

**THE STATE OF NEW HAMPSHIRE
BEFORE THE
NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 11-250

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Investigation of Merrimack Station Scrubber Project and Cost Recovery

**Motion Regarding Scope of Proceedings
Related to Public Service Company of New Hampshire's
Options for Action Regarding RSA 125-O
and
Motion to Compel**

NOW COMES TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast Inc. (together, "TransCanada"), an intervenor in this docket, and moves this Honorable Commission, pursuant to Admin. Rule Puc 203.09(i), to clarify the evidence it will allow regarding the options available to Public Service Company of New Hampshire ("PSNH") with regard to the scrubber and to compel PSNH to respond to certain related data requests, as described in more detail below. In support of this Motion TransCanada states as follows:

INTRODUCTION & PROCEDURAL HISTORY

1. On July 11, 2014, PSNH filed six sets of rebuttal testimony for eight witnesses. The testimony and exhibits were over 700 pages long.
2. TransCanada, along with other parties to this docket, propounded data requests on PSNH's witnesses on July 25, 2014. PSNH provided its objections to the requests on August 4, 2014, and its responses were provided on August 8. By secretarial letter dated August 12, 2014 the Commission appointed its General Counsel to conduct a

technical session and preside over an informal discussion on discovery disputes. On August 15, 2014, to facilitate addressing discovery concerns, TransCanada provided a letter to PSNH narrowing the number of requests it sought to discuss at the August 18, 2014 technical session. During the course of the technical session the data requests were further limited. By secretarial letter dated August 19, 2014 the Commission approved a schedule that required motions to compel to be filed by August 25, 2014 and prehearing motions by September 10, 2014.

3. At its most basic, this motion addresses PSNH's attempt to limit the scope of review of its actions by arguing that the law was a mandate to build the scrubber project. According to PSNH, the law gave it no choice but to build the scrubber, regardless of compelling circumstances that suggested it would be uneconomic to its customers to do so. PSNH further relies on this "mandate" argument to claim that the Commission should not look at the other options that were available to PSNH.

4. TransCanada seeks a ruling and clarification prior to the hearing regarding the scope of discovery and evidence related to PSNH's actions and inactions with regard to the scrubber in 2008 and 2009. Combining the scope and discovery issues into one motion is the most efficient way of addressing these concerns.

A. The Scope of this Proceeding Should Include All of the Options Available to PSNH.

5. TransCanada agrees with, and wishes to emphasize the Commission's statement in Order No. 25,592 (pp. 5-6) that: "*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 the law.*" *Order Affirming Hearing Examiner's Deposition Report and Suspending Procedural Schedule,*

Order No. 25,592 at 5-6 (Nov. 1, 2013) (emphasis added). PSNH's discretion, as identified by the Commission – *e.g.*, whether to request legislative changes or to support or oppose legislation and the information PSNH chose to provide and not to provide to the Commission and the Legislature (see Order No. 25,640 at 10 and Order No. 25,592 at 6) – is a critical aspect of the Commission's prudence review. While TransCanada understands and accepts that the Legislature is responsible for enacting the law, it submits that PSNH is responsible for and should be held accountable for its actions and failure to act. As a result, the Commission should allow discovery and hear evidence and testimony regarding the complete range of options that were available to PSNH with respect to its involvement in the Scrubber project.

6. Throughout this case, PSNH has attempted to narrow the scope of options for its behavior that the Commission should consider. *See, e.g., Order Denying Third Motion for Rehearing*, Order No. 25,565 at 18-19 (Aug. 27, 2013). Once it became clear that the cost of the project had escalated significantly above the “not-to-exceed” cost of \$250 million (what PSNH told the Legislature and the PUC in 2005-2006) and that the price of natural gas would not support the scrubber project economics (see the presentations to the Northeast Utilities Risk and Capital Committee and the NU Board of Trustees in the summer of 2008, Attachments 10 and 11 to Mr. Hachey's prefiled testimony), PSNH's management options were not limited to following the law and actively opposing any attempt to study the issue further. In fact, PSNH had an obligation to act prudently, to consider all available options and to communicate relevant information to decision makers. To the extent that PSNH failed to even consider options other than blindly complying with the law, that failure is relevant evidence; similarly,

what it told -- and didn't tell -- the Staff and Consumer Advocate, the Commission and the Legislature about the scrubber project and the economics of the project is also relevant.

7. As part of a prudence analysis, it is wholly reasonable for this Commission to consider whether a utility performed an adequate analysis and considered alternative options; the Oregon Public Utility Commission recently disallowed costs of investments in the utility's coal fleet, and in so doing said: "Based on our findings that Pacific Power failed to reasonably examine alternative courses of action and perform adequate analysis to support its investments, we conclude that a partial disallowance is warranted. Pacific Power's imprudent and inadequate analysis put ratepayers at risk." See *In the Matter of Pacificorp, dba Pacific Power, Order*, Order No. 12,493 at *31 (Ore. PUC Dec.20, 2012), *available at* <http://apps.puc.state.or.us/orders/2012ords/12-493.pdf> (last visited August 25, 2014).

8. PSNH continues to insist that the "mandate" meant that it had no obligation to consider options other than spending more than \$400 million on the Scrubber. However, the practical and common sense options discussed at length in the Commission's orders to date include retirement of the facility, divestiture of the facility and seeking a variance from the requirements of the law.¹ TransCanada also urges the

¹ In Order No. 25,546, the Commission said: "This does not mean, however, that the possibility of retirement of Merrimack Station is immaterial to our analysis." *Order Denying Second Motion for Rehearing and Clarifying Scope*, Order No. 25,546 at 7 (July 15, 2013). That Order continues, "Likewise, under 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." *Id.* at 8. It is also interesting to note the specific analysis that the Commission directed PSNH to prepare when it opened the DE 08-103 docket: "an analysis of the effect on energy service rates if Merrimack Station were not in the mix of fossil and hydro facilities operated by PSNH." Correspondence from Debra Howland to Robert Bersak, Docket De 08-103 (Aug. 22, 2008). It appears

Commission not to lose sight of the fact that PSNH had choices with respect to the advocacy it undertook both at the Legislature and at the PUC, where PSNH apparently refused to consider any option other than to proceed with the project and to oppose anyone who suggested otherwise. Those options included proposing, supporting or remaining neutral on legislation that would have required a further analysis of the project or a delay in the project or taking a similar position before the PUC in Docket DE 08-103.² To prohibit evidence or testimony regarding any of these options would be to ignore the reality of the full range of options PSNH had available in 2008 and 2009, when it provided only a very narrow range of information to the Legislature and the Commission and failed to provide relevant and adverse information that it had vetted internally. In so doing, PSNH's actions were contrary to those of a reasonable utility in its position. *Order Denying Third Motion for Rehearing*, Order No. 25,565 at 20 (Aug. 27, 2013) (quoting *Duke Energy Indiana, Inc.*, Cause No. 43114 IGCC 4S1, PUR slip copy at 108, 2012 WL 6759528 at *108 (IURC December 27, 2012)). TransCanada asks that the Commission not unnecessarily and inappropriately limit the scope of this proceeding and the range of evidence that may be presented on options that were available to PSNH.

from this statement that the Commission believed that retirement or divestiture was allowed under the scrubber law.

² PSNH urged the Commission in Docket DE 08-103 to hurry up and decide the issue so that there was no delay in building the project. For example in the letter dated September 2, 2008, PSNH said: "Any delay in this project will result in added costs, while, conversely, an accelerated schedule will save money... We respectfully ask the Commission's assistance in complying with the law by expediting the resolution of this inquiry." Correspondence from Gary Long, Docket DE 10-103 at 3 (Sept. 2, 2008). Similarly, the record on SB 152 during the 2009 legislative session shows that PSNH actively opposed legislation that would have required a further study to determine whether the scrubber law was in the interest of PSNH's retail customers and whether it was the least cost means of meeting PSNH's customer requirements in a manner that reduces mercury emissions by at least 80 percent.

9. The Commission has noted that PSNH clearly had the authority and the responsibility to make decisions about the Scrubber, and that this docket is about those decisions.³ As the Commission has noted, a prudence review is supposed to look at the full scope of management discretion: “We are not persuaded by PSNH’s arguments, however, that that our prudence review is limited to these questions alone [whether PSNH managed the construction in a prudent manger]. 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 comprehensive than a simple inquiry into whether PSNH did an adequate job of managing the funds expended to construct the Scrubber.” *Order Denying Second Motion for Rehearing and Clarifying Scope*, Order No. 25,546 at 7 (July 15, 2013). TransCanada merely asks that the scope of the management options available to PSNH be considered along with the option that it clearly exercised (e.g., engaging in regulatory and legislative advocacy against any further consideration of the project and withholding valuable information from both the Commission and the Legislature).

B. PSNH’s Claims Regarding the Meaning of SB 152 and HB 496 Are Contrary to the PUC’s Prior Orders and Relevant Legislative History

10. PSNH has through its rebuttal testimony provided a significant amount of testimony and legislative evidence in support of its claim that the law was a mandate that limited its options. In furtherance of its attempts to narrow the scope of the hearing,

³ “We have emphasized PSNH’s decision-making responsibilities from the outset of proceedings in Docket DE 08-103...” *Order Denying Third Motion for Rehearing*, Order No. 25,565 at 6-7 (Aug. 27, 2013). That Order went on to cite the DE 08-103 order (24,898) that said RSA 125-O:17 (which the Commission later said should have been cited as RSA 125-O:18) did “provide a basis for the commission to consider, in the context of a later prudence review, arguments as to whether PSNH had been prudent in proceeding with the installation of scrubber technology in light of increased cost estimates and additional costs from other reasonably foreseeable regulatory requirements...” *Id.* at 7 (quoting Order No. 24,898). In Order No. 25,565 the Commission once again emphasized that PSNH had a decision to make: “From the outset of proceedings before this Commission, we have characterized PSNH as having made a decision to proceed with the Scrubber project.” *Id.* at 7.

PSNH argues that the Legislature's failure to pass either SB 152, (which would have required a study of whether the scrubber was in the interest of retail customers of PSNH and whether it was the least cost option) or HB 496 (which would have limited PSNH's recovery of the costs of the scrubber to the original \$250 million estimate) in 2009 means that the Legislature expressly confirmed that it was in the public interest for it to spend \$457 million.⁴ See *Smagula Rebuttal Testimony* at 20 ("Thus, knowing that the scrubber was then-estimated to cost \$457 million, and after hearing from myriad other interested parties, the Legislature expressly chose not to change the mandate that a scrubber must be installed and operated at Merrimack Station."). In fact, as the Commission recognized in Order No. 25,565 and as the legislative history cited below shows, the Legislature's decision to kill the 2009 legislation "may signal that the Legislature believed that the Commission already had the authority to review PSNH's decision-making in which case the legislation would have been unnecessary...." *Order Denying Third Motion for Rehearing*, Order No. 25,565 at 11 (Aug. 27, 2013).

11. At hearings on SB 152, several opponents of the study bill, including PSNH executive Gary Long, testified that this Commission would have an opportunity to consider the prudence of PSNH's actions, and therefore a study was unnecessary:

- Harry Judd, a recognized utility lawyer who is a former Assistant Attorney General who worked extensively on the Seabrook bankruptcy and who has been counsel to the Nuclear Decommissioning Financing Committee, told the

⁴ On the one hand PSNH has said that because there was no \$250 million limit included in the law that passed in 2006 there was no understanding that this figure had anything to do with whether the project was in the public interest and whether an 80% increase in this estimate violated the statute's finding that it would be done at a reasonable cost to consumers. RSA 125-O:11,V. PSNH argued this despite the fact that the fiscal note in the bill referred to a not-to-exceed cost of \$250 million for the project and that this figure was based on information from PSNH and that Commissioner Nolin's letters to the House and Senate confirmed this. On other occasions PSNH has argued that by not passing the 2009 legislation the Legislature was confirming that it was OK to go ahead with the project and to spend up to \$457 million, the new estimate for the project, even though there was no express legislative act that said this and this figure does not appear anywhere in the law. PSNH can not have it both ways.

Senate Energy, Environment and Economic Development Committee in 2009 when testifying against SB 152 that *the legislation was unnecessary because the PUC would conduct a full audit and prudence review*, before the cost of the improvements at Merrimack Station was permitted in PSNH's rate and that this is a standard procedure before any capital addition is approved and that it was sure to be done for this project. Attached hereto as Exhibit A (Response to TC 6-233, p. 7 of 35).

- Gary Long similarly told the Legislature: "I mean the Public Utilities Commission can and will see all of this stuff. They look at all these project things and they do prudence review and they do a very thorough job. So we're not at all concerned with that, because we think we're doing a great job and we know they will do a very thorough job in reviewing what we did. But we don't have any problem with that. That's done in the normal course of business. *That's already provided for under current law.*" Attachment 27 to Mr. Hachey's Prefiled Testimony at 31 (emphasis added).⁵
- Senator Gatsas told the Senate Committee: "But there is a time to talk about prudence and that's when the project is done and costs are in." *Id.* at 8.
- Rep. Mary Beth Walls from Bow said: "So the costs have gone up. That happens. It happens on all kinds of things, you know. We'll deal with it and that's what the prudence review is there for." *Id.* at 21. She went on to say: "*Representative Hamm referenced that the prudence review comes too late to do anything. That's malarkey! The prudence review is there to make sure that the company's been honest in what they do, and if they're not honest, then the prudence review, under the prudence review the PUC has an obligation to disallow inappropriate costs. It's not discretionary, it's an obligation, and if they don't disallow it, you can bet the Consumer Advocate's going to take them to court and fight them for not disallowing inappropriate costs. So the prudence review that's in place now is more than adequate to deal with the increased costs of this plant.*" *Id.* (emphasis added).

12. The legislative record demonstrates that PSNH's claims regarding the meaning of the legislative action in 2009 are overreaching, inconsistent with the legislative history that PSNH itself provided, and inconsistent with the Commission's

⁵ Mr. Long went on to say: "I mean the PUC has access to this data without any law changed, and they certainly will look at it before, as Senator Gatsas says, anything goes in rate. I mean you really should take comfort in that. If they think we did anything wrong, or didn't do anything well, they will certainly let us know, and we will be hearing that one out too. So, I don't, you really don't, there's nothing to do in a future study that will help you understand the costs of the scrubber." Attachment 27 to Mr. Hachey's Prefiled Testimony at 32. Similarly: "But if people think that we're out of line, they have recourse. They have recourse through prudence review and they have recourse by, they can make a choice for a different power supplier." *Id.* at 33.

recognition that the decision to kill the 2009 legislation may signal that the Legislature believed it was unnecessary because the Commission already had the authority to review PSNH's decision-making. As the Commission has noted: "No utility may proceed blindly with the management of its assets or act irrationally with ratepayer funds; *PSNH had a duty to its ratepayers* to consider the appropriate response, possibly even including a decision to no longer own and operate Merrimack Station, when facing changing circumstances. As Order No. 24,914 made clear, the scope of our eventual prudence review would encompass those issues." *Order Denying Third Motion for Rehearing*, Order No. 25,565 at (Aug. 27, 2013) (emphasis added). The ratepayers deserve a full analysis of all of the options available to PSNH and which of those options were rational and would constitute appropriate management of its assets and which were not given what was known or available to be known at that time.

C. PSNH Must Respond to Data Requests Regarding its Options, Including the Option of Providing a Complete, Honest Assessment of the Scrubber Economics to the Legislature and the Commission.

13. For the reasons noted above TransCanada submits the Commission should consider the complete range of management options that were available to PSNH and what the Company did or did not do about each of those options and therefore should compel PSNH to respond to the following data requests, to which PSNH has objected.⁶

These questions of Mr. Smagula should be answered:

Q-TC-06-012:

With regard to your testimony on page 8 regarding practical options available to PSNH, was supporting SB 152 in 2009 a practical option for PSNH?

Q-TC-06-014:

What were the options that PSNH had in terms of the position that it took and the information it provided on SB 152 in 2009?

⁶ All four of the below requests, together with the relevant objections, are attached hereto as Exhibit B.

While PSNH includes three objections to these questions, all three concern relevance, and for the reasons set forth above, these objections should fail.

Similarly, the following question of Mr. Reed should be answered:

Q-TC-06-105:

Reference pages 10 through 13 of Mr. Harrison and Mr. Kaufman's testimony, upon which you rely. Do you believe that a prudent utility in PSNH's position in 2009 would have identified these uncertainties for the Legislature if said Legislature was considering further study of a \$450 million capital investment?

Again, all of PSNH's objections concerning this question rely on relevance arguments that are refuted above.

Finally, the following question of Ms. Shapiro should also be answered. If the response is that PSNH considered or made attempts to have the provision in the scrubber law limiting recovery to default service customers amended, i.e. if PSNH was seeking to make other changes to a law that it has said it had no choice but to follow, such a response would refute PSNH's position that it believed it had no choice but to follow the law. For this reason PSNH should be compelled to respond to this request.

Q-TC-06-252:

Are you aware of any efforts to change the Scrubber law so that all customers, rather than just default service customers, would have to pay for the Scrubber? (consider, for example, the testimony of Mr. Long to the Legislative Oversight Committee that the scrubber law is unfair because only default service customers must pay for the capital investment). Please list these efforts during each year from 2007 to present, summarize each effort, including communications with legislators and the executive branch, and provide all documentation and communications regarding that effort.

PSNH objected to this question on relevance grounds and on the ground that Ms. Shapiro testified only regarding the study she provided to the legislature. However, the question is related to PSNH's own testimony, not the testimony of other *parties*. *Order on*

Motions to Compel and Motions to Rescind Intervenor Status, Order No. 25,646 (April 8, 2014). PSNH misapprehends the meaning of Standard #2 in Order 25,646. Finally, Ms. Shapiro is uniquely able to respond to this question, as she has served as lobbyist for PSNH during the time period in question. *See, e.g.*, Exhibit A at 1;

CONCLUSION

14. By continuing to fall back on the argument that the law was a mandate and that it had no option other than to install the Scrubber, and by using this argument as the basis for refusing to answer questions about what steps it did or did not take, PSNH is attempting to inappropriately limit consideration of the full range of options it had available and thus to limit the scope of the Commission's analysis in this docket. The Commission should not countenance this PSNH strategy and should allow discovery, evidence and testimony that explore the full range of options. As a result, TransCanada asks that this Commission clarify the breadth of its prudence analysis to include consideration of all of the options a prudent utility in PSNH's position had with respect to its advocacy and communications before and with both the Legislature and the Commission. TransCanada submits that because such evidence is highly relevant to this proceeding the Commission should order the production of the discovery requests noted above and allow such evidence into the record.

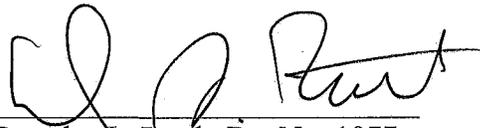
WHEREFORE, TransCanada respectfully requests that this honorable

Commission:

- A. Compel PSNH to respond to data requests TC 6-12, -14, -105 and -252;
- B. Clarify the scope of this proceeding in accordance with the arguments set forth herein; and
- C. Grant such further relief as it deems appropriate.

Respectfully submitted,

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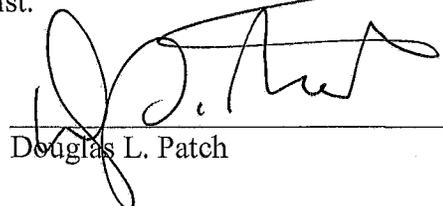


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August 25, 2014

Certificate of Service

I hereby certify that on this 25th day of August, 2014 a copy of the foregoing motion was sent by electronic mail to the Service List.



Douglas L. Patch