

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

**OBJECTION TO 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**

NOW COMES TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast Inc. (together, “TransCanada” or “the Companies”), intervenor in this docket, pursuant to Admin. Rule Puc 203.07(f) and objects to the Motion *in Limine* of Public Service Company of New Hampshire (“PSNH”) to Exclude Evidence Relating to the Potential Retirement of Merrimack Station as a Means of Avoiding the Installation of Scrubber Technology (“Motion”). In support of this Objection, TransCanada states as follows:

1. On August 21, 2014, PSNH filed a motion for reconsideration captioned as “a motion *in limine*” in an attempt to convince this Commission to change the rulings it has made with respect to retirement of Merrimack Station during the time frames at issue in this docket. For the reasons set forth below, PSNH’s motion must fail.

2. PSNH again takes issue with the Commission’s holding in various orders that it “retained management discretion to retire Merrimack Station in advance of divestiture.” *Order Denying Second Motion for Rehearing and Clarifying Scope*, Order No. 25,546 (July 15, 2013),

at 7 [hereinafter “July 2013 Order”].¹ See also *Order Denying Third Motion for Rehearing*, Order No. 25,565 (Aug. 27, 2013) [hereinafter “Aug. 2013 Order”].² In responding to PSNH’s motion, TransCanada incorporates by reference previous pleadings on this issue, in particular: *Joint Objection to Public Service Company of New Hampshire’s Motion for Rehearing of Order No. 25,546* (Aug. 16, 2013); *Joint Motion for Rehearing, Clarification and/or Reconsideration of Order No. 25,506* (May 28, 2013); *Objection to Public Service Company of New Hampshire’s Motion for Rehearing of Order No. 25,445* (Jan. 28, 2013).

3. First, PSNH’s motion misconstrues the import of the Commission’s holdings in 2008.³ The Commission opened Docket DE 08-103 to consider, in part “a potential statutory conflict as to the nature and extent of its authority relative to the scrubber as to the nature and extent of its authority relative to the scrubber project.” *Decision Concerning Statutory Authority*, Order No. 24,898 at 1-2 (Sept. 19, 2008) [hereinafter “Sept. 2008 Order”].⁴ The Commission’s view in Docket DE 08-103 was *prospective* – it was considering the Commission’s authority regarding PSNH’s actions *before* the Scrubber was completed. See, e.g., *id.* at 12 (“Consistent with our findings above, we conclude that the Commission lacks authority to pre-approve installation, but that it retains its authority to determine prudence”). The Commission concluded

¹ The July 2013 Order continued: “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.”

² In the August 2013 Order, the Commission said: “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.”

³ PSNH relies on the following statement to conclude that it could have spent billions on the Scrubber without any oversight with respect to its decision to continue to invest in Merrimack Station: “Nowhere in RSA 125-O does the Legislature suggest that an alternative to installing a scrubber technology as a means of mercury compliance may be considered, whether in the form of some other technology or retirement of the facility.” *Sept. 2008 Order* at 12. The Commission rejected this argument in Order No. 25,445. *Order Regarding TransCanada’s Motions to Compel* (Dec. 24, 2012) [hereinafter “Dec. 2012 Order”], see *infra*, ¶ 5.

⁴ 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).

– agreeing with PSNH’s strenuous advocacy – that it could not prospectively regulate PSNH’s scrubber expenditures. However, the 2008 rulings are limited in that they apply to the Commission’s consideration of future investments in the scrubber, not the retrospective prudence analysis.⁵

4. Second, in claiming that it relied on the language from the September 2008 Order, PSNH fails to recognize that the Commission revisited the question of its decision-making authority on rehearing in November 2008. In the *Order Denying Motions for Rehearing*, the Commission made it clear that “in the context of a later prudence review,” it would consider “arguments as to *whether PSNH had been prudent in proceeding with installation of scrubber technology* in light of increased cost estimates and additional costs from other reasonably foreseeable regulatory requirements such as those cited by the Commercial ratepayers...” *Order Denying Motions for Rehearing*, Order No. 24,914 at 14 (Nov. 12, 2008) (emphasis added) [hereinafter “Nov. 2008 Order”].

5. PSNH’s motion fails to even reference the November 2008 Order, which immediately followed the order upon which it most strenuously relies. *Motion* at ¶ 4-6. The November Order clearly anticipates that PSNH should be considering increased cost and upcoming regulatory requirements when devising its course of action. *Nov. 2008 Order* at 14. Reading the September and November orders together, it is clear that the Commission did not provide PSNH with carte blanche to spend hundreds of millions of dollars on the scrubber without considering whether Merrimack Station should be retired. *Id.* This interpretation

⁵ Similarly, in several recent filings and in discovery, PSNH misconstrues the meaning of the New Hampshire Supreme Court’s ruling with respect to Docket DE 08-103. *See, e.g.*, PSNH’s Response to TC 06-063, attached hereto as Exhibit A. The Supreme Court’s ruling only concluded that certain parties did not have standing to appeal the PUC’s decision in that case. *Appeal of Stonyfield Farm*, 159 N.H. 227 (2009). The Court did not reach the merits of whether the PUC’s orders in Docket DE 08-103 were correct, or what PSNH’s options were with respect to the scrubber and Merrimack Station. The Supreme Court’s quote of the PUC’s September 2008 Order indicating that the installation of the scrubber was “a mandate” is *dicta* related to its description of the case considered by the PUC, and not a holding regarding the meaning of RSA 125-O, 369-B, or any other statute. *Id.* at 230.

becomes even clearer when you read the following statement from the Dec. 2012 Order, which TransCanada submits was not changed by the *Order Granting Motion for Rehearing in Part*, Order No. 25,506 at 17 (May 9, 2013) [hereinafter “May 2013 Order”]:

PSNH’s interpretation that the law required installation of the Scrubber irrespective of cost would have allowed PSNH, or another utility owner, to install scrubber technology costing many billions, a decision which flies in the face of common sense and would violate the principle of statutory interpretation that one avoid an illogical or absurd result when construing legislative language. *In re Johnson*, 161 N.H. 419, 423 (2011) *citing Weare Land Use Assoc. v. Town of Weare*, 153 N.H. 510, 511-12 (2006); and *In re Alex C.*, 161, N.H. 231, 235 (2010) *citing State v. Gubitosi*, 157 N.H. 720, 723-24 (2008). It would not comport with the statute’s express understanding that the mercury reduction requirement was part of a balanced approach that could be accomplished at a reasonable cost to consumers. Finally, to read the variance provision as PSNH urges would lessen from PSNH, or any other utility owner, the obligation to engage at all times in good utility management. *See Public Service Company of New Hampshire*, Order No. 20,794, 78 NH PUC 149, 160 (1993); and *West Swanzey Water Company, Inc.*, Order No. 25,203 (March 25, 2011) at 7.

Dec. 2012 Order at 25-26.

6. The Commission has recognized PSNH’s management discretion throughout this proceeding and Docket DE 08-103. May 2013 Order at 17-18 (“We do not go so far, however, as to conclude that PSNH had no management discretion in this matter. Even though it may not have been within PSNH’s management discretion to propose retirement of Merrimack Station as an alternative reduction requirement under RSA 125-O:17, PSNH, like any other utility owner, maintained the obligation to engage in good utility management at all times.”).

7. PSNH’s argument is now, in effect, that the Commission’s Orders directed it to construct the scrubber whether or not Merrimack Station was to be closed or divested. In other words, PSNH believes that the Legislature found that it was in the public interest to expend over \$400 million on a scrubber *even if PSNH no longer intended to operate Merrimack Station*. This conclusion is absurd when considered in the context of the relevant orders and common sense.

Appeal of Lake Sunapee Protective Ass'n, 165 N.H. 119, 127-128 (2013) (quoting *Appeal of Geekie*, 157 N.H. 195, 202 (2008) and indicating that the Court “will not interpret statutory language in a literal manner when such a reading would lead to an absurd result”); *In re Johnson*, 161 N.H. 419, 423 (2011) (citing *Weare Land Use Assoc. v. Town of Weare*, 153 N.H. 510, 511-12 (2006); and *In re Alex C.*, 161, N.H. 231, 235 (2010).

8. While PSNH attempts to escape regulatory scrutiny by arguing that it complied with a “mandate” set forth in RSA 125-O, as the Commission has made very clear in its orders the issue is whether its scrubber expenditure was prudent, given PSNH’s various management options. In further support of this argument TransCanada incorporates by reference and relies upon the arguments set forth in its *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* filed in this docket on August 25, 2014 [hereinafter “Aug. 25, 2014 Motion”], which, in the interests of time and resources it will not restate here.

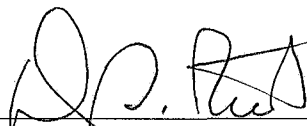
9. Finally, from an administrative efficiency perspective, it appears likely that PSNH will appeal the Commission’s decisions on the above-referenced issues if they are relevant to the Commission’s final order in this matter. *See, e.g., Appeal from Administrative Orders by Petition or, Alternatively, Petition for Original Jurisdiction* (September 25, 2013). At this juncture, the Commission should stand by its ability to hear testimony regarding the range of options available to it. *See, e.g., TransCanada’s Aug. 25, 2014 Motion*. In so doing, the Commission will allow the record to reflect the scope of facts which may ultimately be relevant to the case, permitting a full review at the appellate level, on as complete a record as possible, rather than risking having to reopen discovery and testimony or take additional evidence.

WHEREFORE, TransCanada respectfully requests that this honorable Commission:

- A. Deny the 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; and
- B. Grant such further relief as it deems appropriate.

Respectfully submitted,

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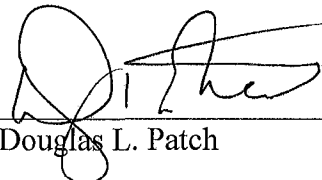


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Certificate of Service

I hereby certify that on this 2nd day of September, 2014 a copy of the foregoing motion was sent by electronic mail to the Service List.



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