

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 RELATING TO PSNH'S ALLEGED DUTY
TO SEEK A VARIANCE PURSUANT TO RSA 125-O:17

Public Service Company of New Hampshire (“PSNH” or the “Company”), in accordance with Rule Puc 203.07, hereby moves to strike any testimony relating to whether PSNH could or should have sought either a “variance in the schedule” relating to the construction of the Scrubber, or a variance in the form of an “alternative reduction requirement based on technological or economic infeasibility” under RSA 125-O:17. This Commission has previously ruled that such testimony is irrelevant to this docket. Such testimony appears specifically in portions of the testimony of Michael E. Hachey (“Hachey”), submitted by TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast, Inc. (collectively, “TransCanada”), and may also appear in other parties’ direct testimony, cross-examination testimony, or rebuttal testimony.

On December 23, 2013, TransCanada submitted the pre-filed testimony of Hachey, who is an officer of both TransCanada entities listed above. Mr. Hachey’s testimony is replete with his interpretations of RSA 125-O:11-18, thus offering his legal opinions on the governing statute in this docket. In the concluding portion of that testimony, Mr. Hachey offers his opinion that PSNH should have understood that “the scrubber project was not going to be economic for its default service customers in 2008.” He then claims that as a result, PSNH “could have sought a variance in the schedule or an alternative reduction requirement based on technological or

economic infeasibility (RSA 125-O:17).” Hachey Testimony at 6/22 to 7/2; 28/14-16.¹ Mr. Hachey also states that he is “familiar with” the provisions of the Scrubber Law and makes particular reference to “the provision that gives the plant owner the ability to request a variance from the mercury reduction requirements which could include an alternative schedule or an alternative reduction requirement based on technological or economic infeasibility, RSA 125-O:17.” *Id.* at 4/7-10. Mr. Hachey apparently contends that because of this provision, PSNH could, and therefore should, have sought a variance from its *obligation to install* the Scrubber. What Mr. Hachey proposes is more than a variance; what he recommends would in fact be a “waiver” from any obligation to comply with the statute as opposed to a “variance,” which might allow for changes in specified requirements under specified circumstances.

The Commission has already ruled in this matter that PSNH had no option to seek a variance as a means of avoiding the mandate in RSA 125-O:11-18. Initially, in Order No. 24,898 issued on September 19, 2008, the Commission stated as follows: “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. Then, on December 24, 2012, more than four years later, and more than a year after the Scrubber went into commercial operation, the Commission issued Order No. 25,445 (the “Christmas Eve Order”). In the Christmas Eve Order, the Commission ruled that pursuant to RSA 125-O:17, PSNH could have sought a variance from the mercury reduction requirements found at RSA 125-O:13 based on “technological or economic infeasibility.” Order No. 25,445 at 24. More specifically, the Commission found that RSA 125-O:17, I, which allows for a variance from the schedule for completing the Scrubber

¹ Cites to the page and lines of testimony are shown as, *e.g.*, “6/22” to refer to page 6, line 22.

installation and achieving the required mercury reduction was “not an issue in this case, because the Scrubber was placed in service in September 2011, well before the statutory deadline of July 1, 2013.” But the Commission also concluded that under RSA 125-O:17, II, when Scrubber cost projections increased:

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. Retirement of Merrimack Station would effectively eliminate all emissions from the Station...

Id. at 25.

PSNH believed that Orders 24,898 and 25,445 were fundamentally inconsistent with one another and therefore moved for reconsideration. Among other arguments, PSNH asserted that variances under RSA 125-O:17 were limited by the introductory language in the statute, which limited such variances to those seeking to modify the “mercury emission reduction requirements” of RSA 125-O:13. Thus, the statute offered no basis to seek a variance from (or waiver of) the requirement in the statute that the Scrubber be installed, but instead, authorized requests for variance from the Department of Environmental Services only : (1) where despite diligent attempts to construct the Scrubber (and where the owner provides a “proposed schedule which demonstrates reasonable further progress and contains a date for final compliance as soon as practicable”); and (2) where factors such as “economic infeasibility” prevent meeting the 80 percent mercury reduction limit as opposed to some lesser limit (for example, where the cost of getting from 78 percent to 80 percent was prohibitive).²

² PSNH need not reargue its Motion for Reconsideration of January 23, 2013 here, as the Commission agreed with PSNH and granted reconsideration. The Motion is available to the Commission as part of this docket should the Commission wish to review it.

On May 9, 2013, in Order No. 25,506, the Commission agreed with PSNH, finding that its conclusion concerning RSA 125-O:17 in its Christmas Eve Order was inconsistent with Order No. 24,898. In particular, the Commission stated as follows:

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 12. Thus, contrary to Mr. Hachey’s testimony in this docket, the Commission specifically ruled that PSNH could not have sought an alternative schedule or reduction requirement based on RSA 125-O:17. The Commission then reiterated this point in its July 15, 2013 Order (No. 25,546) in which it denied TransCanada’s Motion for Rehearing of its Order No. 25,506.

Order No. 24,898, which was issued on September 18, 2009 [sic]³, 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 [sic] 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.

Order No. 25,546 at 6-7.

Mr. Hachey’s proposed testimony that PSNH could have sought a variance is in direct conflict with these Orders. First, the testimony contends that in 2008, before Scrubber construction began, PSNH could have sought a variance from *the schedule*

³ Order No. 24,898 was in fact issued on September 19, 2008, more than four and a half years earlier.

requiring that the Scrubber be constructed by July 1, 2013 based on economic infeasibility.⁴ Implicit in that conclusion (in which Mr. Hachey contends that PSNH never should have even proceeded with construction) is that this “variance” would have permitted DES to approve *no schedule for installation at all*. Nothing in RSA 125-O:17 suggests such a result, as the Commission’s Orders have already concluded. Furthermore, RSA 125-O:17, I, which provides for variances in the schedule for meeting the mercury reduction requirements of the statute makes no reference to economic infeasibility, which is referenced only in RSA 125-O:17, II. The statute therefore makes clear that economic infeasibility is not grounds for delay in meeting the schedule for installing the Scrubber, let alone declining to construct it. The statute also makes clear that the variance provision is not to be used to avoid construction by providing that in order to obtain a variance, the owner must demonstrate “reasonable further progress in construction” and provide a date by which construction is to be complete.⁵

Second, Mr. Hachey’s testimony is that RSA 125-O:17 revises or eliminates the legislative mandate in RSA 125-O:11-18 by giving the owner the opportunity to avoid the mandate by apparently reducing the reduction requirements to zero. The only way to do this is to retire the plant, which Mr. Hachey suggests is viable. See Hachey Testimony at 28/0. By contrast, in the clear and unequivocal language cited above, this Commission

⁴ Also, recall that the Commission in 2008 held that “The legislative history supports a conclusion that the Legislature viewed time to be of the essence” in the installation and operation of the Scrubber. Order No. 24,898 at 10.

⁵ In its August 27, 2013 Order No. 25,565, the Commission suggested that a variance might be used to delay construction of the Scrubber during a divestiture proceeding if the proposed new owner made purchase “contingent upon receiving a variance from the July 23rd deadline pursuant to RSA 125-O:17, II. Order No. 25,565 at 10. While PSNH disagrees that divestiture is contemplated by RSA 125-O:11-18, or that such a variance request could be sought, the request would still have to “demonstrate[] reasonable further progress” toward completing the installation of the Scrubber and provide “a date for final compliance as soon as practicable.” Clearly, PSNH could not have demonstrated reasonable further process by seeking to delay the project before construction began in 2008, which is the basis for Hachey’s testimony.

has concluded in Order No. 24,898, Order No. 25,506, and Order No. 25.546 that RSA 125-O:17 does *not* “allow retirement of Merrimack Station rather than installation of the scrubber technology as a method of meeting the emissions reduction requirements” in the statute. Order No. 25,506 at 12. As a result, any testimony from Mr. Hachey or any other witness concerning the variance provisions of RSA 125-O:17 should be deemed irrelevant and outside the scope of this proceeding, and therefore stricken and the Commission should enter an order excluding all such testimony from this docket.

WHEREFORE, PSNH respectfully moves this Commission to:

- A. Rule that any discussion of the variance provision of the Scrubber Law, RSA 125-O:17, suggesting that PSNH had an opportunity to seek a schedule variation or an alternative emissions reduction requirement in lieu of proceeding with the mandated installation of scrubber technology at Merrimack Station is irrelevant and therefore outside the scope of this proceeding;
- B. Accordingly strike all testimony submitted by any witness relating to the ability of PSNH to seek a schedule or alternative emissions reduction requirement in lieu of proceeding with the mandated installation of scrubber technology at Merrimack Station; and,
- C. Grant such other relief as the Commission deems necessary and appropriate.

Respectfully submitted,

PUBLIC SERVICE COMPANY OF NEW
HAMPSHIRE

By its attorneys,



Dated: December 31, 2013

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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.



Robert A. Bersak