

STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

Public Service Company of New Hampshire

Investigation of Merrimack Station Scrubber Project and Cost Recovery

Docket No. DE 11-250

LEGAL BRIEF OF THE OFFICE OF THE CONSUMER ADVOCATE

The Public Utilities Commission (Commission) opened this docket for the purpose of considering the wet flue gas desulphurization system (Scrubber) installed at Merrimack Station, a coal-fired electricity generation facility owned by Public Service Company of New Hampshire (PSNH). *Order of Notice* (DE 11-250, September 1, 2012). In a previous docket concerning the Scrubber, the Commission ruled that its authority was “limited to determining at a later time the prudence of the costs of complying with the requirements of RSA 125-O:11-18 and the manner of recovery for prudent costs.” Appeal of Stonyfield Farm, Inc., 159 N.H. 227, 230 (2009) *citing* RSA 125-O:18.

PSNH seeks to recover through default energy service rates approximately \$420 million of Scrubber costs, and the Commission must determine whether the proposed rates that would result from recovery of these costs are reasonable. RSA 378:7 and RSA 378:28 (statutory law limits customer rates to a level that is “reasonable”); and RSA 125-O:18 (Scrubber cost recovery in a manner approved by the Commission). PSNH is entitled to earn and recover from its default energy service customers a reasonable return on its capital investment in the Scrubber but only to the extent that the investment is prudent. RSA 378:28 and 125-O:18; see Appeal of Conservation Law Foundation of New England, Inc., 127 N.H. 606, 633-634 (1986) (citations

omitted) (the Commission's revenue requirement formula includes the rate of return allowed on rate base) and 637 (a utility is constitutionally entitled to earn a reasonable return on prudent investment that is used and useful in the service to customers).

The plain and ordinary meaning of prudence is acting with or showing care and thought for the future.” Oxforddictionaries.com

http://oxforddictionaries.com/definition/american_english/prudent?region=us&q=prudent%27

The principle of prudence within the context of utility ratemaking “applies an analogue of the common law negligence standard for determining whether to exclude value from rate base.”

Appeal of Conservation Law Foundation of New England, Inc., 127 N.H. at 637. See Pierce,

The Regulatory Treatment of Mistakes in Retrospect: Canceled Plants and Excess Capacity, 132

U.Pa.L.Rev. 497, 511 (1984) citing, inter alia, S. W. Tel. Co. v. Pub. Serv. Comm., 262 U.S.

276, 289 n. 1 (1923) (Brandeis, J., concurring). The prudence principle “at least requires the

exclusion from rate base of costs that should have been foreseen as wasteful.” Appeal of

Conservation Law Foundation of New England, Inc., 127 N.H. at 637, citing LUCC v. Public

Serv. Co. of N.H., 119 N.H. 332, 343 (1979); Company v. State, 95 N.H. 353, 360 (1949); and S.

W. Tel. Co. v. Pub. Serv. Comm., 262 U.S. at 289. In this case, if the Commission determines

that PSNH acted imprudently when it invested in (any portion of) the Scrubber, PSNH's

shareholders will earn less of a return on that investment and PSNH's customers will pay lower

rates for default energy service.

In considering prudence, the Commission “judges an investment or expenditure in the light of what due care required at the time an investment or expenditure was planned and made.”

Appeal of Conservation Law Foundation of New England, Inc., 127 N.H. at 638. The

Commission must “exercise ... judgment and discretion in determining the recognition that is

appropriately due to the competing interests of the company and its investors and of the customers who must pay the rates to provide the revenue permitted.” Id. See RSA 363-17-a (“commission shall be the arbiter between the interests of the customer and the interests of the regulated utilities”). To assess these competing interests as well as what due care required, the Commission must understand the context within which PSNH made decisions to invest in the Scrubber as well as PSNH’s understanding of that context.

In discovery, TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast, Inc. (TransCanada) sought information related to PSNH’s knowledge of the economic viability of the continued operation of Merrimack Station as well as the conditions and circumstances in the regional electricity market that existed prior to and during the construction of the Scrubber. This information is relevant to, or reasonably calculated to lead to the discovery of admissible evidence concerning, the prudence of PSNH’s investment in a wet flue gas desulphurization system (Scrubber) at PSNH’s Merrimack Station. Order No. 25,398 at 2-3.

Based upon information and belief, the conditions and circumstances that existed for PSNH and within the New England electricity market at least as early as September of 2008 necessitated – at least - the consideration by PSNH of whether it was prudent to invest more than \$400 million in the Scrubber and to expect recovery of these costs through “reasonable” default service rates. A reasonable utility similarly situated to PSNH would have or should have known the then-present and reasonably foreseeable status of various factors that would influence the ability to lawfully recover more than \$400 million through reasonable default energy service rates.

In and around this time, the price of the Scrubber nearly doubled from \$250 million to \$450 million. The price of natural gas continued to decline from the highs experienced in 2005 and 2006, and the New England region began a period of decreased reliance on coal-fired electricity generation which is reflected in the low capacity rates reported by Merrimack Station during (and since) this time. Also, the rate of migration of PSNH's commercial and industrial customers was increasing, and, as a consequence, the customer base through which PSNH could recover its Scrubber investment shrank. As of September 2008, PSNH had spent only approximately \$10 million on preparations for the Scrubber. Report to Commission (DE 08-103, September 12, 2008) at 6-9. Also at this point in time, PSNH had not yet gained permission to begin construction of the Scrubber; its Temporary Clean Air Permit was not issued by the Department of Environmental Services until March of 2009.

Within this context, a reasonable and prudent utility would or should have concluded that the Scrubber was not a prudent investment and would or should have sought relief from the requirement that the Scrubber be installed. PSNH's interpretation of RSA 125-O:11 et seq. as requiring the installation of the Scrubber notwithstanding the costs associated with doing so and the reasonably foreseeable effect that recovery of these costs would have on default service rates is inconsistent with the statutory requirements governing the Commission's rate-setting authority and the requirement that utilities recover only prudent investment.

Had the owner of Merrimack Station not been a regulated public utility, the Scrubber may not have been constructed; a prudent owner would have known that the market would not have allowed for recovery of the costs of the Scrubber and a prudent owner of Merrimack Station would have sought relief from the requirements of RSA 125-O:11 et seq. in all lawful ways

including but not limited to seeking a change in the law. Just because PSNH is regulated and has ratepayers does not mean that it should be held to a different standard.

Because PSNH's recovery of the Scrubber costs is bounded by the requirements that the costs are prudent and the resulting default service rates are reasonable, the Commission should permit the discovery of information sought by TransCanada's data requests. This information is relevant to or likely to lead to the discovery of relevant evidence about the prudence of PSNH's investment in the Scrubber.

Respectfully submitted,

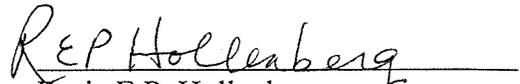


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I hereby certify that a copy of this brief was provided via electronic mail to the individuals included on the Commission's service list for this docket.

8-28-12
Date


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