

**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**

**CONSERVATION LAW FOUNDATION'S AND SIERRA CLUB'S OBJECTION TO  
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE'S MOTION IN LIMINE TO  
EXCLUDE EVIDENCE RELATING TO POTENTIAL RETIREMENT OF  
MERRIMACK STATION AS A MEANS OF AVOIDING THE INSTALLATION OF  
SCRUBBER TECHNOLOGY**

NOW COMES the Conservation Law Foundation (“CLF”) and the Sierra Club (“SC”), pursuant to Puc 203.07(e), and hereby object to the above-referenced Motion filed by PSNH with the Commission on August 21, 2014. In support of this objection, CLF and SC assert the following:

**Factual and Procedural History**

1. On August 21, 2014, PSNH filed a Motion to Exclude Evidence Relating to Potential Retirement of Merrimack Station as a Means of Avoiding the Installment of Scrubber Technology (Motion to Exclude).
2. Prior to the filing the Motion to Exclude, PSNH filed a series of other pleadings asking the Commission to rule that it had no management discretion to retire Merrimack Station prior to completing installation of the scrubber and to exclude all evidence relating to that topic. In response, the Commission has repeatedly ruled that it would consider evidence relating to whether or not PSNH should have retired Merrimack Station, because the law clearly required PSNH to consider retirement as part of prudent utility management. *See, e.g.*, Order No. 25, 445

at 23-26 (PSNH could have retired plant rather than installing scrubber, ruling narrowed upon motion for reconsideration in Order 25,506) Order No. 25,506 at 17 (PSNH maintained management discretion to retire plant prior to installing scrubber but could not use retirement as means of requesting a variance pursuant to RSA 125-O:17); Order No. 25,546 at 8 (denying second motion for reconsideration and holding that PSNH retained management discretion to retire Merrimack Station under RSA 369-B:3-a and Commission never construed RSA 125-O as mandating that PSNH could continue to install scrubber if doing so would be poor or imprudent management of its generation fleet); Order No. 25,565 at 15-19 (denying third motion for reconsideration and affirming ruling that PSNH retained management discretion to retire or divest Merrimack Station prior to completing installation of scrubber and that PSNH had received due process with respect to this issue); and Order No. 25,640 at 13 (denying PSNH's Motions to Strike testimony regarding retirement and reiterating that Commission, despite PSNH's repeated arguments, has clearly stated its ruling that PSNH retained management discretion to divest or retire Merrimack Station).

3. For example, on May 28, 2013, the Commission issued Order No. 25,506, which ruled that: "To the extent that Order No. 25,455 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 17. The Commission did "not go so far, however, as to conclude that PSNH had no management discretion in this matter . . . . PSNH, like any other utility owner, maintained the obligation to engage in good utility management at all times." *Id.*

4. Next, on July 15, 2013, the Commission issued Order No. 25,546, an Order Denying Second Motion for Rehearing and Clarifying Scope. The Commission reiterated that although PSNH could not use retirement as a means of obtaining a variance from the requirements of RSA 125-O, that did “not mean, however, that the possibility of retirement of Merrimack Station is immaterial to our analysis.” *Id.* at 7. “The scope of [the Commission’s] 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 funds expended to construct the scrubber.” *Id.* The Commission reasoned that, although RSA 125-O might not allow PSNH – if it remained the owner and operator of Merrimack Station – the discretion to choose whether to install and operate the Scrubber, the Scrubber Law did “not allow PSNH to act irrationally with ratepayer funds.” *Id.* at 8. The Commission held that under RSA 125-O:18, PSNH retained the management discretion to divest itself of Merrimack Station, and “*under RSA 369-B:3-a, PSNH retained the management discretion to retire Merrimack Station in advance of divestiture.*” *Id.* (emphasis added). The Commission made clear that it would accept evidence regarding conditions in existence up to September 2011 (the date the Scrubber installation was substantially completed). *Id.* at 9. If the evidence showed that market and regulatory circumstances at the time decisions were made did not justify continued operation of the plant with the scrubber installed then “the costs of complying with the Scrubber Law would not be allowed into rates, even if prudently managed.” *Id.* at 10.

5. Thereafter, PSNH filed another Motion for Rehearing. On August 27, 2013, the Commission issued Order No. 25,565, denying the motion and affirming its Second Rehearing Order, Order No. 25,546. The Commission remained firm in its ruling that PSNH retained the

management discretion to divest itself of or to retire Merrimack Station, and that the Commission would accept evidence and make findings related to those management decisions. Order No. 25,565 at 15-19.

6. Next, on December 31, 2013, PSNH filed four motions to strike testimony, including motions to strike testimony regarding whether or not PSNH should have sought a variance or should have sought retirement of Merrimack Station rather than completing scrubber installation. CLF and SC objected to the motions based, in large part, on this Commission's prior orders. *See* DE 11-250:Tab 146: CLF and SC's Objection to PSNH's Motions to Strike Testimony at ¶¶ 7-14.<sup>1</sup>

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<sup>1</sup> For example, ¶ 8 of the Objection explained that:

With respect to retirement, PSNH moves for an order striking "any testimony relating to whether PSNH could have, and therefore should have, retired Merrimack Station as an alternative to installing the Scrubber." Mtn to Strike Retirement at 1. PSNH erroneously argues that the "Commission's prior orders make clear that neither RSA 125-O:18 or RSA 369-B:3-a permits the Commission to consider plant retirement as part of the docket." *Id.* PSNH makes this argument despite very clear language from this Commission that its prudency review in this docket *would* contemplate PSNH's management discretion prior to completion of the scrubber to divest itself of or retire Merrimack Station under those very statutes. Namely, in its July 2013 Order, the Commission stated:

. . . [T]he Scrubber Law does not allow PSNH to act irrationally with ratepayer funds. RSA 125-O:18 makes clear that *PSNH retained the management discretion to divest itself of Merrimack Station, if appropriate. 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.

Order No. 25,546 at 8 (July 15, 2013) (emphasis added). The Commission reiterated this position the following month:

. . . [T]he Legislature's public interest finding under RSA 125-O:11, VI regarding installation of Scrubber technology does not subsume a public interest finding by the Commission under RSA 369-B:3-a regarding PSNH's divestiture of Merrimack Station. . . . Further, *the statutory language expressly acknowledges that divestiture was a permissible decision for PSNH to make*, subject to a proceeding under RSA 369-B:3-a and an independent economic interest determination by this Commission.

. . .  
*Retirement of Merrimack Station presents slightly different considerations, but the result is the same for this analysis.* . . . [W]e reject PSNH's argument that we would have been precluded from making the findings necessary to permit PSNH to divest or retire Merrimack Station, prior to PSNH's completion of its Scrubber project.

7. On March 26, 2014, the Commission denied the Motion to Strike testimony related to retirement. Order No. 25,460 at 13-14. In so doing, the Commission stated that: “Contrary to PSNH’s characterizations of our orders, we have clearly stated ‘that PSNH retained the management discretion to divest itself of Merrimack Station, if appropriate, [and] to retire Merrimack Station in advance of divestiture.’” *Id.* at 13. Therefore testimony on that issue is relevant. *See id.*

8. On August 21, 2014, PSNH filed the instant Motion to Exclude which attempts to revive its failed arguments concerning retirement.

### **Legal Analysis**

9. In essence PSNH is asking this Commission to reconsider its recent ruling on the Motion to Strike and to reverse all of its prior rulings in this docket concerning the admissibility and relevance of testimony concerning retirement. The Commission may grant rehearing or reconsideration when a party states good reason for such relief and demonstrates that the decision is unlawful or unreasonable. *See* Order No. 25,506 (citing RSA 541:3 and *Rural Telephone Companies*, Order No. 25,291 (Nov. 21, 2011) at 9). A successful motion for rehearing does not merely reassert prior arguments and request a different outcome. Order No. 25,506 (string citation omitted).

10. PSNH has presented no new arguments; it merely continues to assert the same arguments that have not prevailed throughout this docket. *See, e.g.*, Order No. 25, 445 at 23-26 (PSNH could have retired plant rather than installing scrubber, ruling narrowed upon motion for reconsideration in Order 25,506) Order No. 25,506 at 17 (PSNH maintained management discretion to retire plant prior to installing scrubber but could not use retirement as means of requesting a variance pursuant to RSA 125-O:17); Order No. 25,546 at 8 (denying second motion for reconsideration and holding that PSNH retained management discretion to retire

Merrimack Station under RSA 369-B:3-a and Commission never construed RSA 125-O as mandating that PSNH could continue to install scrubber if doing so would be poor or imprudent management of its generation fleet); Order No. 25,565 at 15-19 (denying third motion for reconsideration and affirming ruling that PSNH retained management discretion to retire or divest Merrimack Station prior to completing installation of scrubber and that PSNH had received due process with respect to this issue); and Order No. 25,640 at 13 (denying PSNH's Motions to Strike testimony regarding retirement and reiterating that Commission, despite PSNH's repeated arguments, has clearly stated its ruling that PSNH retained management discretion to divest or retire Merrimack Station).

11. For the reasons set forth in all of the Commission's prior orders in this docket and because PSNH has raised no novel arguments that warrant reconsideration, the instant motion must be denied.

12. Moreover, in the interests of judicial economy and efficient and wise use of the administrative hearing process, CLF and SC respectfully request that the Commission not condone further motions from PSNH on this same topic. The motions require needless time from other parties who must file objections and waste the Commission's resources by repeatedly taxing the Commission with ruling on the same issue over and over, based on the same stale arguments.

13. For all of the foregoing reasons, this Commission should deny PSNH's Motion to Exclude.

### **Conclusion**

14. WHEREFORE, CLF and SC respectfully request that that Commission:
- a. Deny the Motion to Exclude; and

b. Grant such further relief, including an award of costs as this Commission deems just and proper.<sup>2</sup>

Dated: September 2, 2014

Respectfully submitted,

CONSERVATION LAW FOUNDATION

By:



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<sup>2</sup> CLF and SC seek recovery of costs pursuant to RSA 365:38-a, which permits the Commission to award just and reasonable costs deemed to be in the public interest to other parties that participate in utility proceedings. "Other parties" are defined as retail customers that are subject to the rates of the utility and who demonstrate financial hardship. CLF's and SC's respective membership includes retail customers of PSNH. CLF's and SC's participation in this docket is representative of those members' interests.

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of September 2014, a copy of the foregoing Objection was sent electronically or by First Class Mail to the service list.

By:



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