

**THE 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 IN LIMINE OF
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
TO EXCLUDE EVIDENCE RELATING TO THE
POTENTIAL RETIREMENT OF MERRIMACK STATION
AS A MEANS OF AVOIDING THE INSTALLATION OF SCRUBBER TECHNOLOGY**

Pursuant to Rule Puc 203.07, Public Service Company of New Hampshire (“PSNH” or the “Company”) respectfully moves the New Hampshire Public Utilities Commission (“Commission”) to exclude evidence from this proceeding relating to the potential retirement of Merrimack Station as a means of avoiding the installation of Scrubber technology.

In support of this Motion, PSNH states as follows:

I. Background Facts

1. On June 8, 2006, the “Scrubber Law” took effect. *See* 2006 N.H. Laws, 105:4; RSA 125-O:11 – 18. In RSA 125-O:11, VI, the General Court found, and enacted as law, that installation of Scrubber Technology at Merrimack Station was in the “public interest of the citizens of New Hampshire and the customers of the affected sources.”
2. On August 22, 2008, the Commission opened Docket No. DE 08-103 via issuance of a Secretarial Letter. That letter stated, “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.”

3. On September 19, 2008, the Commission issued Order No. 24,898 in Docket No. DE 08-103, “Decision Concerning Statutory Authority.” 93 NH PUC 456 (2008). In that Order, the Commission ruled that it had no jurisdiction over the construction of the Scrubber pursuant to RSA 369-B:3-a. *Id.* at 459-60. Emphasizing the statutory public interest findings of the General Court, the Commission described its statutory authority, as follows:

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. at 462, (footnote omitted). The Commission continued, “In this instance the Legislature has made the public interest determination and *required* the owner of the Merrimack Station, viz., PSNH, to install and have operational scrubber technology to control mercury emissions no later than July 1, 2013.” *Id.*

4. Order No. 24,898 also found that “the Legislature intended its findings in RSA 125-O:11 to foreclose a Commission proceeding pursuant to RSA 369-B:3-a... . The legislative history supports a conclusion that the Legislature viewed time to be of the essence.” (*Id.*). More specifically, and significantly, the Commission held:

[A] substantial increase in the cost estimate does not constitute a grant of Commission authority to determine whether the project is in the public interest. 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 alternative review mechanism. Therefore, we must accede to its findings.

Id. at 463, (emphasis added).

5. For the next three years, from September 19, 2008 (the date that Order No. 24,898 was issued), throughout the entire construction of the Scrubber by PSNH until its completion in September of 2011, the Commission did not change its holding that, “*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.*” *Id.* (emphasis added).

6. It was not until the Commission’s Christmas Eve Order, Order No. 25,445 (the “Discovery Order”) issued in this proceeding, on December 24, 2012, that the Commission again addressed the issue of the potential retirement of Merrimack Station as a means of complying with the Scrubber Law. It did so in connection with TransCanada’s contention during the discovery process that PSNH could have complied with the statutory mandate in RSA 125-O:11-18 by seeking a variance under RSA 125-O:17 from the mercury reduction requirements down to zero emissions by retiring the Merrimack Station. In that Order – issued over fifteen months after PSNH had completed construction of the Scrubber -- the Commission stated that PSNH could have, “[P]ursu[ed] 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 and leave only continued emissions from PSNH’s other generation units reducing PSNH’s overall mercury emissions significantly.” *Slip op.* at 25. This finding was directly contrary to the Commission’s earlier finding in Order No. 24,898.

7. PSNH moved for rehearing and four and a half months later, on May 9, 2013, the Commission issued Order No. 25,506 (the “First Rehearing Order”) granting rehearing of the

portion of its earlier Order No. 25,445 regarding the ability of PSNH to retire Merrimack Station to satisfy the Scrubber Law. In that Order on Rehearing, the Commission held:

We concluded that PSNH could have sought a variance in order to comply with RSA 125-O through means other than scrubber technology, ***including retirement of Merrimack Station***. 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***

Slip op. at 17 (emphases added).

8. The Commission continued by noting that it was not “within PSNH’s management discretion to propose retirement of Merrimack Station as an alternative reduction requirement under RSA 125-O:17.” *Id.*

9. On July 15, 2013, after TransCanada moved for reconsideration of the First Rehearing Order, the Commission issued its “Order Denying Second Motion for Rehearing and Clarifying Scope,” Order No. 25,546 (“the Second Rehearing Order”). In that second order on rehearing, the Commission held:

In the Rehearing Order we considered whether our statement on page 25 of the Discovery Order [Order No. 25,445] that PSNH had a right to seek a variance based on “a significant escalation in cost” is directly contrary to prior Commission orders. Rehearing Order at 17. We determined that our statement in the Discovery Order was contrary to our prior statement in Order No. 24,898 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*.” (emphasis added) *Id.* at 17. Accordingly, we granted PSNH’s request for rehearing in part. 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.

Slip op. at 6-7 (alteration in original) (second emphasis added).

10. Despite the Commission's 2008 Order No. 24,898 holding that retirement of Merrimack Station would not have complied with the Scrubber Law, its finding in the First Rehearing Order ratifying the 2008 decision that retirement of Merrimack Station was not a means of complying with the requirements of the Scrubber Law, and the lengthy quote, *supra*, within Order No. 25,546 itself holding, "*It is simply not possible, more than three and a half years later, to revisit that issue,*" the Commission did just that. Just one page later, at *slip op.* page 8, the Commission undid its prior decisions that retirement of Merrimack Station would not comply with the Scrubber Law by holding, "[U]nder RSA 369-B:3-a, ***PSNH retained management discretion to retire Merrimack Station*** in advance of divestiture." (emphasis added).

11. PSNH then moved to clarify the internally conflicting holdings found in Order No. 25,546 – i.e., that "retirement of Merrimack Station was not recognized as a method of compliance with the mercury reduction requirements of RSA 125-O" and "PSNH retained management discretion to retire Merrimack Station". On August 27, 2013, the Commission issued its "Order Denying Third Motion for Rehearing," Order No. 25,565 (the "Third Rehearing Order"). In this Third Rehearing Order, the Commission again acknowledged the inconsistencies between the Discovery Order and the First and Second Rehearing Orders:

In both the First and Second Rehearing Orders in this docket, we acknowledged an apparent inconsistency between our prior construction of RSA 125-O:17 and our construction of that provision in the Discovery Order. ***We then construed RSA 125-O:17 in the manner championed by PSNH.***

Slip op. at 16, emphasis added.

12. Continuing in the Third Rehearing Order, the Commission noted that in both the First Rehearing Order and the Second Rehearing Order, it had upheld and ratified the holding in Order No. 24,898 – the Order outstanding while the Scrubber was designed, procured, and installed – “that retirement of Merrimack Station was not recognized as a method of compliance with the mercury reduction requirements of RSA 125-O.” *Id.* at 17.

13. The Commission concluded its discussion of the “retirement” option in the Third Rehearing Order by finding:

PSNH prevailed on its interpretation of whether retirement of Merrimack Station was a recognized method of compliance with the mercury reduction requirements of RSA 125-O, and whether retirement would have formed a legitimate basis for a variance under RSA 125-O:17. It cannot then argue that by accepting its position we have not provided it due process

Id. (emphasis added).¹

14. As a result, at the conclusion of the rehearing process regarding the Discovery Order, the Commission specifically stated that PSNH had not been denied due process because it agreed with and adopted PSNH’s view on the ability to retire Merrimack Station – *i.e.*, i) retirement of Merrimack Station was ***not*** a method of complying with the Scrubber Law’s mercury reduction requirements; and, ii) retirement of Merrimack Station would ***not*** have formed a basis for seeking a variance under RSA 125-O:17.

¹ In its Motion for Rehearing of Order No. 25,546, dated August 9, 2013, referencing the disparate findings contained in Commission Orders regarding the retirement option, PSNH argued (at pp. 7-8) that the Commission’s “repeated reversals in opinion and revisiting of issues reflect arbitrary and capricious decision-making, in violation of PSNH’s due process rights,” citing to *Verizon Tel. Companies v. F.C.C.*, 453 F.3d 487, 497 (D.C. Cir. 2006).

15. In the Third Rehearing Order (page 16), PSNH notes the Commission also stated, “The Legislature’s public interest findings in the Scrubber Law are not rendered meaningless by our ruling that PSNH had management discretion to divest itself of or to retire Merrimack Station;” Obviously, given the Commission’s ruling that retirement of Merrimack Station was not a method of complying with the Scrubber Law, and that retirement of Merrimack Station was not a basis for seeking a variance under that law, the Commission could not have ruled in the same Order that PSNH retained management discretion to retire Merrimack Station. Not only would such a retirement have placed PSNH out of compliance with the law as found in the Third Rehearing Order itself, it would have been inconsistent with the Commission’s holding in its first scrubber related order, Order No. 24,898, where the Commission held, “The Legislature would only need to make special notice that RSA 369-B:3-a would apply in the event of divestiture, if it intended that RSA 369-B:3-a not apply absent divestiture, which is the case before us.” Order No. 24,898 at 12. If RSA 369-B:3-a was inapplicable absent divestiture, then, as the Commission found in Order No. 24,898 and ratified in the First, Second and Third Rehearing Orders, retirement of Merrimack Station was not an option available to PSNH in lieu of installation of the Scrubber. As a result, under the analysis applied by the Commission itself in Order No. 24,898, the Commission has no jurisdiction to consider retirement of Merrimack Station prior to completion of the Scrubber.

16. Since retirement of Merrimack Station was *not* an option available to PSNH to comply with the Scrubber Law, and it was also *not* a basis for seeking a variance under RSA 125-O:17, testimony relating to the potential retirement of Merrimack Station should be excluded from this proceeding.

17. The pre-filed testimonies of Dr. Stanton submitted by CLF; of Mr. Kahal submitted by OCA; and of Mr. Hachey submitted by TransCanada all include testimony relating to the retirement of Merrimack Station which should be excluded from this proceeding. In particular:

- a. Mr. Hachey: The following portions of testimony should be excluded:
 - i. Page 23, lines 13-15:
“or whether it should have retired the Merrimack facility and purchased power from the New England market.”
 - ii. Page 28, lines 9-10:
“it could have sought the PUC's approval to retire the plant (see RSA 369-8:3-a; Order No. 25,546, p.8);”
- b. Dr. Stanton: The following portions of testimony should be excluded:
 - i. Page 6:
“should the unit be retired”
and
“the costs if the unit is retired”
 - ii. Page 7:
“If the cash flow analysis showed a negative net present value over the period of the life of the capital expense, then retirement would be less costly than continued operation, and a prudent manager would recommend against continuing to finance the project.”
 - iii. Page 10:
Q. Did PSNH consider retiring the plant instead of proceeding with scrubber construction
A. Gary Long states in his September 16, 20 13 deposition that retirement of Merrimack was not considered in the decision to begin major construction (see page 214).
 - iv. Page 13:
“or the cost of retirement.”
 - v. Page 14:
“(resulting in high energy replacement costs for PSNH in the Merrimack retirement case)
 - vi. Page 15, last question:
“or retirement”
- c. Mr. Kahal: The following portions of testimony should be excluded:
 - i. Page 7, line 23:
“at least three potential”
 - ii. Page 8, lines 1-5:
“Promptly suspend the Clean Air Project in early 2009 and monitor economic conditions. Decide at a later date whether to resume the Project

- or retire the plant.
“Cancel the Clean Air Project and retire Merrimack units 1 and 2 at the compliance deadline of July 1, 2013”
- iii. Page 17, line 9:
“retirement and for the”
 - iv. Page 18, lines 5-6:
“In other words, the study showed that the Merrimack plant retirement would render customers significantly worse off”
 - v. Page 30, line 24:
“as compared to the retirement decision.”
 - vi. Page 34, lines 5-8:
“Nonetheless, the savings from retiring Merrimack (on July 1, 2013) and avoiding most of the scrubber costs are so large under a study update, that it seems clear that retirement, from an early to mid-2009 perspective, would be the more economical decision.”
 - vii. Page 34, line 20:
“retirement or”
 - viii. Page 51, lines 12-13:
“Outright cancellation of the Clean Air Project, with the associated retirement of the two coal units by the July 1, 2013 compliance deadline”
 - ix. Page 52, line 17:
“retirement or”

18. In addition, the Commission should issue an appropriate order prohibiting the parties from raising during this proceeding the issue of PSNH’s retirement of Merrimack Station as a means of complying with the Scrubber Law or as a basis for seeking a variance pursuant to RSA 125-O:17.²

WHEREFORE, PSNH respectfully moves that the Commission issue an order excluding from this proceeding any questioning or testimony relating to the issue of PSNH’s retirement of Merrimack Station as a means of complying with the Scrubber Law or as a basis for seeking a variance pursuant to RSA 125-O:17.

² If this Motion is granted, PSNH recognizes that certain portions of its rebuttal testimony relating to this retirement issue should also be excluded. PSNH would make an appropriate compliance filing identifying such testimony following receipt of such a Commission decision.

Respectfully submitted this 21st day of August, 2014.

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

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CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2014, I served an electronic copy of this filing with each person identified on the Commission's service list for this docket pursuant to Rule Puc 203.02(a).



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