distinguish these public interest findings in the case of divestiture, the Legislature made no such distinction. The PUC has no authority to repeal those findings.

When it decided that it had no jurisdiction under RSA 369-B:3-a in 2008, the PUC said that its authority was:

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.

Order No. 24,898 at 13, A.288. If the PUC thought it had any authority over the construction of the Scrubber, it could have, and should have, put PSNH on notice of that fact before the scrubber was completed; instead, it expressly ruled to the contrary.<sup>21</sup> Having failed to do so while PSNH spent \$422 million in reliance on its prior orders the PUC cannot, consistent with due process, do so now.

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<sup>20</sup> This Court has previously concluded that under RSA 369-B:3-a, the “public interest” is a broader standard than “economic interests.” *Appeal of Pinetree Power*, 152 N.H. 92, 97 (2005).

<sup>21</sup> On April 11, 2006, during a hearing before the Senate Committee on Energy and Economic Development, Robert Scott, then Director of the Air Division DES (and now a PUC Commissioner who has recused himself from the PUC’s scrubber proceedings) provided the following testimony in support of House Bill 1673-FN, the bill that was later codified as RSA 125-O:11 through RSA 125-O:18:

It’s also been raised, *why are we being prescriptive?* . . . And I have to take some personal responsibility for that; I advocated for that myself. Why would I do that? Everybody, including myself I think agrees that we want to see mercury reductions, a high level of mercury reductions sooner than later. . . . *What we wanted to avoid is extra time being given, another year, two years of a selection process, what’s the best technology, the owner’s having to go to PUC to convince them that this is the best technology, and then perhaps having some other company come in and say, “Well, I had this new alchemy and I can do something even better.” That’s all fine and dandy, but what we’re concerned about is we don’t want to have this as a method where we’re constantly delaying the installation. By calling out scrubber technology in the bill, we’re signaling PSNH from the word go to start to engineer, design and build scrubber technology right away.*

(Emphases added).

This appeal offers an opportunity for this Court to address issues of importance in the administration of justice – the matter of the PUC’s jurisdiction and the PUC’s compliance with the due process rights of PSNH – and to avoid unnecessarily lengthy, wasteful hearings.<sup>22</sup>

For all these reasons, PSNH requests that this Court accept this case.

**Statement Concerning Issues Raised**

Each issue raised in this appeal was presented to the PUC by PSNH in motions for rehearing, or objections to motions for rehearing beginning with Order No. 25,445.

Respectfully submitted,

**PUBLIC SERVICE COMPANY OF  
NEW HAMPSHIRE**

By its attorneys,  
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Dated: September 25, 2013

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<sup>22</sup> *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110, 23 S.Ct. 33, 39, 47 L.Ed. 90 (1902); *Dart v. United States*, 848 F.2d 217 (D.C. Cir. 1988); *Griffith v. FLRA*, 842 F.2d 487 (D.C.Cir.1988).

**Certification**

I certify that on September 25, 2013, I served the foregoing Notice of Appeal by email and first class mail to all counsel of record as listed in this appeal, as well as to the administrative agency from which this appeal is taken, and to the Office of the Attorney General for the State of New Hampshire, with a copy of the accompanying Appendix by first class mail to each counsel or interested party.

A handwritten signature in black ink that reads "Wilbur A. Glahn, III". The signature is written in a cursive style with a large, stylized initial "W".

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Wilbur A. Glahn, III

## Addendum

### **Was PSNH Mandated to Construct the Scrubber or Was it a Matter of Management Discretion?**

#### **Current PUC Orders**

- “While we agree with PSNH’s statement that RSA 125-O:17 should not be used to defeat the overall purpose of the statute, . . . we disagree that PSNH had no opportunity or obligation to consider a variance in the face of a significant escalation in cost.” Christmas Eve Order (No. 25,445) at 25, A.26.
- “The scope of our prudence review is determined by the management discretion that PSNH had under existing law” Second Rehearing Order (No. 25,546) at 7; A.31.
- “While, under RSA 125-O, PSNH had no discretion, and continues to have no discretion, whether to install and operate the Scrubber if it remains the owner and operator of Merrimack Station, the Scrubber Law does not allow PSNH to act irrationally with ratepayer funds. RSA 125-O:18 makes clear that PSNH retained the management discretion to divest itself of Merrimack Station, if appropriate.” Order No. 25,546, at 8; A.132.
- “[U]nder RSA 369-B:3-a, PSNH retained the management discretion to retire Merrimack Station in advance of divestiture. Consequently, *we have never construed RSA 125-O to mandate that PSNH continue with the Scrubber’s installation* if continuing would require PSNH to engage in poor or imprudent management of its generation fleet.” Order No. 25,546 at 8; A.132.<sup>1</sup>
- “PSNH’s prudent costs of complying with RSA 125-O must be judged in accordance with the management options available to it at the times it made its decisions to proceed with and to continue installation.” Order No. 25,546 at 9; A.133.
- “*From the outset of proceedings before this Commission, we have characterized PSNH as having made a decision to proceed with the Scrubber project.*” Third Rehearing Order (No. 25,565) at 8; A.248.
- “Although PSNH has chosen to continue to own and operate Merrimack Station, RSA 125-O:11-18 did not compel PSNH to do so from 2006 through July 2013.” Order No. 25,565 at 8; A.248.
- “Our clarification that PSNH retained the management discretion and duty of prudence to consider divestiture of Merrimack Station under RSA 125-O:18 is not inconsistent with

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<sup>1</sup> Unless otherwise indicated, all emphases are added.

our prior construction of RSA 125-O and RSA 369-B:3-a.” Order No. 25,565 at 12; A.252.

### **Prior PUC Orders**

August 22, 2008:

- “***RSA 125-O:11***, enacted in 2006, ***requires PSNH to install new scrubber technology at Merrimack Station by July 1, 2013*** that will achieve at least an 80 percent reduction in mercury emissions.” Secretarial Letter initiating Docket No. DE 08-103, “Investigation of PSNH Installation of Scrubber Technology at Merrimack Station.” A.274.

September 19, 2008:

- “***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.” Order No. 24,898 at 1 (emphasis added), A.276.
- “***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.” Order No. 24,898 at 7, A.282.
- “In this instance the Legislature has made the public interest determination and ***required*** the owner of Merrimack Station, viz. PSNH to install and have operational scrubber technology...no later than July 1, 2013. Accordingly, based on our reading of RSA 125 as a whole, we find that the Legislature did not intend that PSNH be required to seek PUC approval pursuant to RSA 369-B:3-a for a modification the Legislature has required and found to be in the public interest. Thus, we conclude that an RSA 369-B:3-a proceeding has been obviated by the Legislature’s findings in RSA 125-O:11.” Order No. 24,898 at 10, A.285 (bold faced print in original.)
- “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.” Order No. 24,898 at 12; A.287.

November 12, 2008:

- “***RSA 125-O:11 et seq. requires PSNH to install the scrubber technology at Merrimack Station*** in order to reduce mercury emissions.” Order No. 24,914 at 1; A.290.

June 19, 2009:

- “[T]he scrubber installation at Merrimack Station does not reflect a utility management choice among a range of options. Instead, installation of scrubber technology at the Merrimack Station is a legislative mandate, with a fixed deadline. See RSA 125-O:11, 1,11; RSA 125-O:13, I. *The Legislature, not PSNH, made the choice, required PSNH to use a particular pollution control technology at Merrimack Station*, and found that installation is ‘in the public interest of the citizens of New Hampshire and the customers of the affected sources.’ RSA 125-O:11, VI.” Order No. 24,979 at 15; A.319.
- “Further distinguishing this case is the fact that the Legislature pre-approved constructing a particular scrubber technology at Merrimack Station by finding it to be in the public interest and *thereby removing that consideration from the Commission’s jurisdiction*. See *Investigation of PSNH’s Installation of Scrubber Technology at Merrimack Station*, Order No. 24,898 at 13; *Investigation of PSNH’s Installation of Scrubber Technology at Merrimack Station*, Order No. 24,914 at 12. As a result, the regulatory paradigm that applies to the Merrimack scrubber installation is fundamentally different from the regulatory paradigm that applied to Seabrook.” Order No. 24,979 at 15; A.319.

February 6, 2012:

- “RSA 125-O:11 et seq. *requires PSNH to install the Scrubber at Merrimack Station* to reduce air pollution, including mercury emissions.” Order No. 25,332 at 1; A.324.

April 10, 2012:

- “Pursuant to the express language in RSA 125-O:11, *the Legislature required that PSNH install the Scrubber* by July 1, 2013 because, according to DES, it was the best known commercially available technology for the reduction of mercury. RSA 125-O:11, I and II.” Order No. 25,346 at 21; A.366.
- “*RSA 125-O:11 requires PSNH to build the Scrubber.*” Order No. 25,346 at 23; A.368.

## Does the PUC have Jurisdiction to Review the Overall Costs of the Scrubber?

### Current PUC Orders

- “[W]hen the Scrubber cost projections rose to nearly double the cost presumed by the Legislature when enacting the statute, PSNH, citing economic infeasibility, could have requested a variance from the 80% reduction requirement, and could have sought a lesser level of reduction, even down to no reduction at Merrimack Station, while pursuing a request to retire Merrimack Station pursuant to RSA 369-B:3-a.” Christmas Eve Order, No. 25,445 at 25, A.26.
- “Accordingly, we will allow discovery of PSNH’s economic analyses of the Scrubber installation up to the point it was substantially complete in September 2011. Such economic analyses might include estimated costs of construction and operation, as well as income projected from the sale of power, capacity, emissions credits and any other source. Costs might also include environmental compliance costs and estimated fuel costs for Merrimack Station and PSNH’s other coal burning plants.” Order No. 25,445 at 26, A.27.
- “At hearing the evidence may demonstrate that market and regulatory circumstances in place at times of critical decision-making justified continued operation of Merrimack Station, under the standards of RSA 369-b:3-a and justified the installation of the Scrubber technology....[T]he evidence may demonstrate that market and regulatory circumstances at the time the decisions were being made did not justify . . . the expenses of the Scrubber.” Second Rehearing Order, No. 25,546 at 10; A.134.
- “The Legislature did not address PSNH’s degree of care in deciding to proceed with the Scrubber project through to its completion.” Third Rehearing Order, No. 25,565 at 20, A.260.

### Prior PUC Orders

September 19, 2008

- “***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 review mechanism. Therefore we must accede to its findings.” Order No. 24,898 at 12-13; A.287-288.

- “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.” Order No. 24,898 at 13, A.288.

November 12, 2008:

- “The Legislature could have provided express cost limitations on the scrubber installation but it did not.” Order No. 24,914 at 12, A.301
- “Under the Commercial Ratepayers’ theory, the public interest finding would be restricted to a specific level of costs and the Commission would effectively be required to second guess the Legislature’s public interest finding at any dollar level above \$250 million. Hence, for all practical purposes, the Legislature’s public interest finding would be so limited as to be negated, and the RSA 369-B:3-a approach would be resurrected to require Commission permission before PSNH could act. ***We find such a constrained reading of the statute to be incompatible with the generally expansive statutory scheme adopted by the Legislature to bring about the installation of scrubber technology.***” Order No. 24,914 at 12, fn. 6, A.301.

June 19, 2009:

- ***The Legislature has also retained oversight of the scrubber installation*** including periodic reports on its cost. *See* RSA 125-O:13, IX. Furthermore, the Commission has only those powers delegated to it by the Legislature, *see Appeal of Public Service Co. of N.H.*, 122 N.H. at 1066, and, ***by statute, the Commission’s regulatory oversight here is limited to after-the-fact determinations of whether costs incurred by PSNH in complying with RSA 125-O:11-18 are prudent. RSA 125-O: 18.*** If the Commission determines such costs are prudent, PSNH may recover those costs through its default service charge. RSA 125-O:18.” Order No. 24,979 at 15-16, A.319-320.

## **Do the Legislature's Public Interest Findings in RSA 125-O:11-18 Preclude a Contrary Finding under RSA 369-B:3-a Prior to Completion of the Scrubber so that the PUC Has No Jurisdiction to Counter Those Findings?**

### **Current PUC Orders**

- “As we stated in Order No. 24,914 at 13-14, ‘RSA 125-O:17 [sic]..provide[s] a basis for the Commission to consider, in the context of later prudence review, arguments as to whether PSNH had been prudent in proceeding with installation of scrubber technology in light of increased cost estimates and additional costs from other reasonably foreseeable regulatory requirements. . . .’ Second Rehearing Order, No. 25,546 at 8-9, A.132-133. (“sic” reference in original.)
- “Applying the same analysis to the public interest in divestiture as we applied in Order Nos. 24,898 and 24,979 to the public interest in a modification of Merrimack Station, we concluded [in Order No. 25,546] that the public interest findings in RSA 125-O:11 do not preclude an inquiry under RSA 369-B:3-a into the public interest of a decision by PSNH to divest itself of Merrimack Station or to retire that Station prior to divestiture.” Third Rehearing Order, No. 25,565 at 13-14, A.253-254.

### **Prior PUC Orders**

September 19, 2008

- “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 PUC’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.” Order No. 24,898 at 13, A.288.
- “The last sentence of this provision [Section 18] 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.” Order No. 24,898 at 12, A.287.

- ***“The Commission lacks the authority to make a determination pursuant to RSA 369-B:3-a as to whether this particular modification [the Scrubber] is in the public interest.”*** Order No. 24,898 at 13. [T]he “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 PUC might make under RSA 369-B:3-a.*** Order 24,898 at 8, A.283.
- “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.*** If we concluded otherwise, we would be nullifying the Legislature’s public interest finding and rendering it meaningless.” Order 24,898 at 9, A.284. (Internal footnote deleted).
- ***“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.”*** Order 24,898 at 10, A.285.
- “Finally, RSA 125-O:13, IX directs PSNH to report annually to the legislative oversight committee on electric utility restructuring the 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.” Order No. 24,898 at 11, A.286.
- “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 to under RSA 369-B:3-a to determine whether it is in the public interest for PSNH to modify Merrimack Station.” Order No. 24,914 at 12, A.301.
- “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.***” Order No. 24,898 at 13, A.288.

November 12, 2008:

- “Given the Legislature’s specific finding in 2006 that the installation of scrubber technology at the Merrimack Station is in the public interest, the statute’s rigorous timelines and incentives for early completion, and the statute’s requirement of annual progress reports to the Legislature, the PUC found that the Legislature did not intend that the PUC undertake a separate review pursuant to RSA 369-B:3-a.” Order No. 24,914 at 2, A.291
- “Under the Commercial Ratepayers’ theory, the Legislature’s public interest finding would be restricted to a specific level of costs and *the Commission would effectively be required to second guess the Legislature’s public interest finding at any dollar level above \$250 million. Hence, for all practical purposes, the Legislature’s public interest finding would be so limited as to be negated*, and the RSA 369-B:3-a approach would be resurrected to require Commission permission before PSNH could act. *We find such a constrained reading of the statute to be incompatible with the generally expansive statutory scheme adopted by the Legislature to bring about the installation of scrubber technology.*” Order No. 24,914, at 12, fn 6, A.301.