

STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

Docket No. DE 11-250

Public Service Company of New Hampshire

Investigation of Merrimack Station Scrubber Project and Cost Recovery

MOTION OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
TO STRIKE TESTIMONY OF MICHAEL E. HACHEY RELATING TO EFFORTS TO
SUPPORT OR BLOCK LEGISLATION RELATING TO THE SCRUBBER

Public Service Company of New Hampshire (“PSNH” or the “Company”), in accordance with Rule Puc 203.07, hereby moves to strike portions of the pre-filed testimony of Michael E. Hachey (“Hachey”) submitted by TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast, Inc. (collectively, “TransCanada”). Throughout his testimony, Mr. Hachey refers to what he describes as PSNH’s motivation in supporting the original legislation that became RSA 125-O:11-18 (the “Scrubber Law”) or to oppose bills pending before the Legislature in 2009 and deemed “inexpedient to legislate.” PSNH moves to strike this testimony because the Commission has ruled that any such testimony is irrelevant in this docket

Mr. Hachey’s Testimony

Mr. Hachey is the Vice President of Regulatory Affairs and Compliance at TransCanada. TransCanada is a direct competitor of PSNH and its intervention in this matter appears to be solely for the purpose of protecting its competitive market by denying PSNH the recovery of certain costs.¹ Although he does not have a law degree, he purports to opine not only on the meaning of RSA 125-O:11-18, but on PSNH’s alleged motivation in allegedly supporting the

¹ See Hachey at 5/9-21. PSNH has consistently contended that TransCanada has no standing in this proceeding, a position it will continue to assert before the Commission and in the Supreme Court, if necessary.

2006 House Bill (HB 1673) that became the Scrubber Law, or opposing proposed bills submitted to the Legislature in 2009 that were subsequently deemed “inexpedient to legislate.” Hachey

28/23-29/5.² Statements or proposed submissions to this effect include the following:

- Material that Mr. Hachey contends explains “what PSNH was telling officials about the legislation.” 4/20-22 and attachment 3.
- That former PSNH CEO Gary Long “took credit for ‘spearheading’ and ‘crafting’ the scrubber law, so clearly PSNH played a major role in drafting and then supporting the enactment of the law.” 6/15-17.
- “It is not as if PSNH had no role in the development and passage of the law, which its argument about the scrubber being a mandate suggests; in fact, PSNH by its own admission had a major role in the creation of its ‘mandate.’” 6/17-20.³
- “PSNH understood and was well aware that the Legislature was relying on it to provide updated and accurate information.” 7/14-15.
- PSNH “essentially withheld critical information about the commodity prices that would be required for the project to ‘break even’ and create customer benefits” from the Commission. 12/21-23.
- “PSNH appears to have withheld from Staff and the OCA critical information about the 15 year history of the price spread between gas and oil.” 13/2-11.
- PSNH did not put certain information concerning the “price spread” in the filing it made with the PUC in September 2008. 13/12-15.
- “I saw no indication that PSNH ever told the NH PUC at this time [September 2008] at this time or at any time subsequently that the basis for their economic analysis was flawed or outdated.” 19/3-5.
- “In my view, the president and COO of PSNH fully understood the shortcomings of the analysis by his personnel, yet recommended proceeding with construction of the scrubber

² All references to Hachey’s pre-filed testimony will be to the page and line number. For example, page 28 line 23 will be cited as “28/23.”

³ While it is not particularly relevant to this Motion, Hachey states that “In my opinion it is absurd to suggest, as PSNH has throughout this docket, that RSA 125-O stands for the proposition that PSNH was required to build the Scrubber at any cost.” 7/7-9. Hachey cites no reference in the docket for this proposition. Nor could he. PSNH has never taken that position. Rather, as this Commission found in Order No. 24,898 in Docket DE 08-103, the Legislature placed no cost limit on the obligation to install the Scrubber. Thus, PSNH has contended only that it was the Legislature that was required to make a decision regarding a cost that was “too high,” not the PUC, and certainly not TransCanada.

despite the high likelihood that it would not result in customer benefits.” 22/21-24.

- PSNH “could have agreed to study whether proceeding with the project still made sense (for example, this could have included supporting rather than actively opposing SB 152, the Janeway bill, in 2009, or it could have included taking a different approach in DE 08-103, such as suggesting a more in depth study of the economics).” 28/10-13.
- “Furthermore, the company fought strenuously against the SB 152 legislation that would have required a study of the economics of the project. Gary Long argued to the Legislature in March 2009 that a vote to study the project was a vote to kill the project, presumably because he realized that a study would show that the economics of the project put default service customers at great risk and this would have led to the project being abandoned.” 28/23-29/5.
- “PSNH failed to recognize and share with the Commission Staff, the OCA and the Commission, critical information about the economics of the scrubber project.” 29/15-17.

The Commission Has Ruled That This Testimony Is Irrelevant.

Apart from the fact that Mr. Hachey is not competent to provide much of this proposed testimony because he opines on PSNH’s state of mind, and that much of this is based on what “appears” to Mr. Hachey to be true or what he “presumes,” the testimony is not relevant because the Commission has specifically determined that it is outside the scope of this docket. Specifically, in connection with the request by TransCanada to depose Mr. Long, and to inquire into PSNH’s motivation in supporting or opposing legislation, or what PSNH may have indicated to the PUC in connection with the decision to proceed with the scrubber project, the Commission stated as follows:

This is not, however, an open-ended authorization to query Mr. Long on all matters. In fact, we agree with PSNH that much of the information that the Joint Movants cite as important is not relevant to this docket. We see no relevance to PSNH’s, or Mr. Long’s involvement in cooperating with the Legislature to pass the Scrubber law, or to Mr. Long’s alleged attempts to block the Legislature or this Commission from looking further into whether PSNH should have proceeded with the Scrubber project. PSNH is not responsible for the Legislature’s actions, nor for ours.

Order No. 25,566, August 27, 2013, at 5. The Commission thus excluded any testimony relating to efforts by PSNH to influence legislation or to prevent the Commission from looking into whether to proceed with the scrubber.⁴ TransCanada's pre-filed testimony is directly contrary to the Commission's ruling in this Order.

Despite this Order, TransCanada attempted to inquire about these matters in Mr. Long's deposition, and now includes the entire transcript of the deposition with Mr. Hachey's testimony. See Attachment 25. Yet on a number of occasions during that deposition, Commission Counsel Anne Ross, who was appointed the Hearing Examiner to rule on objections, sustained objections to efforts by TransCanada to inquire into the very matters the Commission had determined to be irrelevant. A few examples will demonstrate this point:

Q. (PATCH) Would you consider a critical point to be
19 your decision as to whether or not to support
20 legislation?

21 MR. NEEDLEMAN: Objection. I
22 think that's beyond the scope of the
23 deposition.

24 MS. ROSS: I'll sustain that
1 objection.

2 BY MR. PATCH:

3 Q. Well, okay. So you're saying the only
4 critical point with regard to PSNH's -- well,
5 let me go back then to --

6 MR. PATCH: Could we get the
7 letter, the September 2nd letter from
8 Mr. Long to the PUC in 08-103.

9 BY MR. PATCH:

10 Q. And I think there's a place in that letter
11 where you said that PSNH crafted the
12 legislation. So I guess I would like to know
13 whether, in fact, that was the case. Seems
14 to me that it's relevant from a discovery
15 perspective, which is supposed to be a

⁴ PSNH made no effort to block information from the Commission. Moreover, the Commission requested information from PSNH in September 2008 and always had the ability to request additional information at any time if it was not satisfied with the response. *See* RSA 374:3; 374:18.

16 liberal standard, as to whether or not that
17 was a critical point in PSNH's decision to
18 proceed with the scrubber.
19 MR. NEEDLEMAN: I'm going to
20 object --
21 MR. PATCH: In the
22 September 2nd letter to the Commission in the
23 08-103 docket, Mr. Long took credit for
24 crafting and then also spearheading the

1 legislation. And so what I'm trying to get
2 at is what the thought process was of PSNH at
3 critical points in the decision-making
4 process. Seems to me that's one of the
5 critical points. They had to decide whether
6 or not they were going to -- whether or not
7 they were going to support the legislation
8 that they, in fact, had drafted.

9 MR. NEEDLEMAN: I'll object
10 again. Regardless of anything that may be
11 contained in that letter, the Commission was
12 explicit in its order with respect to this
13 deposition, that things like that were beyond
14 the scope and not relevant.

15 MR. PATCH: Well, I'd just
16 like to state, I don't think the Commission
17 was explicit in that way at all. In fact, if
18 you look back over the Commission's orders
19 with regard to motions to compel in this
20 docket, they've allowed a number of inquiries
21 with regard to things that were said to the
22 legislature and various aspects of
23 presentations to the legislature. So I don't
24 think that's correct at all.

1 MS. ROSS: I think what I
2 would allow in framing the question this way,
3 is what was the Company's understanding of
4 the process of the installation of that
5 particular environmental compliance element,
6 which is the scrubber. I think it's fair to
7 ask the Company what it knew and what it
8 thought at that point in time, not -- ***I don't***
9 believe it's appropriate to ask the Company
10 why it may or may not -- whether it attempted
11 to support or oppose the legislation, that

12 clearly the Commission has said is off
13 limits. But if you can phrase your question
14 to get to the Company's knowledge about the
15 installation at that time, I'll allow that
16 inquiry.
17 BY MR. PATCH:
18 Q. Okay.

Transcript of Long deposition at 23-26 (emphasis added.)

Q. So if the risk committee or the board of
5 trustees did not approve, was an option to go
6 back to the legislature and ask for relief
7 from the law?

8 A. Again, never got to that situation, never had
9 to do that. As we were in compliance mode,
10 you know, we were updating most everyone on
11 the status of the project, the costs. And,
12 you know, it's up to the legislature to
13 decide if they wanted to change course. Of
14 course, they were well aware of the \$455
15 million estimate, and they did not --
16 (Court Reporter interjects.)

17 A. -- the \$457 million estimate and did not
18 change course. And so we had to continue to
19 comply with the law as it was.

20 Q. But you would admit, would you not, that you
21 were, as Senator Bradley said, "complicit" in
22 that?

23 A. No, I would not agree with that.

24 Q. You don't believe that -- you didn't
1 participate in the lobbying and the
2 legislative session of 2009? Is that what
3 you're saying?

4 MR. NEEDLEMAN: I'm going to
5 object again. We're wandering again into
6 areas that have to do with interactions with
7 the legislature, which I understood to be
8 beyond the scope here.

9 MR. PATCH: Well, I would just
10 like to say that PSNH keeps saying it was a
11 mandate, it was a mandate. And clearly, they
12 had significant involvement in legislative
13 processes. So I don't think they can just
14 continue to fall back on that argument
15 without explaining themselves.

16 MR. NEEDLEMAN: It's not --
17 MR. PATCH: I think it's
18 important for discovery to be able to ask
19 that question.
20 MR. NEEDLEMAN: It's not
21 falling back on an argument. The Commission
22 ruled explicitly on this issue and said that
23 this wasn't going to be the subject of this
24 deposition, and that was premised explicitly
1 on the papers that you submitted asking for
2 the deposition.
3 MR. PATCH: Not true. Not
4 true. I don't think that's true at all. I
5 think that's mischaracterizing what the
6 Commission said.
7 MS. ROSS: I think, Mr. Patch,
8 what I would -- a question that I would allow
9 would be to get to the Company's knowledge of
10 the project in that time frame as opposed to
11 whether or not they took a specific action to
12 influence the legislature.
13 MR. PATCH: Well, I guess the
14 question I'm trying to have answered is, if
15 the committee or the board had said no, was
16 an option that was available to PSNH to go
17 back to the legislature and basically say,
18 you know, We don't have authority from our
19 board; it's become too expensive; you know,
20 please relieve us of this responsibility or,
21 at a minimum, study it before we proceed.
22 And I think that's very relevant to what the
23 options are and very relevant to the
24 consideration of what a prudent utility under
1 those circumstances would have done, which is
2 the central theme of this case.
3 MR. NEEDLEMAN: Well, and I'll
4 object. Not only is it a hypothetical, but
5 it's a hypothetical that goes to influencing
6 legislature, which is exactly what we're not
7 supposed to be discussing here.
8 MR. PATCH: I think it's
9 critical. I think it's critical to what a
10 prudent utility would have done under the
11 circumstances.
12 MS. ROSS: *I'll sustain the*
13 *objection.* You may probe the witness as to

14 his knowledge of the project in that time
15 frame and as to any communications that the
16 Company had which divulged its understanding
17 of the project or the cost of the project.

Id. at 53-56.

Following the deposition, Ms. Ross issued a report governing objections in the deposition. Among the rulings Ms. Ross sustained were the following:

Page 23 line 18

Question: Would you consider a critical point to be your decision as to whether or not to support legislation?

Objection: beyond the scope of the deposition.

Ruling: Objection sustained.

Page 24 line 10

Question: And I think there's a place in that letter where you said that PSNH crafted the legislation. So I guess I would like to know whether, in fact, that was the case. Seems to me that it's relevant from a discovery perspective, which is supposed to be a liberal standard, as to whether or not that was a critical point in PSNH's decision to proceed with the Scrubber.

Objection: beyond the scope of the deposition.

Ruling: Objection sustained and suggested the questioner reframe the question to explore PSNH's understanding of the process of the installation of the scrubber.

Page 53 line 24

Question: You don't believe that — you didn't participate in the lobbying and the legislative session of 2009? Is that what you're saying?

Objection: beyond the scope of the deposition.

Ruling: Objection sustained and suggested the questioner reframe the question to explore PSNH's knowledge of the Scrubber project in that time frame.

Page 134 line 9.

Question: So, I mean, I just find that hard to believe, given all the times that I know PSNH has gone to the legislature otherwise. You're telling me under no circumstances would you have approached the legislature to change the mandate and the law, regardless of what the cost had

risen to. Is that what you're saying?

Objection: hypothetical and beyond the scope.

Ruling: Objection sustained.

Page 148 line 8

Question: I'm talking about before the legislature, the PUC, anybody else, any and all times PSNH has made any efforts to try to change the effect of that provision. Again, it's

part of the mandate that says you can only recover from default service customers. Have you made any effort to try to change that? You suggested that to the legislature. Have you suggested it to the PUC?

Objection: beyond the scope.

Ruling: Objection sustained.

TransCanada then sought review by the Commission of each of these rulings, in effect asking the Commission to reconsider its ruling in Order No. 25,566. The Commission declined to do so. In Order No. 25,592 dated November 1, 2013, the Commission repeated, verbatim, its ruling from Order No. 25,566 and further stated:

While we recognize that PSNH had the discretion to request legislative changes or to support or oppose legislation, it is the legislature itself, and not PSNH, that is responsible for enacting law. We would be hard pressed to second guess the legislature and determine what the law would have become if PSNH had made a particular showing before a legislative committee. Instead we will determine what PSNH's management options were under existing law. Accordingly, we overrule TransCanada's exceptions.

TransCanada has requested, in the alternative, that we rule at this point that parties are free to submit evidence and make inquiries about these issues during the remainder of the proceeding. *We have already determined that whether PSNH supported or opposed enactment of the Scrubber Law and related legislation is irrelevant to our statutory analysis, and we will not allow further inquiry or submission of evidence that goes solely to that issue.* We are cognizant, however, that information presented by PSNH and others before the legislature may be relevant to our determination of other facts in issue. We do not believe it appropriate to decide the relevance of such evidence in the abstract as TransCanada asks us to do here. We will make these determinations when presented with particular evidence and justification for its admissibility. Accordingly, we deny TransCanada's request in part.

Order No. 25,592 at 4-5. (Emphasis added.)

The Commission's rulings are clear: while actual information presented to the Legislature or the Commission may be relevant to certain issues in this docket, information or testimony concerning alleged efforts by PSNH to support or oppose legislation is irrelevant. Likewise, testimony or information concerning any alleged attempt by PSNH to "block the Commission from looking further into whether PSNH should have proceeded with the Scrubber project" is not

relevant to this proceeding. Accordingly, TransCanada's effort to inject this testimony into this proceeding despite the rulings of the Commission's Hearing Examiner and two orders of the Commission to the contrary should be rejected, and the testimony set out above should be stricken or excluded.

WHEREFORE, PSNH respectfully moves this Commission to :

- A. Strike or exclude the testimony of Michael E. Hachey identified above as it relates to efforts to influence the legislature or the Commission and, pursuant to the Commission's Orders No. 25,566 and 25,592 is irrelevant and therefore outside the scope of this proceeding;
- B. Strike or exclude all testimony submitted by any witness relating to the same matters; and,
- C. Grant such other relief as the Commission deems necessary and appropriate.

Respectfully submitted,

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Dated: December 31, 2013

By: 

Robert A. Bersak, Bar No. 10480
Assistant Secretary and Associate General
Counsel
Linda Landis, Bar No. 10557
Senior Counsel

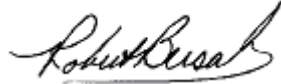
Public Service Company of New Hampshire
780 N. Commercial Street
Post Office Box 330
Manchester, New Hampshire 03105-0330
[\(603\) 634-3355](tel:6036343355)
Robert.Bersak@PSNH.com
Linda.Landis@PSNH.com

McLANE, GRAF, RAULERSON &
MIDDLETON, PROFESSIONAL ASSOCIATION

Wilbur A. Glahn, III, Bar No. 937
Barry Needleman, Bar No. 9446
900 Elm Street, P.O. Box 326
Manchester, NH 03105
(603) 625-6464
bill.glahn@mclane.com
barry.needleman@mclane.com

Certification

I hereby certify that a copy of this Motion has been served electronically on the persons on the Commission's service list in this docket in accordance with Puc 203.11 this 31st day of December, 2013.

A handwritten signature in black ink, appearing to read "Robert Bersak", is written above a horizontal line.

Robert A. Bersak