THE STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

Public Service Company of New Hampshire
Merrimack Station Scrubber Project
Request for Information

Docket No. DE 08-103

OBJECTION OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE TO MOTION OF SIERRA CLUB

Public Service Company of New Hampshire (hereinafter "PSNH" or "the Company") hereby objects to the Motion filed by the New Hampshire Chapter of the Sierra Club (hereinafter "Sierra Club") on May 24, 2010. By that Motion, the "Sierra Club demands that the Public Utilities Commission enter the Burns & McDonnell, GZA and Sargent & Lundy studies to the public record in this case; together with whatever other relief proper in the premises [sic]."

PSNH's Objection is based upon the fact that the instant docket is not an adjudicative proceeding; the materials in question are not relevant to the purpose of this docket; the Sierra Club's allegations, which are unfounded and patently absurd, are wasting the Commission's time and resources and incurring costs that ultimately must be borne by consumers; and Sierra Club's lack of standing.

I. INTRODUCTION

This docket involves the mandate placed on PSNH by 2006 N.H. Laws Chapter 105 to install scrubber technology at its Merrimack Station. In *Appeal of Stonyfield Farm*, 159 N.H. 227 (2009), the New Hampshire Supreme Court stated, "the legislation specifically requires PSNH to install 'the best known commercially available technology . . . at Merrimack Station,' which the New Hampshire Department of Environmental Services (DES) has determined is the scrubber technology" and "[t]o comply with the Mercury Emissions

Program, PSNH must install the scrubber technology and have it operational at Merrimack Station by July 1, 2013. *See* RSA 125-O:11, I." *Id.*at 228-9.

This docket was initiated by a Secretarial letter dated August 22, 2008, "pursuant to RSA 365:5 and 365:19 to inquire into: the status of PSNH's efforts to install scrubber technology; the costs of such technology; and the effect installation would have on energy service rates (previously referred to as the default service charge) for PSNH customers."

The Commission found in Order No. 24,898, dated September 19, 2008, (the "Order"), that it "lacks the authority to make a determination pursuant to RSA 369-B:3-a as to whether this particular modification is in the public interest." Order, slip op. at 13. The Commission's legal analysis leading to that conclusion was detailed and comprehensive. On rehearing, in Order No. 24,914, dated November 12, 2008, (the "Rehearing Order"), the Commission upheld its prior Order, reiterating its "authority to determine prudence, including 'determining at a later time the costs of complying with the requirements of RSA 125-O:11-18 and the manner of recovery for prudent costs'" (Rehearing Order, slip op. at 13) and its determination that it lacked "authority to determine at this juncture whether PSNH may proceed with installing scrubber technology." *Id*.

The Commission's Order and Rehearing Order decisions were appealed to the New Hampshire Supreme Court in *Stonyfield,* an appeal in which Sierra Club participated as *amicus curiae*. As the Commission is aware, the Supreme Court dismissed the *Stonyfield* appeal.

II. THE MOTION

In its Motion, the Sierra Club demands that certain reports be entered into the public record in this case, and exhorts that "PUC staff should be compelled to explain by what authority it redacted" those reports by "improperly sequester[ing]" them.

In the Motion, the Sierra Club bizarrely alleges it "has reason to believe that Public Service Company of New Hampshire is engaged in a major life extension project at the 50 year old Merrimack Station; a project that exceeds the ambit of RSA125-O, which requires only that Public Service Company of New Hampshire install flue gas desulphurization equipment." Sierra Club continues by stating that it "*believes* that Public Service Company of New Hampshire is in the process of upgrading the plant generation capacity and incrementally de-bottlenecking the balance of plant equipment, all under the guise of the scrubber legislation"(emphasis added).

Sierra Club goes on to state that the reports in question "prove that Public Service Company of New Hampshire engaged in a comprehensive study of life extension and generation upgrade projects for Merrimack Station" and from that concludes they "strongly suggest that Public Service Company of New Hampshire is engaged in more than the installation of the pollution control equipment contemplated by RSA 125-O."

III. OBJECTION

A. This Docket is Not an Adjudicative Proceeding

The instant docket is not an adjudicative proceeding. It was not instituted by an Order of Notice as required for such an adjudicative proceeding by Rule Puc 203.12. Moreover in the Rehearing Order, the Commission expressly stated it "did not commence a full adjudicative proceeding." Slip op. at 9.

As this proceeding is not an adjudicative proceeding, there is no "record" as that term is used in RSA 541-A:31, VI. Therefore, there is no "record" in which to enter the reports in question.

Based upon Sierra Club's admonishment of Commission Staff in footnote 1 of the Motion, PSNH assumes that what the Sierra Club wants is for the reports in question to be publicly displayed on the Commission's website. There is no requirement for such a posting to take place. The Commission's website is neither a public "blog" nor "Facebook" nor an alternative to the Sierra Club's own website. If the Sierra Club determines that it has the requisite authority, and that it is necessary and proper to publicly post and distribute the reports in question, it has its own website to do so. However, PSNH warns that the reports in question, even if legitimately obtained by Sierra Club, may be copyrighted by their creators and may contain confidential or proprietary information of PSNH and/or the contractors who created the reports. (For example, just because Sierra Club may legitimately have a book or DVD recording in its possession, it is not free to post those materials on its website, nor to attach them to a letter sent to the Commission, demanding that those materials be posted on the web as part of an on-going docket.) Any posting made of the materials in question by Sierra Club would be done at its own peril.

The Commission's Rules governing motions are contained in PART Puc 203. PART Puc 203 applies to "Adjudicative Proceedings" – which this is not. Hence, Sierra Club's filing of a Motion in this proceeding has neither a regulatory nor procedural basis and thus should be stricken from the record.

B. The Reports in Question are Not Relevant to this Proceeding

Sierra Club alleges that PSNH is engaged in a secret, undisclosed "major life extension" at Merrimack Station that includes "the process of upgrading the plant generation capacity and incrementally de-bottlenecking the balance of plant equipment, all under the guise of the scrubber legislation." Such allegations are patently absurd.

Sierra Club's basis for its frivolous allegations is that PSNH commissioned studies that "thoroughly examine the engineering, capital costs, operation and maintenance costs, and, environmental permitting requirements for various life extension options for Merrimack Station, including replacement of the boiler, projects that are substantially more extensive than the scrubber project."

The Commission is well aware of the requirement for PSNH to prudently own, operate, and maintain its assets, including its generating stations. The "Agreement to Settle PSNH Restructuring" approved by the Commission in Docket No. DE 99-099 requires that "PSNH will be responsible for prudently operating its fossil/hydro generating assets, and for prudently managing the generation-related entitlements and purchase obligations in which it retains an interest until such time as they are sold or transferred to another entity, or a purchase obligation terminates." It would be imprudent for PSNH <u>not</u> to periodically review potential improvements to its generating stations.

If such studies reveal improvements that make economic sense to implement, PSNH will pursue those improvements in a manner consistent with all applicable laws, regulations, and Commission orders. The mere fact that PSNH has commissioned such studies proves nothing other than that PSNH is indeed taking the measures that are necessary and appropriate to meet its prudence requirement.

The Sierra Club claims that the clandestine modifications allegedly being undertaken at Merrimack Station are being done under the guise of the mandated scrubber project. PSNH vehemently denies such irresponsible accusations. For sake of argument, even if one were to accept the Sierra Club's fiction, how and when would PSNH be able to recover the costs of such undisclosed improvements? The Commission has affirmatively stated in both the Order and Rehearing Order that the scrubber project will be the subject of a prudence review. The Commission has already engaged an expert consultant to assist with that prudence review process. It is quite unlikely that PSNH would be able to camouflage the allegedly undisclosed life-extension and generation upgrade projects so that they are not discovered by

the Commission or its expert consultant. Furthermore, for this chicanery to be pulled off, PSNH would need the assistance of its myriad contractors and subcontractors in an intricate conspiracy so that their contracts and invoices did not reveal the covert work that was undertaken. The Sierra Club's absurd allegations must be dismissed out of hand.

The reports in question have no bearing whatsoever on the underlying purpose of this docket as set forth in the August 22, 2008 Secretarial letter (i.e., "the status of PSNH's efforts to install scrubber technology; the costs of such technology; and the effect installation would have on energy service rates (previously referred to as the default service charge) for PSNH customers"). The reports are irrelevant to this proceeding as they have no probative value to the matters set forth by the Commission in the cited Secretarial letter. The reports would not provide any tendency to make the existence of a material or consequential fact more probable or less probable than it would be without the evidence. (*See* Rule 401, New Hampshire Rules of Evidence and Federal Rules of Evidence.)

Indeed, Rule 402 of both the New Hampshire and Federal Rules of Evidence is more on point in this situation: "[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The introduction of several outdated feasibility studies, with no identifiable link to the scrubber project, serves no purpose other than to obfuscate issues and waste the Commission's valuable time and resources.

C. Lack of Standing

In *Stonyfield*, the Supreme Court noted:

> A party's standing is a question of subject matter jurisdiction, which may be addressed at any time. *Libertarian Party of N.H. v. Sec'y of State*, 158 N.H. 194, 195 (2008). To have standing to appeal an administrative agency decision to this court, a party must demonstrate that his rights "may be directly affected by the decision, or in other words, that he has suffered or will suffer an injury in fact." *Appeal of Richards*, 134 N.H. 148, 154 (quotations and citations omitted), *cert. denied*, 502 U.S. 899, 112 S.Ct. 275, 116 L.Ed.2d 227 (1991); *see* RSA 541:3 (2007).

159 N.H. at 231.

Applying that standard to this particular proceeding, the Court decided:

> Here, as in *Appeal of Campaign for Ratepayers Rights*, any potential injury the petitioners may suffer would arise only in a subsequent rate setting proceeding. See RSA 125-O:18 (Supp.2008) (PSNH "shall be allowed to recover all prudent costs" of installing the scrubber technology "in a manner approved by the [PUC]," and recovery of these costs "shall be ... via ... [PSNH's] default service charge"). Such future harm is insufficient, as a matter of law, to confer standing upon the petitioners to appeal the PUC's decision. Accordingly we dismiss the appeal.

Id. at 231-2.

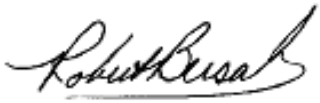
As noted earlier, Sierra Club was an *amicus curiae* party in the *Stonyfield* proceeding. In the "Brief of *Amici Curiae*" submitted to the Court by Sierra Club, *et al.*, factual allegations similar to those in the instant Motion were included. Yet, despite these arguments, the Court dismissed the *Stonyfield* appeal based upon the petitioners' lack of standing. Sierra Club's arguments contained in its Brief filed with the Supreme Court over a year ago have not changed, nor have the underlying facts. Hence, the Commission should follow the Court's dictates and deny the Motion due to lack of standing.

IV. Conclusion

For the reasons set forth above, the Motion of Sierra Club should be denied. Moreover, due to the fact that there is no basis in law for the Sierra Club's procedurally, substantively, and factually deficient Motion, the Commission should consider the imposition of sanctions and other relief as it may deem appropriate.

Respectfully submitted this 1st day of June, 2010.

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

By: 

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CERTIFICATE OF SERVICE

I certify that on this date I caused this Objection to be served to parties on the Commission's service list for this docket.

June 1, 2010