

**THE STATE OF NEW HAMPSHIRE**

**BEFORE THE**

**PUBLIC UTILITIES COMMISSION**

**DE 11-250**

**PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE**

**Investigation of Merrimack Station Scrubber Costs and Cost Recovery**

**OBJECTION BY THE OFFICE OF THE CONSUMER ADVOCATE TO  
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE'S MOTION  
TO STRIKE TESTIMONY RELATING TO  
PSNH'S ABILITY TO RETIRE MERRIMACK STATION AS A  
MEANS OF AVOIDING COMPLIANCE WITH RSA 125-O:11-18**

NOW COMES the Office of the Consumer Advocate (OCA), and respectfully moves this Honorable Public Utilities Commission (Commission or PUC) to deny the Motion of Public Service Company of New Hampshire (PSNH) to Strike Testimony Relating to PSNH's Ability to Retire Merrimack Station as a Means of Avoiding Compliance with RSA 125-O:11-18. In support of this objection, the OCA states:

1. On December 31, 2013 PSNH filed several motions to strike testimony in the above-captioned docket. This objection responds to the "Motion of Public Service Company of New Hampshire to Strike Testimony Relating to PSNH's Ability to Retire Merrimack Station as a Means of Avoiding Compliance with RSA 125-O:11-18." Re *PSNH Investigation of Merrimack Station Scrubber Costs and Cost Recovery*, DE 11-250 (December 31, 2013)(PSNH Motion to Strike).

2. PSNH argues that retirement of Merrimack station was "not an option that

PSNH could have pursued.” *Id. at 1*. PSNH identifies 12 instances where the word “retirement” appears in the testimony of OCA expert witness Matthew Kahal, *Id at 1, 2*, and seeks to have those sections of pre-filed testimony removed before they are entered into evidence.

3. PSNH’s motion is premature. The Commission entertains objections to sworn evidence at hearing and excludes “irrelevant, immaterial or unduly repetitious evidence” at that time. Puc 203.23 (d) and (f). See *Re City of Nashua*, 91 NH PUC 384, 386 (2006). To prematurely strike testimony is to deny the OCA its statutory right to present testimony on matters affecting the utility rates of residential ratepayers. RSA 363:28. (“the consumer advocate shall have the power and duty to petition for, initiate, appear or intervene in any proceeding concerning rates, charges, tariffs, and consumer services before any board, commission, agency, court, or regulatory body in which the interests of residential utility consumers are involved and to represent the interests of such residential utility consumers.”) While RSA 363:28 does not grant the OCA unfettered discretion in submitting testimony, it does demonstrate the legislature’s intent that residential ratepayers are entitled to have their interests fully represented by the OCA.

4. Should the Commission reach the merits of the motion, PSNH’s Motion to Strike fails as PSNH does not meet its burden of showing the testimony is “irrelevant, immaterial or unduly repetitious.” Puc 203.23(d). Mr. Kahal’s Prefiled Testimony “...is limited to the Company’s prudence from a planning perspective, i.e., whether, given the circumstances at the time, it was appropriate to proceed with and complete this very expensive project.” PSNH Investigation of Merrimack Station Scrubber Costs and Cost Recovery, DE 11-250, (December 23, 2013)(Kahal Prefiled Testimony) p 3 line 16-18.

This is a modest scope for a prudence review and does not conflict with Commission precedent, statutory or case law. See *Appeal of Conservation Law Foundation of New England, Inc.* 127 N.H. 606 (N.H. 1986). (“While the scope of the prudence principle is by no means clear, [*cite omitted*] it at least requires the exclusion from rate base of costs that should have been foreseen as wasteful. See, e.g., LUCC, 119 N.H. at 343, 402 A.2d at 633-34; *Company v. State*, 95 N.H. at 360, 64 A.2d at 15; see also *S.W. Tel. Co. v. Pub. Serv. Comm.*, 262 U.S. at 289, 43 S.Ct. at 547 (Brandeis, J., concurring)).

5. PSNH argues the Commission’s prior orders prohibit the sections of Mr. Kahal’s Prefiled Testimony that refer to “retirement.” PSNH Motion to Strike at 3. The Commission’s order relied upon by PSNH for this argument, holds as follows:

...To the extent that Order No. 25,445 interpreted the variance provision RSA 125-O:17 to allow retirement of Merrimack station...*that portion of Order No. 25,445 alone is reversed.*

PSNH Investigation of Merrimack Station Scrubber Costs and Cost Recovery, DE 11-250, Order No 25,506 (May 9, 2013)(emphasis added).

Nowhere in Mr. Kahal’s testimony does he refer to the variance provision of RSA 125-O:17 as authorizing plant retirement. Mr. Kahal’s testimony specifically addresses PSNH’s management obligation to keep decision makers – the legislature and the PUC – informed of the economic consequences of continuing with the scrubber project. Mr. Kahal states:

Given these [public interest] objectives, it was incumbent upon the Company to undertake the appropriate studies – as the Company was in the best position to do so – and provide its analyses and recommendations to policymakers...I have identified at least three *potential alternative actions* by PSNH that could meet the required mercury emissions reduction target and minimize ratepayer burdens...*if authorized by the lawful authority...*

Kahal Prefiled Testimony, p7 line 19-25. (emphasis added)

6. At all times Mr. Kahal's Prefiled Testimony rests on the premise that PSNH should have sought legal authority to change its course of action, not that PSNH had the legal authority to stop construction on its own initiative. He states:

...PSNH takes the position that the Clean Air Project was effectively a legal mandate. However, that viewpoint should not have stopped the Company from updating its study, reevaluating market conditions, and presenting updated findings and recommendations to policymakers.

Kahal Prefiled Testimony, p 48 lines 1-4.

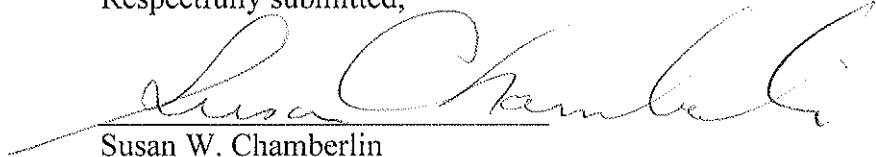
7. The Commission ultimately may agree or disagree with the OCA's expert testimony on the scope of the prudence review. However, there are no lawful grounds upon which to exclude such testimony before it is submitted. The Commission has the legal authority to give the OCA's expert witness testimony the weight it finds appropriate under the circumstances. *In re Pennichuck Water Works, Inc.* 160 N.H. 18 (N.H. 2010) ("It [the Commission] is not compelled to accept the opinion evidence of any one witness or group of witnesses." *Id.* at 102).

8. PSNH's Motion to Strike should be denied as it seeks to make a legal conclusion regarding the merits of the case before the case is tried. It is exactly the nature of this proceeding to determine the interpretation of RSA 125-O in light of the facts, other statutes and case law. The Commission may be persuaded by PSNH's legal arguments at the end of the case or it may not, but PSNH must not be allowed to foreclose the opportunity of the OCA to present its arguments for Commission consideration.

WHEREFORE, the OCA respectfully requests that this honorable Commission:

- A. Deny PSNH's Motion to Strike Testimony Relating to PSNH's Ability to Retire Merrimack Station as a Means of Avoiding Compliance with RSA 125-O:11-18.
- B. Accept the OCA prefiled testimony of expert witness Mr. Matthew Kahal in its entirety; and
- C. Grant such other relief as may be just and equitable.

Respectfully submitted,



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January 10, 2014

Certificate of Service

I hereby certify that on this 10 day of January, 2014 a copy of the foregoing motion was sent by electronic mail to the Service List.



Susan Chamberlin

THE STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

DE 11-250

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Investigation of Merrimack Station Scrubber Costs and Cost Recovery

**OBJECTION BY THE OFFICE OF THE CONSUMER ADVOCATE TO  
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE'S MOTION  
TO STRIKE TESTIMONY RELATING TO  
THE 'USED AND USEFUL' RATEMAKING CONCEPT**

NOW COMES the Office of the Consumer Advocate ("OCA"), and respectfully moves this Honorable Commission deny Public Service Company of New Hampshire's (PSNH) Motion to Strike Testimony Relating to the "Used and Useful" Ratemaking Concept. (PSNH Motion to Strike) In support of this Objection, the OCA states:

1. On December 31, 2013 PSNH filed several motions to strike testimony in the above-captioned docket. Here, PSNH argues that the "new" used and useful ratemaking standard cannot apply in this instance as RSA 378:27 and 378:28 are overruled by RSA 125-O:18. PSNH Motion to Strike *at 1,2*.

2. PSNH's motion is premature. The Commission entertains objections to sworn evidence at hearing and excludes "irrelevant, immaterial or unduly repetitious evidence" at that time. Puc 203.23 (d) and (f). See *Re City of Nashua*, 91 NH PUC 384, 386 (2006). There is no reason for the Commission to make such a determination before the hearing and as such the Commission need not reach the merits of PSNH's motion. To foreclose review of testimony on a substantial aspect of the case by prematurely striking testimony

is to deny the OCA its statutory right to represent the interests of residential ratepayers. RSA 363:28 (“the consumer advocate shall have the power and duty to petition for, initiate, appear or intervene in any proceeding concerning rates, charges, tariffs, and consumer services before any board, commission, agency, court, or regulatory body in which the interests of residential utility consumers are involved and to represent the interests of such residential utility consumers.”)

3. PSNH’s Motion to Strike does not meet the standards specified in Commission Rules. At a minimum, PSNH must refile its motion identifying line by line the testimony it seeks to disallow. As the moving party, PSNH has the burden of proof to show why the Commission should disregard its standard procedural practice and strike aspects of intervenor testimony. Puc 203.25. As PSNH seeks to disallow testimony, it is the party required to identify exactly that which is under consideration. Neither the OCA, Commission Staff nor any other party can make that determination.

4. PSNH’s Motion to Strike should be denied as it seeks to make a legal conclusion regarding the merits of the case before the case is tried. It is exactly the nature of this proceeding to determine the interpretation of RSA 125-O:11-18 in light of the facts, other statutes and case law. The Commission may be persuaded by PSNH’s legal arguments at the end of the case or it may not, but PSNH must not be allowed to foreclose the opportunity of the OCA to challenge these arguments and submit its own for Commission consideration. In re Pennichuck Water Works, Inc., 160 N.H. 18 (N.H. 2010) (“It is the PUC’s duty to determine the proper weight to be given to evidence...” *citing* Appeal of McKenney, 120 N.H. at 81.)

5. Furthermore, PSNH's own expert testimony uses the "used and useful" ratemaking standard. See Joint Testimony of Baumann and Smagula, PSNH *In Re Investigation of Scrubber Costs and Cost Recovery* DE 11-250 (November 18, 2011) p 1 line 15. Where PSNH has opened the door by submitting testimony that the scrubber is used and useful, it cannot foreclose the OCA from arguing how the used and useful concept should apply.

6. The "used and useful" ratemaking concept is not new, as alleged in PSNH's Motion to Strike at p1. On the contrary, the used and useful principle is a long standing element of ratemaking that the Commission is required to consider in determining permanent rates. The New Hampshire legislature originally enacted the statutes incorporating the principle, RSA 378:27 and RSA 378:28 in 1941 and 1951, respectively.

7. The New Hampshire Supreme Court holds it as a key element of ratemaking, stating:

The second principle of rate base inclusion or exclusion derives directly from the statutory description of allowable rate base property as "used and useful." RSA 378:27, :28. Here again, there is no simple formulation that describes the standard of usefulness, *Bluefield Co. v. Pub. Serv. Comm.*, 262 U.S. at 690-91, 43 S.Ct. at 678; *New Eng. Tel. & Tel. Co. v. State*, 98 N.H. at 218-19, 97 A.2d at 219. Prior case law has invested the commission with flexibility in determining what may qualify as used and useful, *LUCC*, 119 N.H. at 343-44, 402 A.2d at 633-34, [507 A.2d 674] thus necessarily providing scope for policy judgments. *Appeal of Conservation Law Foundation of New England, Inc.*, 507 A.2d 652, 127 N.H. 606, 637 (N.H. 1986).

8. Prior to 1941 and up to the present, New Hampshire common law repeatedly relies upon the standard. The first notable case was reported in 1881 where the New Hampshire Supreme Court in *Cummings v Parker* allocates a fractional proportion of water rights. The Court held:



According as Whiting took a right to water enough to carry the saw-mill, all the canal water-privilege, whatever that was,---one half, three quarters, or any other fraction of the whole water-power created by the dam,---so was his proportionate right in the dam. The clause admits of no other construction. The case finds that the whole of the dam was then (at the time of the deed), as well as ever before, subservient to the canal water-privilege, was used for and was useful for that alone, certainly to the extent of the capacity of the canal.

*Cummings v. Parker*, 61 N.H. 516 (1881).

9. Federal case law is replete with references to "used and useful." See *Hope Natural Gas* 320 U.S. 591 (1944); *Bluefield Waterworks* 262 U.S. 679 (1923); *Duquesne Light Co* 488 U.S. 299 (1989). The factual basis on which the used and useful standard applies changes with each case. The Commission is the authority which determines how and to what extent the used and useful ratemaking standard applies in this proceeding.

10. Staff's testimony also includes the "used and useful" ratemaking standard. See Testimony of Steve Mullen, DE 11-250 PSNH *In Re Investigation of Scrubber Costs and Cost Recovery* (December 23, 2013) p 28 line 23. The prevalence of this standard in testimony, state law, common law and federal law demonstrates the fundamental nature of the concept.

11. Finally, the rules of evidence do not apply to Commission hearings. Puc 203.23 (c). The New Hampshire Supreme Court determined that:

...because the PUC is not bound by the technical rules of evidence, the admission of hearsay or technically irrelevant or immaterial evidence is insufficient to render its order unjust, unreasonable, or unlawful. *Appeal of McKenney*, 120 N.H. 77, 81, 412 A.2d 116 (1980); see RSA 541:17 (2007). ...It is not compelled to accept the opinion evidence of any one witness or group of witnesses. *Id.* at 102, 302 A.2d 814. "

*In re Pennichuck Water Works, Inc.* 160 N.H. 18 (N.H. 2010)

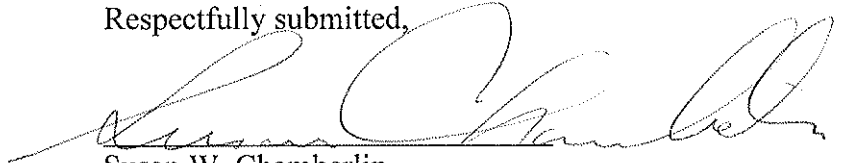
The Commission is free to give whatever weight it believes fit to witness testimony and may choose not to uphold even uncontested testimony. *Id.*

12. The OCA incorporates by reference the arguments made by Conservation Law Foundation and TransCanada in their responses to this PSNH Motion to Strike and to the additional PSNH motions to strike testimony filed concurrently.

WHEREFORE, the OCA respectfully requests that this honorable Commission:

- A. Deny PSNH's Motion to Strike Testimony Relating to the "Used and Useful" Ratemaking Concept;
- B. Accept the OCA prefiled testimony in its entirety; and
- B. Grant such other relief as may be just and equitable.

Respectfully submitted,



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January 10, 2014

Certificate of Service

I hereby certify that on this 10 day of January, 2014 a copy of the foregoing motion was sent by electronic mail to the Service List.



Susan W. Chamberlin