STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

Public Service Company of New Hampshire

Docket DE 11-250

Memorandum of Public Service Company of New Hampshire in Response to Commission Order 25,398

I. Introduction

[T]he scrubber installation at Merrimack Station does not reflect a utility management choice among a range of options. Instead, installation of scrubber technology at the Merrimack Station is a legislative mandate, with a fixed deadline. See RSA 125-O: 11, I, II; RSA 125-O:13, 1. The Legislature, not PSNH, made the choice, required PSNH to use a particular pollution control technology at Merrimack Station, and found that installation is "in the public interest of the citizens of New Hampshire and the customers of the affected sources." RSA 125-O: 11, VI.

. . .

The Legislature has also retained oversight of the scrubber installation including periodic reports on its cost. See RSA 125-O:13, IX. Furthermore, the Commission has only those powers delegated to it by the Legislature, see Appeal of Public Service Co. of N.H., 122 N.H. at 1066, and, by statute, the Commission's regulatory oversight here is limited to after-the-fact determinations of whether costs incurred by PSNH in complying with RSA 125-O:11-18 are prudent. RSA 125-O:18. If the Commission determines such costs are prudent, PSNH may recover those costs through its default service charge. RSA 125-O:18.

. . .

[I]t was the Legislature who determined that the scrubber technology is in the public interest and, therefore, any modification or rescission of that finding logically rests with that body. Consequently, we may not revisit or review the finding.

Order No. 24,979, Docket No. DE 09-033,
Public Service Co. of New Hampshire,
94 NH PUC 311, 318-19 (2009)

Following a Motion to Compel filed by TransCanada Power Marketing Ltd. ("TransCanada") and an Objection by Public Service Company of New Hampshire ("PSNH"), the Commission requested that the parties file memoranda of law on the "proper interpretation of RSA 125-O:10[1] and RSA 125-O:17 and the cost recovery provisions of RSA 125-O:18, and how these statutes relate to one another… ." Order No. 25,398, August 7, 2012, in Docket No. DE 11-250 (the "Order") at 10. The Commission identified five issues to be addressed by the parties. While the issues raised by the Commission are addressed in detail in this memorandum, a summary of PSNH's position on the five issues is as follows:

1. **The types of variance requests that may be made under RSA 125-O:17, I and II.**

   "RSA 125-O:17 constitutes a mechanism for PSNH to seek relief from the Department of Environmental Services ("DES") *in certain circumstances*."[2] Section 17 would have permitted (but not required) PSNH to seek a variance from the mandates set forth in the mercury reduction law in two instances only: (I) if and when some variation in the compliance schedule set in RSA 125-O: 13, I (the July 1, 2013 deadline) was needed while still necessarily demonstrating "reasonable further progress" and providing a date "for final compliance as soon as practicable," or (II) if and when some variation in the 80 percent mercury emissions reduction requirement found in RSA 125-O:13, II was needed. (RSA 125-O:17, I, II.) No other variances are permitted by statute. As explained below, because neither a change in schedule nor a change in emissions reduction amount was needed, PSNH did not seek (and could not have sought) a variance. The Section is therefore irrelevant and of no consequence for this proceeding.

2. **The meaning of the phrases "alternative reduction requirement" and "technological or economic infeasibility" in RSA 125-O:17, II.**

   In RSA 125-O:11, II, the Legislature found that "Scrubber technology achieves significant emissions reduction benefits, including but not limited to, cost effective reductions in sulfur dioxide, sulfur trioxide, small particulate matter, and improved visibility (regional haze)." However, the *only* emissions reduction requirement contained in the mercury reduction law is the "mercury reduction requirement" (for example, *see* RSA 125-O:11, VII and VIII; 125-O:13, VI, VII, and VIII), which refers to the requirement in RSA 125-O:13, II that "Total mercury emissions from the

[1] All references to RSA Ch. 125-O are to the 2011 supplement.

[2] Order No. 24,914, Docket DE 08-103 (2008) at 13 (emphasis added).

affected sources shall be at least 80 percent less on an annual basis than the baseline mercury input, as defined in RSA 125-O:12, III, beginning on July 1, 2013." Thus, an "alternative" reduction requirement would mean some deviation from the law's 80 percent reduction mandate.

However, the Legislature *mandated* construction of the Scrubber. In addition, as this Commission has held, "The Legislature has also retained oversight of the scrubber installation including periodic reports on its cost." Docket No. DE 09-033, Order No. 24,979 at 14. Given that express construction mandate and retention of Legislative oversight, the term "alternative reduction requirement" can only mean that a variance may be sought from the "mercury emissions reduction requirements" of the law if the 80 percent reduction requirement in RSA 125-O:13, II was not achieved once the Scrubber technology had been installed. This interpretation is supported by RSA 125-O:13, V, which provides that the 80 percent reduction "shall be sustained *insofar as the proven operational capability of the system, as installed, allows*" (emphasis added). The term "technological or economic feasibility" appears only in Subpart II, and thus provides evidence of the Legislature's intent that the Department of Environmental Services (not the Commission) consider *once the Scrubber technology had been installed* whether achieving the 80 percent reduction was either not possible with the particular scrubber technology chosen, or because, for example, spending additional amounts to achieve the last required fraction of a percent reduction in emissions to meet the 80 percent mandate was "economically infeasible."

Nothing in the statute suggests that this subpart permits a wholesale "waiver" or repeal of the mandate to construct the Scrubber, or that "economic infeasibility" relates in any way to the duty to construct, as opposed to the amount of reduction achieved.

3. The duty of PSNH to seek a variance from DES under RSA 125-O:17 to obtain cost recovery under RSA 125-O:18.

PSNH had neither a duty, nor the opportunity, to seek any variance under RSA 125-O:17. The statute is permissive. However, PSNH did have a duty to fully comply with a law that mandated the accomplishment of a challenging engineering feat: the installation of a Scrubber to effectively target not sulfur dioxide emissions, for which scrubbers have traditionally been designed, but far more elusive mercury emissions, and not just from one unit but two units. Since PSNH was the first utility in the country to be required to remove a certain percentage of mercury through the installation of specifically identified technology, the Legislature, through the variance provision, provided for a limited degree of flexibility once the construction was complete and operational – but always under the supervision of the Department of Environmental Services. However, it was unnecessary for PSNH to seek a variance in this case because the circumstances that would have permitted a request for a variance under Section 17 did not occur. Therefore Section 17 has no relevance whatsoever to the Commission's determination of prudent costs under RSA 125-O:18.

4. The meaning of the non-severability clause in RSA 125-O:10 for purposes of the prudence determination under RSA 125-O:18.

The non-severability clause in RSA 125-O:10, together with a similar clause in RSA 125-O:11, VIII, provides further evidence that RSA 125-O:17 was not intended to create a general exception to the mandate in RSA 125-O:13. An interpretation of RSA 125-O:17 that allowed a variance in order to re-assess the threshold duty to build the Scrubber or the overall cost of construction would be completely inconsistent with the requirements of RSA 125-O:10, which provides that "no provision of RSA 125-O:1 through RSA 125-O:18 of this chapter shall be implemented in a manner inconsistent with the integrated, multi-pollutant strategy of [Sections 1-18]." It would also undermine the "comprehensive, integrated power plant strategy" of the Multiple Pollution Reduction Program espoused in RSA 125-O:1, V.

Given the mandate to build the Scrubber and the Legislature's retention of jurisdiction to review costs, a prudence review that allowed a reassessment of the viability or wisdom of the Scrubber Project in its totality – rather than focusing on the specific costs incurred to build the Scrubber – would violate the statutory mandate and the clear intent of the Legislature as expressed throughout Sections 1 through 18 of the law. The purpose of the non-severability clause when considered within the statutory scheme as a whole was to ensure that there would be just no such second-guessing the legislative intent, no tinkering with the carefully crafted mandate once the Scrubber Project was underway – given the rarity of non-severability clauses in the law, the Legislature could not have found a clearer way to seal the deal.

5. How RSA 125-O:10 and RSA 125-O:17 relate to one another and to the Commission's prudence determination under RSA 125-O:18.

Section 10 supports the interpretation of Section 17 as having only limited applicability and establishes that Section 17 cannot be sought as a means of avoiding the construction mandate in RSA 125-O:13. RSA 125-O:10 establishes that the Scrubber is an integral part of the State's Multiple Pollutant Reduction Program and no portion of Sections 1 through 18 may be removed or nullified.

Standing alone, Section 10 does not directly relate to Sections 17 and 18. Instead, it must be read in conjunction with the entirety of the first 18 sections, including Section 13. Section 13 imposes the mandate to construct the Scrubber and to do so by a date certain. Since the Legislature determined that the cost of the Scrubber was a reasonable means of complying with a Legislative goal, was in the public interest, and retained jurisdiction to oversee the appropriate cost of the Scrubber construction, the Commission may not use RSA 125-O:18 to determine that the cost to construct the Scrubber is not prudent *per se*. This is especially true in light of the Legislature's express consideration of measures to modify or limit the Scrubber mandate during 2009 in SB 152 and HB 496 – measures which were soundly defeated and found to be "inexpedient to legislate."

> Likewise, since Section 17 allows a variance based on economic infeasibility *only* in relation to whether the specific 80 percent emissions reduction requirement can be met using the mandated, installed technology, there was no authority for PSNH to seek relief from the requirement to construct the Scrubber and, therefore, not seeking such a variance cannot be considered in the prudence proceeding.

At the heart of the Commission's inquiry is TransCanada's erroneous claim that the Commission may determine that costs incurred by PSNH during construction to install a wet flue gas desulphurization system (the "Scrubber") at Merrimack Station are not prudent because they exceeded some unspecified level. TransCanada contends that under RSA 125-O:17, PSNH had a *duty* to seek a "variance" from the legal mandate imposed by the Legislature to build the Scrubber whenever this unknown cost limit was reached. It further posits that because PSNH failed to seek such a variance, RSA 125-O:18 allows the Commission to find any such "excess" costs not to be prudent. Reviving an argument that this Commission has explicitly rejected in two previous dockets, TransCanada concocts a duty that does not exist, and then bootstraps the alleged breach of that duty into a basis for a Commission review – and rejection – of reasonable construction costs mandated by RSA 125-O:11-18.[3]

TransCanada's claim is nothing more than a recycled version of the arguments it, and others, made in Docket DE 08-103. There, it contended that the Commission had the authority to review the cost of the Scrubber whenever construction costs exceeded $250 million, the 2006 conceptual estimated cost of the Scrubber when the Legislature first made its public interest

[3] There are many problems with TransCanada's variance argument, but one is sufficient to dispose of this case. Neither of the circumstances that would have permitted PSNH to seek a potential variance occurred in this case because, as the Commission knows, the Scrubber was completed well within the statutory deadline and the Scrubber is meeting – indeed, surpassing – the mercury emission requirements mandated by the statute. As a result, PSNH never had the legal ability to seek a variance under RSA 125-O:17, and TransCanada's alleged obligation for PSNH to seek a variance – and the discovery to determine whether PSNH considered seeking such a variance – is a purely hypothetical issue. TransCanada is asking the Commission to allow discovery to address a moot point.

determination.[4] Here, its claims are more vague. It has presented no specific number, but contends that because Scrubber costs "increased dramatically" PSNH had an obligation to seek a variance and the Commission could declare those increased costs not to be prudent. In short, it seeks in this docket to have the Commission do indirectly what the Commission refused to do – and found it had no authority to do – directly in Docket DE 08-103.

Because the statute mandated construction without regard to a specific cost figure, and because the variance provision allows no such review of overall construction costs, TransCanada's argument is not only contrary to the language of the statute, it is contrary to this Commission's prior orders, and contrary to fact. As it did in the past efforts to limit the cost of construction of the Scrubber, the Commission should reject this attempt.

II. Background to the Current Dispute.

This is the third effort by TransCanada to harm PSNH either by requiring Merrimack Station to shut down because it cannot meet mercury reduction requirements, or by preventing the timely and complete recovery of the cost to construct the Scrubber.[5]

In 2008, TransCanada intervened in Docket DE 08-103, "Investigation of Merrimack Station Scrubber Project and Cost Recovery," which was instituted when the cost of constructing

[4] *See* "New Hampshire Clean Air Project, Due Diligence on Completed Portion Report," Jacobs Consultancy, June 2011, p. 3.

[5] TransCanada's interest in this proceeding is dubious, at best. In its December 7, 2011 Petition to Intervene in this proceeding, it stated, "TransCanada's competitive position relative to PSNH may be harmed depending on the results of this docket. TransCanada's rights and interests as a competitive supplier and as a participant in the market for electricity in New England may be affected by the Commission's decision with regard to PSNH's recovery of the Scrubber Project costs and some of the other issues raised and addressed in this proceeding." Yet, its challenge to the recovery of prudently-incurred costs by PSNH belies this statement. It is antithetical to TransCanada's interests to advocate a position that would *lower* PSNH's energy service rate by a disallowance of some, or all, costs of the Scrubber. If TransCanada's goal is merely to delay these proceedings in order to ultimately increase the costs to customers as a result of growing under-recoveries and deferrals, the Commission may want to reconsider both TransCanada's status as an intervenor as well as the level of Temporary Rates that are in effect.

the Scrubber increased from an original conceptual estimate of $250 Million to $457 million.[6] Order No. 24,898 at 1. TransCanada argued that the Legislature's finding that the Scrubber was in the public interest was based on a specific cost level and that at some unspecified point above $250 million (described as a "substantial increase"), construction was no longer in the public interest (despite statutory findings to the contrary). It asked this Commission to take jurisdiction under RSA 369-B:3-a, to determine, in advance of its construction, whether the Scrubber was still in the public interest given the increased cost. In short, it contended that the Commission had the authority, in advance, to set a limit on the prudent costs of construction.

By Order No. 24,898 dated September 19, 2008, the Commission dismissed this claim, concluding that it had no jurisdiction to review the Project under RSA 369-B:3-a. It rejected the contention that the installation of the Scrubber was a "modification" requiring review under RSA 369-B:3-a, finding that the Legislature was aware of RSA Ch. 369-B when it passed RSA 125-O:11-18, and intended that the more specific, later statute prevail:

> We do not find it reasonable to conclude that the Legislature would have made a specific finding in 2006 that the installation of scrubber technology at the Merrimack Station is in the public interest, set rigorous timelines and incentives for early completion, and provided for progress reports to the Legislature while simultaneously expecting the Commission to undertake its own review, conceivably arrive at a different conclusion, and certainly add significant time to the process. If we concluded otherwise, we would be nullifying the Legislature's public interest finding and rendering it meaningless.

Id. at 7-8. Reading RSA Ch. 125-O "as a whole," the Commission found that the Legislature did not intend PSNH to seek its approval under RSA 369-B:3-a "for a modification that the

[6] The original parties to Docket DE 08-103 were PSNH and the Office of Consumer Advocate, which the Commission invited to participate. After the Commission declined to exercise jurisdiction, Stonyfield Farm, Inc. and other commercial ratepayers intervened. TransCanada did not seek to intervene until the rehearing stage. *See* Order 24,914 in DE 08-103 at 2-3.

Legislature has required and found to be in the public interest." *Id*. This finding was "supported by the overall statutory scheme of RSA 125-O:11 *et seq.* as well as its legislative history." *Id.*

The Order also addressed TransCanada's argument (made in that docket and here) that an increase in cost of construction above a certain amount (in that case, the original $250 Million conceptual estimate) required Commission review of construction costs.[7] The Commission determined that the reported cost increases did not alone constitute a grant of jurisdiction to review the Project given the "unconditional determination that the scrubber project is in the public interest," the Legislature's failure to include any alternative means of compliance with the law, and its failure to set any cap on costs or rates. *Id.* at 10-12. Although noting that RSA 125-O:18 calls for review of the "prudence of the costs of complying with the requirements of RSA 125-O:11-18 and the manner of recovery for prudent costs," it concluded that this review could occur only after construction. *Id.* at 13. (Section 18 "bolsters our finding that the Legislature intended to rescind the Commission's authority to pre-approve the scrubber installation under RSA 369-B:3-a.") *Id.* at 12.

On rehearing, the Commission again rejected claims that the Legislature's public interest findings in RSA 125-O:11-18 were predicated on a specific level of costs. It found that the directive in RSA 125-O:13, IX that PSNH report annually to the Legislature on the progress and status of installing the scrubber technology, including any updated cost information, demonstrated a legislative intent to retain control of cost review, precluding any delegation of that function to the Commission. ("The Legislature could have provided express cost limitations

[7] In Docket DE 08-103, TransCanada asserted that cost increases required pre-construction review by the Commission. Here, it contends that such increases required review during construction and required PSNH to seek Commission review whenever costs "dramatically increase."

on the scrubber installation, but it did not.") Order 24,914 at 12. The Commission summarized its finding on this issue as follows:

> Under the Commercial Ratepayers' theory, the Legislature's public interest finding would be restricted to a specific level of costs and the Commission would effectively be required to second guess the Legislature's public interest finding at any dollar level above $250 million. *Hence, for all practical purposes, the Legislature's public interest finding would be so limited as to be negated,* and the RSA 369-B:3-a approach would be resurrected to require Commission permission before PSNH could act. *We find such a constrained reading of the statute to be incompatible with the generally expansive statutory scheme adopted by the Legislature to bring about the installation of scrubber technology.*

Id. (emphasis added).

These findings are largely dispositive of the issues on which the Commission sought memoranda in this docket. The Commission recognized that the Legislature had placed no arbitrary cost limit on the Scrubber, thereby finding that it could not determine (either before or after construction) that any particular Project cost level, or some amount above that cost level, was not prudent. Likewise, it concluded that it had no jurisdiction to review costs during construction. Thus, the claim that the variance provision in RSA 125-O:17 provides an indirect basis for the Commission to rule that any amount above an arbitrary cost level is not prudent has been conclusively decided by the Commission.[8]

Other commercial ratepayers appealed the Commission's orders to the Supreme Court, and TransCanada joined that appeal as an *amicus*. After describing the mandate imposed by RSA 125-O:13, the Legislature's retention of the power to review costs in RSA 125-O:13, IX, and its finding in RSA 125-O:11,VIII that the Scrubber project constituted a "careful, thoughtful

[8] As it recognized in Order 24,898, and as the Supreme Court has found on many occasions, the Commission is a body of limited jurisdiction and has "only those powers delegated to it by the Legislature." Order 24,898 at 13, citing *Appeal of Public Service Company of N.H.*, 122 N.H. 1062, 1066 (1982). *See also, Petition of Boston & Maine Railroad*, 82 N.H. 116, 119-20 (1925); *State of New Hampshire v. New Hampshire Gas & Electric Co.*, 86 N.H. 16, 32-33 (1932); *H.P. Welch Co. v. State*, 89 N.H. 428, 437-38 (1938); *Blair and Savoie v. Manchester Water Works*, 103 N.H. 505, 507-08 (1961); and *State v. New England Telephone & Telegraph Co.*, 103 N.H. 394, 398 (1961).

balancing of cost benefits, and technological feasibility," the Court dismissed the appeal, finding that the commercial ratepayers (and all other appellants) lacked standing to challenge the Commission's decision. *Appeal of Stonyfield Farm, et al*., 159 N.H. 227, 231 (2009).

Having failed in its effort to limit the cost of the Scrubber to $250 Million, TransCanada then pursued a different strategy in a different forum. It filed a "Petition for Declaratory Ruling" with the Site Evaluation Committee ("SEC"), claiming that the Scrubber was a "sizeable addition" requiring review by the Committee under RSA 162-H:5. After the SEC ruled that the Scrubber did not implicate review under RSA Ch. 162-H because it was not a sizeable addition within the meaning of the statute, TransCanada appealed to the Supreme Court. Again, the Supreme Court dismissed its appeal, finding that TransCanada was not one of the narrow class of petitioners granted standing under RSA Ch. 162-H. *Appeal of Campaign for Ratepayers' Rights*, 162 N.H. 245, 252 (2011). Once again, the Supreme Court described RSA Ch. 125-O as a legislative mandate to build the Scrubber.

At about the same time that TransCanada was appearing before the SEC and that the Supreme Court heard the appeal from Docket DE 08-103, this Commission reaffirmed its prior determinations regarding the Scrubber. In Docket DE 09-033, *Re PSNH* "Petition for Approval of the Issuance of Long Term Debt Securities," the Conservation Law Foundation ("CLF") and the Office of Consumer Advocate contended that the Commission could review the use of the proposed financing to the extent that the financing related to the Scrubber under the "public good" standard in RSA 369:1. Reiterating its earlier decisions, the Commission's conclusion in Docket DE 09-033 that it had no ability to undermine the Legislature's public interest findings are dispositive of many of the issues in this docket, and worth quoting at length:

> The principal distinction between the financing in this case and the prior Seabrook financing cases for the Coop and PSNH discussed above is that each of the prior

cases involved management decisions by the utility, when faced with a range of possible supply options. At various points, those management decisions involved whether to continue to construct and operate the Seabrook plant or to pursue other power supplies…. In other words, those management decisions reflected an inherent management prerogative to choose a course of action. In the instant case, by contrast, the scrubber installation at Merrimack Station does not reflect a utility management choice among a range of options. Instead, installation of scrubber technology at the Merrimack Station is a legislative mandate, with a fixed deadline. *See* RSA 125-O: 11, I, II; RSA 125-O:13, 1. The Legislature, not PSNH, made the choice, required PSNH to use a particular pollution control technology at Merrimack Station, and found that installation is "in the public interest of the citizens of New Hampshire and the customers of the affected sources." RSA 125-O: 11, VI.

Further distinguishing this case is the fact that the Legislature pre-approved constructing a particular scrubber technology at Merrimack Station by finding it to be in the public interest and thereby removing that consideration from the Commission's jurisdiction. *See Investigation of PSNH's Installation of Scrubber Technology at Merrimack Station*, Order No. 24,898 at 13; *Investigation of PSNH's Installation of Scrubber Technology at Merrimack Station*, Order No. 24,914 at 12. As a result, the regulatory paradigm that applies to the Merrimack scrubber installation is fundamentally different from the regulatory paradigm that applied to Seabrook. The Legislature has also retained oversight of the scrubber installation including periodic reports on its cost. *See* RSA 125-O:13, IX. Furthermore, the Commission has only those powers delegated to it by the Legislature, *see Appeal of Public Service Co. of N.H.,* 122 N.H. at 1066, and, by statute, the Commission's regulatory oversight here is limited to after-the-fact determinations of whether costs incurred by PSNH in complying with RSA 125-O:11-18 are prudent. RSA 125-O:18. If the Commission determines such costs are prudent, PSNH may recover those costs through its default service charge. RSA 125-O:18.

As a result of these statutory mandates, we conclude that the Commission's review of the financing to be used for construction of the scrubber technology at Merrimack Station cannot serve to undo the statutory purpose set out in RSA 125-O:11-18. Given this legislative framework, the scope of our review of the current PSNH financing request does not extend to questions of whether or not PSNH should construct the scrubber technology at Merrimack Station, or whether there are available alternatives to installing that technology. Finally, we find it inconceivable that the Legislature would countenance a situation where it had determined that the installation of this specific scrubber technology is in the public interest, but that the Commission could nonetheless determine that financing used for that very purpose is not in the public good.

Order No. 24,979 at 14-16.

The Commission also addressed the question of whether an increase in Scrubber costs somehow changed the Legislature's public interest findings:

> One significant factual similarity exists between the Seabrook cases and the current docket, however. In both, the estimated cost of the project escalated significantly. *See Appeal of Conservation Law Foundation*, 127 N.H. at 649 (charting the escalating costs of the Seabrook plant). In this case, estimates presented to the Legislature prior to passage of RSA 125-O:11-18, listed the cost of the installation of the scrubber technology at approximately $250,000,000. Updated cost estimates provided by PSNH in late 2008 were approximately $457,000,000. As a result, CLF and OCA argue that the Commission must revisit the public interest finding. Such a change in fact might be sufficient to trigger a new review if the Commission had made an earlier finding about the costs of the scrubber, *see SAPL I*, 125 N.H. at 474. However, it was the Legislature who determined that the scrubber technology is in the public interest and, therefore, any modification or rescission of that finding logically rests with that body. Consequently, we may not revisit or review the finding.

Id. at 16-17. In sum, this Commission has already concluded that because of the mandate in RSA Ch. 125-O to construct the Scrubber and the retention by the Legislature of oversight over Scrubber costs, it has no authority to review the cost of construction simply because the costs increase above some arbitrary level.

TransCanada now asks this Commission to effectively reverse these orders by finding that some unknown "dramatic increase" in Scrubber costs must have imposed a duty on PSNH to seek relief from the unequivocal mandate in the Act and thus give the Commission the indirect power through a prudence review to do what it has twice declined to do in other proceedings – that is, to declare any costs of the project over some arbitrary number not to be prudent.

As TransCanada now puts it, the discovery dispute in this case "begs the question of whether the cost of the project was totally irrelevant or instead whether PSNH had a duty to seek a variance when the cost reached a *certain level* and if so, what was that level?" TransCanada Motion to Compel at 5 (emphasis added). TransCanada's position is as follows: any increase in the cost of construction beyond some unspecified level that is "too high" required PSNH to seek

a variance granting a rescission of the Legislative mandate to construct the Scrubber because construction had become "economically infeasible."

TransCanada's position actually begs several other questions with ready answers from the Commission's past proceedings and from RSA 125-O:11 *et seq.* First, what "certain level" would trigger the alleged obligation of PSNH to seek the variance? Is it anything above the approximate $250 Million conceptual cost estimate discussed in the legislative hearings before RSA 125-O:11 *et seq*. was passed? Is it anything above the $457 Million that the Commission had before it in 2008 when it determined that RSA 125-O did not set any cap on costs for construction of the Scrubber and it had no authority to review the cost of the Scrubber before construction was completed? *See* Order No. 24,898 at 12-13. Is it anything above that same $457 Million estimate that the Legislature was aware of when it found SB 152 and HB 496 inexpedient to legislate in 2009? Is it whatever number TransCanada thinks is just "too high?" Or is the trigger left entirely to the discretion of PSNH or the hindsight determination of the Commission? TransCanada provides no answer to any of these questions. And with good reason: it knows that this Commission has declined to review the cost of the Scrubber prior to completion, that the Legislature did not place a cap on its costs, and that the Legislature retained oversight over the cost of the project while expressly finding that the uncapped cost of the project was in the public interest. RSA 125-O:11, V.

Second, if prudence dictated that a variance must be sought, a variance from what? TransCanada claims that RSA 125-O:17 obligates PSNH to seek a variance from its duty to construct the Scrubber. ("Under the plain language of the [RSA 125-O:17], PSNH had the ability and the responsibility to seek a variance if and when the project became uneconomic or the technology….became uneconomic or not the least expensive or most efficient way of

achieving the emissions reductions *required by the law*." Motion to Compel at 5 (emphasis added)). As shown below, the statute plainly states otherwise, limiting variances to two specific circumstances, neither of which occurred in this case because the Scrubber was completed ahead of schedule and has resulted in emissions reductions of more than the 80 percent required. Equally important, the final cost of the project was less than the $457 Million projected when the Commission determined that it had no authority to review costs during construction (and when the Legislature determined that SB 152 and HB 496 were inexpedient to legislate).

TransCanada's entire claim is thus based on the false premise that RSA 125-O:17 empowered the Department of Environmental Services to completely rescind the mandated construction of the Scrubber based on "economic infeasibility." Yet this Commission has already held that "it was the Legislature who determined that the scrubber technology is in the public interest and, therefore, any modification or rescission of that finding logically rests with that body." Order No. 24,979 at 17. Because TransCanada's premise is false, the remainder of its arguments fall like a house of cards.

III. The Statutory Scheme of RSA Ch. 125-O Establishes that this Commission's Prudence Review is Limited to a Determination of Whether the Scrubber Was Constructed in a Prudent Manner, Not Whether Some Arbitrary Cost Level Was Prudent. The "Variance" Provisions of RSA 125-O:17 Are Irrelevant to that Review in this Case.

Although TransCanada's Motion to Compel focuses only on Sections 17 and 18 of RSA Ch. 125-O, the issues raised by the Commission actually involve the intersection of four sections of the statute: the mandate imposed on PSNH by RSA 125-O:13; the variances that may be requested under RSA 125-O:17; the scope of the Commission's prudence review in RSA 125-O:18, when considered in light of the statutory mandate; and the non-severable nature of Sections 1-18 of RSA Ch. 125-O as set forth in RSA 125-O:10. While PSNH submits that this

Commission need look no further than its prior orders to resolve this dispute over PSNH's alleged duty to seek a variance, a review of the relevant sections of RSA Ch. 125-O establishes that RSA 125-O:17 is irrelevant to this docket and that TransCanada is tilting at windmills.

TransCanada properly defines the relevant issue in a prudence review in its Motion to Compel. It describes that review as requiring an analysis of PSNH's actions "in light of the conditions and circumstances as they existed at the time they were taken" and compares this standard to a duty of care in negligence; that is, "what would a reasonable person do at the time the decision was made." Motion at 2, citing *Re Public Service Company of New Hampshire*, 87 NH PUC 876, 886 (2002). It then makes a leap that has no factual basis, asking what PSNH should have done "before beginning to incur the dramatically increased expenses of the scrubber project" based on TransCanada's contention that "RSA 125-O:17 provides PSNH with authority to potentially avoid the need to install scrubber technology by requesting a variance." *Id.* This claim has three fatal flaws. First, it posits that there were "dramatically increased expenses" that should have prevented construction. Second, it asserts that PSNH could have decided not to construct the project. Third, it claims that Section 17 offers a means to avoid construction of the Scrubber. None of these positions are accurate as a matter of fact, or law.

A. RSA 125-O:11-18 Imposes a Mandate to Install a Specifically Identified Technology in a Specifically Identified Plant by a Specifically Identified Date. PSNH Had a Legal Duty to Comply With that Mandate Unless Changed by Legislative Action.

TransCanada's claim that RSA 125-O:17 permitted PSNH to obtain relief from building the Scrubber ignores the fact that the Legislature mandated that installation by statute.[9] *See*

[9] In addition to the dockets cited above, *see Appeal of Stonyfield Farm*, 159 N.H. 227, 228 (2009) ("the legislation *specifically requires* PSNH to install 'the best known commercially available technology . . . at Merrimack Station' . . . ." (emphasis added)). *See also In re Campaign for Ratepayers' Rights*, 162 N.H. 245, 247 (2011) ("The installation of such a [scrubber] system was mandated by the legislature in 2006"). *See also* Secretarial Letter dated August 22, 2008 in Docket No. DE 08-103 ("RSA 125-O:11, enacted in 2006, *requires* PSNH to install new

Order No. 24,979 at 14-16 ("installation of scrubber technology at the Merrimack Station is a legislative mandate, with a fixed deadline").

On June 8, 2006, "AN ACT relative to the reduction of mercury emissions," 2006 N.H. Laws 105 (the "Scrubber Law"), took effect. By that law, the Legislature imposed an unmistakable legislative mandate for PSNH to install and have operational scrubber technology to control mercury emissions at Merrimack Station in Bow no later than July 1, 2013. RSA 125-O:13, I. *Every* court, commission, department, committee, and agency that has discussed the Scrubber project has recognized and confirmed the existence, nature, and scope of this mandate. The listing of such representative declarations appended hereto as Attachment 1 supplements those contained in fn. 9.

The Scrubber Law, codified at RSA 125-O:11 through 125-O:18, is clear, straightforward, and unambiguous in its mandate. This unequivocal mandate was expressed in the law's Statement of Purpose and Findings:

> I. ***It is in the public interest to achieve significant reductions in mercury emissions at the coal-burning electric power plants in the state as soon as possible.*** The requirements of this subdivision will prevent, at a minimum, 80 percent of the aggregated mercury content of the coal burned at these plants from being emitted into the air by no later than the year 2013. ***To accomplish this objective, the best known commercially available technology shall be installed at Merrimack Station no later than July 1, 2013.***
>
> II. ***The department of environmental services has determined that the best known commercially available technology is a wet flue gas desulphurization system, hereafter "scrubber technology," as it best balances the procurement, installation, operation, and plant efficiency costs with the projected reductions in mercury and***

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scrubber technology at Merrimack Station by July 1, 2013 that will achieve at least an 80 percent reduction in mercury emissions") (emphasis added). *See also* "Findings of Fact and Director's Decision," *In the Matter of the Issuance of a Temporary Permit To Public Service Company of New Hampshire, Merrimack Station Located in Bow, New Hampshire*, NHDES, March 9, 2009 ("New Hampshire state law (RSA 125-O) *requires* PSNH to undertake this project…." at 2; "RSA 125-O:13 *requires* PSNH to install a FGD system to control mercury emissions from Merrimack Station Units MK1 and MK2 no later than July 1, 2013," at 3; "RSA 125-O *requires* the applicant to install 'scrubber technology' to control mercury emissions at Units MK1 and MK2 no later than July 13, 2013" at 23 (emphases added)).

other pollutants from the flue gas streams of Merrimack Units 1 and 2. Scrubber technology achieves significant emissions reduction benefits, including but not limited to, cost effective reductions in sulfur dioxide, sulfur trioxide, small particulate matter, and improved visibility (regional haze).

III. ***After scrubber technology is installed at Merrimack Station,*** and after a period of operation has reliably established a consistent level of mercury removal at or greater than 80 percent, the department will ensure through monitoring that that level of mercury removal is sustained, consistent with the proven operational capability of the system at Merrimack Station.

IV. To ensure that an ongoing and steadfast effort is made to implement practicable technological or operational solutions to achieve significant mercury reductions prior to the construction and operation of the scrubber technology at Merrimack Station, the owner of the affected coal-burning sources shall work to bring about such early reductions and shall be provided incentives to do so.

V. ***The installation of scrubber technology will not only reduce mercury emissions significantly but will do so without jeopardizing electric reliability and with reasonable costs to consumers.***

VI. ***The installation of such technology is in the public interest of the citizens of New Hampshire and the customers of the affected sources.***

VII. Notwithstanding the provisions of RSA 125-O:1, VI, the purchase of mercury credits or allowances to comply with the mercury reduction requirements of this subdivision or the sale of mercury credits or allowances earned under this subdivision is not in the public interest.

VIII. ***The mercury reduction requirements set forth in this subdivision represent a careful, thoughtful balancing of cost, benefits, and technological feasibility and therefore the requirements shall be viewed as an integrated strategy of non-severable components.***

RSA 125-O:11 (emphases added).

This highly unusual set of eight findings by the Legislature as to the specific property of PSNH is, as the language of Section 11 states, accompanied by a mandate that PSNH *shall* modify Merrimack Station by installing a specific technology within a specific time period, and by the explicit finding in subsection VI that the installation of "such technology is in the public

interest."[10] RSA 125-O:13 implements this mandate by imposing requirements for compliance.

The mandate could not be more clear: PSNH was *required* to install a wet flue gas desulphurization system at Merrimack Station by July 1, 2013. In particular, RSA 125-O:13, I requires that: "The owner [PSNH] *shall install and have operational scrubber technology to control mercury emissions at Merrimack Units 1 and 2 no later than July 1, 2013.*" (Emphasis added.)[11] The Legislature also found that the costs of this technology were reasonable when balanced with the benefits of the Project and the feasibility of the technology. RSA 125-O:11, V and VIII. In so doing, it mandated these actions as a matter of law, leaving PSNH no choice but to comply with the mandate.[12]

Although TransCanada now asks the Commission to focus solely on the construction costs of the Scrubber, the issue of cost was a secondary concern to the health benefits of mercury reduction and the need for reduction of emissions as soon as possible.[13] With so many

[10] Lest there be any doubt that Sections 11-18 impose a mandate on PSNH, the Legislature used the word "shall" 60 times in the Scrubber Law. Section 11 includes four such references, as well as a finding that significant reduction of mercury is in the public interest (Section 11, I), the explicit finding that the installation of this particular technology is in the public interest (Section 11, VI), and the finding that continued purchase of mercury credits is not in the public interest (Section 11, VII).

[11] In addition to this mandate, Section 13 also requires that: (1) total mercury emissions shall be at least 80 percent less on an annual basis from defined baseline levels beginning on July 1, 2013, RSA 125-O:13, II; (2) PSNH shall test and implement mercury reduction control technologies to achieve early reductions, shall report the results of such testing to DES, and shall submit a plan for DES approval, RSA 125-O:13, III; and (3) PSNH shall sustain the 80% mercury reduction levels achieved by the Scrubber technology "insofar as the proven operational technology capability of the system as installed allows," RSA 125-O:13, V. Failure to meet these requirements by the 2013 deadline, absent a plan for meeting them approved by DES, subjects PSNH to significant penalties. RSA 125-O:13, VIII; 125-O:7.

[12] RSA 125-O:11-18 was the result of a collaborative effort between the State, PSNH, and representatives of a broad range of environmental and public interests. *See* N.H.S. Jour. 935-38 (2006). Following an extensive evaluation by the Senate Committee on Energy and Economic Development, the House Committee on Science, Technology and Energy, the Governor's Office, the Governor's Office of Energy and Planning, PSNH, DES, environmental groups, and the Office of Consumer Advocate, HB 1673 was adopted in 2006 to deal with the specific issue of mercury reduction. *See* Hearings before the Senate Committee on Energy and Economic Development, April 11, 2006 ("Hearings") at 2. (A copy of the testimony from the Hearings is appended hereto as Attachment 2. References are to the page numbers of the testimony.)

[13] *See* comments of Senator Maggie Hassan in the Hearings (Attachment. 2, 12-13) and Rep. Naida Kaen (16). *See also* testimony of Jared Teutsch, Environmental Director N.H. Lakes Association (19); Michael Nolin,

competing interests at stake,[14] the bill was a "consensus building process" resulting in what one Senator called "an extraordinary compromise" to "extract from the air we breathe one of the most deadly toxins known to man." Comments of Senators Odell and Burling. N.H.S. Jour., *supra*, 935-37. The compromise included those who believed that there should be a greater reduction of emissions at an earlier date. *Id.* at 935.[15] The Legislature not only found that the final enactment was "a careful, thoughtful balancing of cost, benefits and technological feasibility," it took the unusual step of stating that because of that balancing "the requirements shall be viewed as an integrated strategy of non-severable components." RSA 125-O:11, VIII. This non-severability provision was in addition to the existing non-severability statute integrating the state's Multiple Pollutant Reduction Program of RSA Ch. 125-O:

> [N]o provision of RSA 125-O:1 through RSA 125-O:18 of this chapter shall be implemented in a manner inconsistent with the integrated, multi-pollutant strategy of RSA 125-O:1 through RSA 125-O:18 of this chapter, and to this end, the provisions of RSA 125-O:1 through RSA 125-O:18 of this chapter *are not severable.*

RSA 125-O:10, as amended by 2008 N.H. Laws 182:7 (emphasis added). The intent is clear: the statute is to be read as an integrated whole. *See* Friedman, *Inseverability Clauses in Statutes,*

Commissioner of DES (32); Robert Scott, Director, Air Resources Division of DES (34); Georgia Murray, Staff Scientist for the Appalachian Mountain Club (36-38). As Commissioner Nolin indicated in prepared testimony, a successful mercury bill needed to "reduce emissions as quickly as possible," with "technology that achieved the greatest reduction technically feasible" "and in a manner that maintained "electrical reliability and affordability." *Id*. 71-72. The Commissioner stated that "HB 1673 meets these goals with the creative use of incentives and aggressive application of technology. …. Critical to the success of this bill is the requirement that wet scrubber technology be installed on Merrimack Units 1 and 2 by July 1, 2013." *Id.*

[14] Among the environmental groups supporting the legislation were the N.H. Lakes Association, N.H. Audubon Society, N.H. Loon Preservation Committee, N.H. Bass Federation, N.H. Timberland Owners Association, The Society for the Protection of New Hampshire Forests, The Environmental Responsibility Committee of the Episcopal Diocese and the New Hampshire Council of Trout Unlimited.

[15] In a January 19, 2006 letter to the Chair of the House Science, Technology and Energy Committee from Mr. Brad Kuster of the Conservation Law Foundation (a copy of which is appended hereto at Attachment 2, p. 66), the "New Hampshire Clean Power Coalition," a diverse alliance of groups including two parties to this proceeding (Conservation Law Foundation and the Sierra Club) stated, "*Scrubbers should have been priority number one for PSNH* as soon as the Clean Power Act passed in 2002; if scrubbers were on line by 2007, PSNH would have saved ratepayers about $47 million in 2007 when the new cap and these incentives kick in. *At this point there should be no further delays, a target date of 2010 for scrubbers,* and interim controls for mercury *should be incorporated into the bill,"* Attachment 2 at 69 (emphasis added).

64 U. Chi. L. Rev. 903 (1997) ("The presence of an inseverability clause evidences a legislative compromise and a deliberate attempt by the statute's drafters to inseverably link statutory provisions.") TransCanada's suggestion that the variance provision of the law gave the Department of Environmental Services the authority to break the inseverable link mandating the construction of the Scrubber as part of the overall RSA Ch.125-O Multiple Pollutant Reduction Program is thus contradicted by the statute itself.

TransCanada's effort to argue that a change in the construction costs of the Scrubber requires a reconsideration of the mandate in RSA 125-O:13 would accomplish exactly what the Legislature prohibited. It would treat one component of the "careful, thoughtful balancing" as "severable." In Docket DE 08-103, TransCanada and others asserted that while a *de minimis* increase would not require a review of the public interest finding, a "substantial" increase (or as they now allege, a "dramatic" one) would require such a review. The non-severability language of RSA 125-O:10 and 125-O:11, VIII allows no such word-smithing. This argument is simply an attempt to substitute TransCanada's judgment – or in the case of the claimed variance procedure, DES's judgment – of the proper balancing of "cost, benefit and technology" for that of the Legislature.

B. The Mandate and Public Interest Findings in RSA 125-O Were Not Based on Any Specific Cost of Construction.

TransCanada claims that at some *level* the cost of constructing the Scrubber was "prudent," but that anything above that undefined level must not have been prudent, and must have required PSNH to ask DES or this Commission for relief. TransCanada does not identify the base level of costs, or specify how much of an increase, triggered that obligation. Instead, it apparently asserts that PSNH (or the Commission), like Justice Stewart defining pornography,

should "know it when they see it." *Jacobellis v. Ohio*, 378 U.S. 184 (1964) (Stewart, J. concurring). Once again, the statute demonstrates that TransCanada's arguments have no merit.

As shown above, in Dockets DE 08-103 (Order No. 24,898 and Order No. 24,914) and DE 09-033 (Order No. 24,979), the Commission interpreted the statute to reject the claim that the mandate in RSA 125-O:13 was tied to a specific cost level.[16]

> Nowhere in RSA 125-O does the Legislature suggest that an alternative to installing scrubber technology as a means of mercury compliance may be considered, whether in the form of some other technology or retirement of the facility. Furthermore, RSA 125-O does not: (1) set any cap on costs or rates; (2) provide for Commission review under any particular set of circumstances; or (3) establish some other review mechanism. Therefore we must accede to its findings.

Order No. 24,898 at 12-13. *See also* Order No. 24,914 at 12 ("The Legislature could have provided express cost limitations on the scrubber installation but did not do so.")

The Commission's findings in these dockets are supported by the plain language of the statute. RSA 125-O:13, IX, provides as follows:

> The owner [PSNH] *shall* report by June 30, 2007 and annually thereafter to the legislative oversight committee on electric utility restructuring, established under RSA 374-F:5, and the chairpersons of the house science, technology and energy committee and the senate energy and economic development committee on the progress and status of complying with the requirements of paragraphs I and III, relative to achieving early reductions in mercury emissions and also installing and operating the scrubber technology *including any updated cost information.*

(emphasis added.) This specific reservation by the Legislature of jurisdiction over the progress, status, and cost of compliance with RSA 125-O:11-18 is, as the Commission has ruled, a clear indication that it was the Legislature that was to review the overall cost of construction.[17] This

[16] Plainly, the cost of the Project was a consideration in the balancing of "cost, benefits and technological feasibility." However, the cost of $250 Million was not a guarantee, but rather was understood as an estimate. See Comments of Rep. Phinizy (extending the timeline for compliance could result in "far greater costs further down the line"), Attachment 2 at 9; Comments of Rep. Anderson (project "estimated at about $270 Million") (14).

[17] Order No. 24,979, 94 NH PUC 311, 318 (2009).

prevents any subsequent prudence review based on a conclusion that the overall project cost was simply "too high." The review of "updated cost information" through legislative committees is entirely inconsistent with a limitation on the overall cost of the project by either DES or the Commission, and thus inconsistent with TransCanada's claim that some unknown increase in those costs was amenable to relief from anyone other than the Legislature.

The problems created by continued review of the costs and technology during construction were addressed in the Senate hearings on HB 1673. Robert R. Scott, then Director of the Air Resources Division of DES,[18] pointed out that the reason the bill specified a particular technology was precisely to avoid a requirement that PSNH go back to the PUC each time technology changed or a better technology was said to be available with resultant delays in the Project. Attachment 2 at 33. Continued review by DES (with consultation by this Commission) of the cost of the technology chosen by the Legislature would be equally disruptive of the deadline for completion. As the Commission recognized in Order 24,898, if the Legislature had wanted it to review the cost of any change – substantial or otherwise – above the $250 Million conceptual estimate, and thereby change the balance of interests in the Legislation, it would have been simple to place a cap on the costs of the Scrubber or to specifically vest such jurisdiction to review those costs during construction in DES or the Commission.

Any doubt about whether the Legislature intended to set a limit on the cost of the Scrubber and to thus, in effect, place a cap on prudent costs, was resolved in the 2009 Legislative session. SB 152 and HB 496, both introduced on January 8, 2009, were designed to place such a cap on Scrubber costs. SB 152, "relative to an investigation by the PUC to determine whether

[18] Mr. Scott is now a Commissioner on the Public Utilities Commission. Based upon his prior involvement in the Scrubber Project in his former position as Director of the Air Resources Division of DES, Commissioner Scott recused himself from participation in this docket. *See* Letter dated March 9, 2012, from Commissioner Scott.

the scrubber installation at the Merrimack station is in the public interest of retail consumers," had as its purpose a requirement that the Commission "investigate, in light of substantial cost increases now projected by [PSNH] whether installation of the wet flue gas desulphurization system ('scrubber') at the Merrimack Station…as mandated by RSA 125-O:11 *et seq*. is in the public interest of retail customers of PSNH." *See* SB 152 (appended hereto as Attachment 3) at 1. The bill also would have required the Commission to review all "projected future operating and capital costs of Merrimack Station, including, but not limited to, costs associated with the Scrubber Project." *Id.* at 2. In short, the bill sought to change the law and delegate jurisdiction to the Commission over the costs of the Scrubber during construction and would have mandated the very remedy TransCanada now claims already exists in RSA 125-O:17. The bill was voted "inexpedient to legislate" by a vote of 6-0 in the Senate Energy, Environment and Economic Development Committee, and was rejected by a vote of 21-1 on the Senate floor, with only the sponsor voting in favor. *Id.* at 3-4.

HB 496, "establishing a limit on the amount of cost recovery for emissions reduction equipment installed at Merrimack Station," also sought to effectuate a remedy similar to that sought by TransCanada here. The bill proposed to amend RSA 125-O:18 to provide that "the owner shall be allowed to recover prudent costs up to $250,000,000 of complying with the requirements of this subdivision in a manner approved by the Commission." *See* H.B. 496 (Attachment 3 at 6). This proposal would both have changed the law and delegated jurisdiction to the Commission and capped prudent costs for the Project at $250 Million. The Majority Report of the House Science, Technology, and Energy Committee noted as follows:

> In 2006, the Legislature had required the plant owner to proceed with the installation *without placing a specific limit on the cost*. The majority believes that to choose now to place an absolute cap on the cost at this time would pose significant problems. While the majority recognizes that the increase in projected costs is

> significant, it is the role of the PUC….to decide the amount of the funds to be recovered *after completion of the project* in a legal process known as a prudency review. This means that before the Company can be granted cost recovery it must provide justification for each expense before the PUC.
>
> The majority was also concerned that the passage of this bill would lead to a pause or cancellation of the project. This would not only have significant environmental ramifications, but would also lead to the loss of several hundred short and long term jobs associated with the Project.

N.H.H.R. Jour. 899 (2009) (emphases added). The bill failed in Committee by a vote of 15-4, and was deemed inexpedient to legislate by a unanimous voice vote of the House. *Id.*at 5.

The statute, together with the Legislature's decision not to amend it in 2009, destroys TransCanada's claim that the Legislature intended to set a limit on Scrubber costs and to require PSNH to seek a variance above certain costs. On the contrary, the Legislature made plain, as confirmed by this Commission, that no arbitrary limit was placed on the cost of construction so as to permit review by anyone other than the Legislature.[19] A prudence review – or a limitation on prudent costs – based on some alleged cap on construction costs is therefore prohibited by RSA 125-O:11-18.

Applying TransCanada's definition of the test for what constitutes prudence, PSNH had no obligation to apply for a variance from increased costs even if 125-O:17 allowed it to do so (and as discussed herein, it does not). TransCanada would measure the prudence of PSNH's actions during construction "in light of the conditions and circumstances as they existed at the time they were taken" and would ask, "what would a reasonable person do at the time the decision was made?" What PSNH knew during construction of the Scrubber from 2006-2011

[19] Commenting on the Legislature's 2009 consideration and rejection of SB 152 and HB 496 during deliberations in NH SEC Docket 2009-01, Mr. (now Commissioner) Harrington noted, "There were specific bills that came up and were considered. …whether this was proper policy to have this scrubber be built. … there was actually - - there were bills brought in front of the Legislature. It was discussed, there were hearings, and the Legislature chose not to take any additional action…. So, I think that we have to at least look to say that there's some additional guidance from the Legislature on what their intent was." Transcript, July 7, 2009, p. 56-7.

was this: PSNH had a statutory mandate to complete the Scrubber by July 1, 2013; it was incentivized by the Legislature to complete the project as soon as possible in order to obtain "Economic Performance Incentives" under RSA 125-O:16 that would benefit its customers; on two separate occasions the Legislature had refused to place a cap on costs to meet the public interest mandate of the statute; this Commission had specifically declined to assert jurisdiction to review costs during construction and had found that there was no cap on costs in the statute; and the Supreme Court had twice declined to reach the merits of any attempt to place review of the Scrubber construction outside the Legislature.

Just as important, contrary to TransCanada's claims here, PSNH knew there were no "dramatically increased expenses" between 2008, when this Commission declined to exercise any pre-construction review, and 2011, when construction ended. In fact, there were no increased expenses at all – the actual cost of construction was approximately *$35 Million less* than the $457 Million 2008 cost estimate, and the Scrubber was placed into service 21 months before the mandated date and has surpassed the mercury emissions reduction requirements of the statute. Measured by the "what would a reasonable person do" standard, PSNH acted reasonably by continuing construction, reporting costs to the Legislature, and completing the project.

C. As this Commission Has Found, the Variance Provisions in RSA 125-O:17 Are Permissive and Apply Only In "Certain Circumstances." Those Circumstances Were Not Applicable Here.

TransCanada points out that the Commission stated in Order 24,914 that "RSA 125-O:17 does…. 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." Order 24,914 at 13; Motion to Compel at 7. But TransCanada fails to mention that this statement was preceded by a statement that the mechanism for PSNH to apply

to DES for relief applies "in certain circumstances" and which described the section as "provid[ing] PSNH the option to request a variance from the *statutory mercury emissions reductions requirements* for reasons of 'technological and economic infeasibility.'" *Id.* (Emphasis added.) Nothing in the Commission's Order states that Section 17 allows PSNH to seek a variance for reasons other than the "certain circumstances" identified in the statute.[20] And the plain language of the statute indicates that neither of these circumstances is applicable to this case.

RSA 125-O:17 provides as follows:

> The owner may request a variance from the **mercury emissions reduction requirements** of this subdivision by submitting a written request to the department. The request shall provide sufficient information concerning the conditions or special circumstances on which the variance request is based to demonstrate to the satisfaction of the department that variance from the applicable requirements is necessary.
>
> I. Where an **alternative schedule** is sought, the owner shall submit a proposed schedule which demonstrates reasonable further progress and contains a date for final compliance as soon as practicable. If the department deems such a delay is reasonable under the cited circumstances, it shall grant the requested variance.
>
> II. Where an **alternative reduction requirement** is sought, the owner shall submit information to substantiate an energy supply crisis, a major fuel disruption, an unanticipated or unavoidable disruption in the operations of the affected sources, or technological or economic infeasibility. The department, after consultation with the public utilities commission, shall grant or deny the requested variance. If requested by the owner, the department shall provide the owner with an opportunity for a hearing on the request.

As this language indicates, Section 17 permits, but does not require, PSNH to seek a variance only in two instances: (I) to vary the *schedule* for achieving the required mercury reduction (and therefore the completion date); and (II) to vary the reduction *requirement* of 80

[20] With respect, if the Commission intended to say that Section 17 offered a basis for PSNH not to have installed the Scrubber, it erred. Section 17 only applies to alternatives to meeting the July 1, 2013 deadline or the mercury reduction requirements. As the Commission and the Supreme Court have made plain, RSA 125-O:13 mandates the installation of the Scrubber, and the Legislature retained oversight over the project, including cost, to itself. The only way for that obligation to be changed was via action by the Legislature.

percent established in RSA 125-O:13, II.[21] Since the Scrubber is complete and works as designed, there was no need, and no basis, to seek a variance of the schedule or the 80 percent requirement, and no extraordinary expenses were incurred to meet either requirement. As a result, RSA 125-O:17 is completely irrelevant to the Commission's review under RSA 125-O:18.

While this construction of Section 17 is expressed in its plain language, further support for this reading is found by a reading of the statute in its entirety. Although the term "mercury emissions reduction requirements" is not defined in RSA 125-O:12, "Definitions," the meaning of that term is provided by other sections of the statute. RSA 125-O:13,VII provides that if the "*mercury reduction requirement of Paragraph II* is not achieved by the owner in any year after the July 1, 2013 implementation date *despite the owner's installation and good operation of scrubber technology*….then the owner shall be in violation of this section." (Emphases added.) RSA 125-O:13, II provides that "total mercury emissions from the affected sources shall be at least 80 percent less on an annual basis than the baseline mercury input… beginning on July 1, 2013." RSA 125-O:11, I establishes that this "significant reduction in mercury emissions" to a minimum of 80 percent by 2013 is in the public interest and requires the installation of the Scrubber. Read together, these sections establish that the "alternative schedule" referenced in RSA 125-O:17, I refers to the July 1, 2013, schedule for meeting the reduction, and that the "alternative reduction requirement" in RSA 125-O:17, II is from the 80 percent requirement. Thus, PSNH *could* have considered seeking a variance *if* it had not been able to meet the

[21] The language of RSA 125-O:17 is clear and unambiguous and there is thus no need to seek guidance from the legislative history of HB 1679. In matters of statutory interpretation and construction, the Court examines the statute's words "not in isolation, but in the context of the entire statute and statutory scheme." *N.H. Health Care Ass'n v. Governor*, 161 N.H. 378, 385 (2011). The analysis begins with the statute's language, construed "according to its plain and ordinary meaning." *N.H. v. Dimaggio*, 44 A.3d 468, 470 (2012). If "the language of a statute is plain and unambiguous, [the Court will] not look beyond it for further indications of legislative intent." In fact, there is no mention of the variance provision in the extensive legislative history of the Act. If the purpose of the section was to grant a broad exception from the mandate to build the Scrubber by a date certain, one would have expected some discussion of that issue.

reduction schedule by July 1, 2013, provided that it had demonstrated "reasonable further progress" and had identified an alternative date for compliance.

Likewise, PSNH *could* have considered seeking a variance to alter the mercury emissions reduction requirement to something less than 80 percent *if* either the technology chosen was found not to be able to achieve that goal, or *if* it became "economically infeasible" to reach the mandated 80 percent reduction with the installed technology.[22] The ability of PSNH to seek an alternate reduction variance under RSA 125-O:17, II was tied to the operational performance of the installed Scrubber technology. For instance, RSA 125-O:13, V provides, "Mercury reductions achieved through the operation of the scrubber technology greater than 80 percent shall be sustained *insofar as the proven operational capability of the system, as installed,* allows." (Emphasis added.) Similarly, RSA 125-O:13, VII states, "If the mercury reduction requirement of paragraph II is not achieved in any year after the July 1, 2013 implementation date, *and after full operation of the scrubber technology*… ." (Emphasis added.) And, RSA 125-O:13, VIII states, "If the mercury reduction requirement of paragraph II is not achieved by the owner in any year after the July 1, 2013 implementation date *despite the owner's installation and full operation of scrubber technology*, consistent with good operational practice… ." (Emphasis added.) No other variance requests are permitted by the statute and neither variance was necessary in this instance.

TransCanada's argument that "economic infeasibility" could or must be used by PSNH whenever the cost of the Scrubber increases, finds no support whatsoever in Section 17. If TransCanada were correct, there would be no need for Subparts I and II of RSA 125-O:17 as those subparts describe with specificity the type of variances from the "mercury emissions

[22] For example, such a variance might have been sought if the Scrubber achieved only a 79 percent mercury reduction, but it would cost tens of millions of dollars more to make the modifications necessary to reach 80 percent.

reduction requirements" that are permitted. If the Legislature had wanted to create a broad variance provision such as TransCanada posits, it would have been simple to do so. All that would have been required was the omission of the words "mercury emissions reduction" from the first sentence of Section 17 so that it read as follows: "The owner may request a variance from the requirements of this subdivision by submitting a written request to the department."

There are two other reasons why TransCanada's "economic infeasibility" argument makes no sense. Economic infeasibility is a basis for seeking a variance only under subpart II of Section 17. As a result, it does not serve as a basis for adjusting the scheduled completion of the Scrubber by July 1, 2013. Thus, even if there had been a need to request a variance in the schedule, the economics – or cost – of the project would not have been a valid basis for seeking that variance, or for delaying construction. This is another indication that the Legislature did not intend Section 17 to serve as a basis for undercutting the mandate in RSA 125-O:13. Just as important, under Subpart II, a variance from the 80 percent mercury emissions reduction requirements could not be sought until the Scrubber was completed. It was only when the Scrubber was installed and placed into operation that PSNH would know whether it had met the reduction requirements of the statute, or whether the expenditure of additional funds would be necessary to increase reduction requirements to 80 percent. Once again, this demonstrates that the variance provisions were not intended to serve as a basis for PSNH to seek relief during construction. TransCanada's "economic infeasibility" argument is simply formulated from whole cloth. And in this case, a variance (or waiver or repeal as interpreted by TransCanada) of the Scrubber construction mandate was neither legally nor factually available.[23]

[23] Because this is true, TransCanada's discovery requests are not only legally irrelevant, they are based on a hypothetical. Although enacted as a general law, RSA 125-O:11-18 is in effect special legislation applicable only to one project – the Scrubber, and one owner – PSNH. Because the Scrubber was completed on time and met the 80

D. Under the Circumstances of this Case the Commission's Authority to Review Scrubber Costs Under RSA 125-O:18 Is Completely Unrelated to the Provisions of RSA 125-O:17.

The Commission's prior orders establish that it had no jurisdiction to review the costs of the Scrubber prior to construction (under RSA 369-B:3-a), or to set any cap on construction costs where the Legislature retained the authority to review those costs (Order 24,898 at 12-13). Those orders also establish that the Commission retained the authority to "determine…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." Order 24,914 at 13.

RSA 125-O:18 provides that as in any other construction project by a utility, the Commission retains the ultimate decision to determine whether expenses meeting the public service requirements of a utility have been incurred in a prudent way before those costs may be approved for inclusion in the utility's rates. What is unique about this statute – as this Commission has already concluded – is that because PSNH was *required* to incur the cost of constructing the Scrubber, was *required* to employ a specific technology, was *required* to complete construction by a date certain, and was *incentivized* to meet "the public interest to achieve significant reductions in mercury emissions at the coal-burning electric power plants in the state *as soon as possible"* (RSA 125-O:11, I, emphasis added), the Commission was precluded from determining that it was imprudent for PSNH to construct the Scrubber using the mandated technology as soon as possible, and not later than the required date. Apart from that

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percent reduction requirement of the statute, Section 17 does not apply, and discovery concerning whether it *might* have applied is irrelevant.

limitation, the Commission's review is limited only by the constitutional mandate that a rate cannot result in an unconstitutional taking.[24]

RSA 125-O:18 provides as follows:

> If the owner is a regulated utility, the owner *shall be allowed to recover all* prudent costs of complying with the requirements of this subdivision in a manner approved by the public utilities commission. During ownership and operation by the regulated utility, *such costs shall be recovered* via the utility's default service charge. In the event of divestiture of affected sources by the regulated utility, such divestiture and recovery of costs shall be governed by the provisions of RSA 369:B:3-a.

(Emphases added). Once again, the language of the statute is clear: PSNH *shall* be entitled to recover all prudent costs of complying with the mandate to construct the Scrubber. The actual manner of recovery of those costs must be approved by the Commission. So long as PSNH owns and operates Merrimack Station, those costs *shall* be recovered through the default service charge.

TransCanada concedes that PSNH's right to recover prudent costs depends on an assessment of whether the costs incurred were reasonable in light of PSNH's mandated obligations under RSA 125-O:11-18. Without repeating arguments made above, since PSNH had no choice but to build the Scrubber as specified in the statute, it cannot be said to have acted unreasonably in doing so, and it is entitled to recover the costs of doing so provided that it acted prudently when incurring specific expenses.

[24] "Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law." *Stone v. Farmers' Loan & Trust Co.*, 116 U.S. 307, 6 S.Ct. 914 (1886). PSNH must be allowed to recover its prudently incurred costs of complying with the scrubber law; otherwise, it would violate the U.S. Constitution's restriction on the taking of private property for public use without just compensation. The New Hampshire Supreme Court has recognized that the fifth and fourteenth amendments to the United States Constitution and part I, article 12 of the New Hampshire Constitution require a level of rates sufficient to protect Constitutional interests. *In Petition of Public Service Co. of New Hampshire*, 130 N.H. 265 (1988); s*ee also, Appeal of Pennichuck Water Works*, 120 N.H. 562 (1980), and *Appeal of Conservation Law Foundation of New England Inc.*, 127 N.H. 606 (1986).

E. The Non-Severability Provisions of RSA 125-O:10 and 125-O:13, VIII, Buttress the Conclusion That the Commission is Not Entitled to Undo the Legislative Mandate to Construct the Scrubber Through the Statute's Variance Provision or the Commission's Prudence Review.

Little more needs to be said about the statutory mandate, the limited opportunities to seek a variance from that mandate under RSA 125-O:17, or the Commission's prudence review under Section 18. Since, on its face, RSA 125-O:17 did not permit PSNH to seek a variance from the mandate of the statute, TransCanada's argument to the contrary has no merit. But even assuming, for argument's sake, that Section 17 was not clear and unambiguous, when the statute is read as a whole – as it must be – it is even more apparent that TransCanada's argument makes no sense.[25]

As noted above, included in the Legislature's public interest findings in RSA 125-O:11, VIII, is the finding that the mercury reduction requirements in the statute "represent a careful, thoughtful balancing of *cost*, benefits, and technological feasibility" (Emphasis added.) In that same subsection, the Legislature stated that because of this "thoughtful balancing," the statute's "requirements shall be viewed as an integrated strategy of non-severable components." This specific non-severability clause with respect to the balancing of the cost of the project with the requirement to build it is *in addition to* the broader non-severability clause in RSA 125-O:10, which provides that each part of RSA Ch. 125-O:1-18 is not to be implemented in a manner that is "inconsistent with the integrated, multi-pollutant strategy" of the Chapter. Indeed, as expressed in RSA 125-O:1, V, the Legislature found:

> For the above reasons and others, the general court finds that substantial additional reductions in emissions of SO_2, NOx, mercury, and CO_2 must be required of New Hampshire's existing fossil fuel burning steam electric power

[25] When determining the meaning of a statute, the New Hampshire Supreme Court examines the "intent of the legislature as expressed in the words of a statute considered as a whole." *N.H. v. Dimaggio*, 44 A.3d 468, 470 (N.H. 2012).

> plants. Due to the collateral benefits and economies of scale associated with reducing multiple pollutant emissions at the same time, the general court finds that such aggressive emission reductions are both feasible and cost-effective if implemented simultaneously through a comprehensive, integrated power plant strategy.

TransCanada suggests that the "comprehensive, integrated power plant strategy" that underpins the entirety of RSA Ch. 125-O can be cast asunder by way of a "variance."

That argument would undo this "thoughtful balancing" by asking the Commission to ignore the legislative efforts and findings that resulted in this carefully crafted "integrated strategy." Not only would this read Section 17 to undermine the mandate of Section 13 and thus the non-severable components described in subsection 13, VIII, it would undermine the entire Multiple Pollutant Reduction Program in RSA 125-O:1-18.

In sum, a prudence review that undermined the mandate of RSA 125-O:13 is not only inconsistent with the statutory language of several sections of the statute, an interpretation of RSA 125-O:18 in that manner would be inconsistent with the integrated multiple pollutant strategy and therefore would be contrary to RSA 125-O:10 and 13,VIII.

F. Practical and Fairness Considerations Demand that the Variance Provision be Construed As Limited in Scope.

For all the reasons set forth above, the variance provision of the mercury reduction law did not delegate authority to either the DES or this Commission to effectively repeal the Scrubber installation mandate. The variance provision's applicability was limited to two specific areas where, in appropriate circumstances, PSNH could seek, and DES could consider, the grant of slight deviations from the mandates in the law.

The practical considerations of what TransCanada argues should also be considered. Interpreting the variance provision of the mercury reduction law in the expansive manner

suggested by TransCanada would have placed a cloud of uncertainty over the Scrubber Project. Suppose hypothetically, despite all the law discussed herein, that PSNH had sought such a waiver of the law's construction mandate. Prudence would dictate that no further costs be expended on the project while the DES considered that waiver application.

The DES consideration of such a request would take some time. Per the statute, a hearing might be held. Other parties could have sought intervention. Whatever the decision, appeals could have ensued. All the while, the project would be on hold, with the potential for the ultimate project cost to increase over time.

Meanwhile, the project delays would put in jeopardy the ability of PSNH to comply with the mandated in-service date should the waiver application be denied. Such a delay would put PSNH in the position of not heeding the law's mandate to achieve significant reductions in mercury emissions at the coal-burning electric power plants in the state as soon as possible. (RSA 125-O:11, I). The delay also would have effectively eliminated any opportunity for PSNH to capture the RSA 125-O:16 Economic Performance Incentives that would accrue to the benefit of its customers.

What would PSNH then face at the ultimate RSA 125-O:18 prudence review if it had delayed the project only to have DES agree with this Commission that "[t]he Legislature … retained oversight of the scrubber installation including periodic reports on its cost," the variance law did not allow it to "repeal" the construction mandate, and therefore it rejected PSNH's waiver request? Based on the clear and unequivocal mandates set forth in the law (as also acknowledged by the law's legislative history, the New Hampshire Supreme Court, this Commission, the Department of Environmental Services, the Air Resources Council, the Site Evaluation Committee, and the U.S. Environmental Protection Agency (see examples in

Attachment 1)), PSNH would be in the unenviable position of trying to prove that what it did, and the ensuing delay, was prudent, despite the overwhelming commentary to the contrary.

Hence, PSNH would be placed in jeopardy of an imprudence finding for any project costs that increased as a result of the delay, as well as for the failure to attain economic incentives on behalf of its customers and, of critical importance, if as a result of the delay PSNH could not meet the mandated deadline, operation of its plants would be in violation of air regulations.

Surely, the Legislature did not intend to present PSNH with this "Hobson's choice."[26] Interpreting the variance provision in a manner that creates this no-win scenario is unreasonable and unnecessary, and should be rejected. In order to find that TransCanada's argument that the existence of RSA 125-O:17 imposes an obligation on PSNH to seek a variance not to build the project at all, or to install a different technology, had any merit, one would have to believe that despite the facts that the Legislature mandated the construction using a specific technology by a specific date (RSA 125-O:11 and 13); determined before construction that the technology chosen would reduce mercury emissions "with reasonable costs to consumers" (RSA 125-O:11,V); retained the authority to review the cost of construction and stripped the Commission of its ability to review those costs during construction (RSA 125-O:113, IX); determined that the project, the technology and the costs were in the "public interest" (RSA 125-O:11); and determined that the project was part of "an integrated strategy of non-severable components" to reduce pollution from various sources (RSA 125-O:13, VIII and RSA Ch. 125 generally), it intended to allow the Commission to decide that none of the costs of constructing the project, or that the costs above some unknown and arbitrary level, were not prudent. That result is absurd;

[26] *See* MORRIS DICTIONARY OF WORD AND PHRASE ORIGIN 289-90 (Harper & Row 2d ed.1988) (describing a Hobson's choice as an apparent choice that is really no choice at all because both options are equally undesirable).

it would read Sections 17 and 18 to gut the remainder of the non-severable components of RSA Ch. 125-O:1-18. It is also a reading this Commission has already rejected in its prior orders.

PSNH does not, and could not, contend that this Commission has no power in its prudence determination to review the *specific* costs it incurred to comply with the statutory mandate to construct the Scrubber – as opposed to whether it should have been constructed at a particular cost, or at some level above that cost known only to TransCanada. Prudence relates to costs reasonably incurred during construction, not to some unspecified level said to be "unreasonable" by a competitor. Likewise, PSNH does not contend that the variance provisions of 125-O:17 might not have been relevant to that review if the facts in this case had played out differently. But in this case, RSA 125-O:17 is irrelevant to the Commission's prudence review. Consistent with the discussion of PSNH's duties under the law presented herein, PSNH acted reasonably and prudently in its compliance with all aspects of the mercury reduction law.

G. Discovery.

Since the Commission's Order No. 25,938 arises in the context of a discovery request, it should be noted that the foregoing discussion is dispositive of outstanding discovery disputes, including TransCanada's Motion to Compel. The discovery requests that remain outstanding relate to three general areas: (1) PSNH's "*decision* to construct the Scrubber" (Requests TC 1-1 to 1-5, emphasis added); (2) whether PSNH considered requesting a variance pursuant to RSA 125-O:17 (Requests TC 1-14 to TC 1-16); and, (3) information for which the only purpose is to look behind and undermine the statutes which the Legislature enacted and the Governor signed into law. The information sought in these requests is irrelevant.

First, as this Commission specifically stated in Order No. 24,979, PSNH did not have a choice or "decide" to build the Scrubber. It was required to do so. ("[T]he scrubber installation

at Merrimack Station does not reflect a utility management choice among a range of options. Instead, installation of scrubber technology at the Merrimack Station is a legislative mandate, with a fixed deadline.") *See* RSA 125-O: 11, I, II; RSA 125-O:13, 1. Accordingly, questions relating to an alleged "*decision* to install" the Scrubber are irrelevant to this prudence review proceeding.

Second, RSA 125-O:17 did not provide PSNH with the unfettered ability to seek a variance "if and when the project became uneconomic," as TransCanada claims. As noted, this Commission has already held that "RSA 125-O:17 constitutes a mechanism for PSNH to seek relief from the Department of Environmental Services (DES) *in certain circumstances*."[27] Those circumstances did not occur. Hence, the question of whether PSNH sought a variance – or considered doing so – is also irrelevant.

Third, TransCanada's attempts to question and undermine the law that the Legislature duly enacted, that the Governor signed, and that PSNH had a legal duty to obey, are irrelevant to this prudence proceeding. "[T]he circumstances under which we look behind plain language are extremely limited, usually confined to those 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters, and those intentions must be controlling' *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982), or where the plain meaning will result in an absurd outcome, *Textron* [*v. CIR*], 336 F.3d 26 at 31 (*citing Sullivan v. CIA*, 992 F.2d 1249, 1252 (1st Cir.1993))."[28] It is not the function of a court or administrative agency to decide what the law *ought* to be, but rather to construe and apply the law *as the legislature has enacted it* to the facts before such court or agency, and it is the role of the legislature to evaluate public-policy

[27] Order No. 24,914, Docket DE 08-103 (2008) at 13 (emphasis added).

[28] *In re Pharm. Indus. Average Wholesale Price Litig.*, 582 F.3d 156, 168 (1st Cir. 2009).

considerations regarding the wisdom of a statute, just as it is its role to cure any unfairness of a statute.[29] The amendment of statutes is a legislative and not a judicial or administrative function.[30] It is for the legislature to determine the justice, wisdom, necessity, desirability, or expediency of a law which is within its powers to enact, and such questions are not open to inquiry by the courts or administrative agencies. It is not the province of a court or administrative agency to question the wisdom, social desirability, or economic policy underlying a statute, as these are matters for the legislature's determination.[31] "[T]o substitute our understanding of what the legislature intended for the express language of the statute …would significantly interfere with the legislative prerogative, and we therefore will not look behind the express, unambiguous language of the statute." *State v. Berry*, 121 N.H. 324, 327 (1981).

IV. Conclusion

TransCanada's newest argument challenging the Scrubber law and PSNH efforts to comply with that law is based on erroneous facts and a misinterpretation of the law. Its claim that PSNH could have sought a variance when costs "dramatically increased" and, as a result, PSNH was unreasonable in incurring costs beyond that unspecified level, ignores reality. There was no such increase, "dramatic" or otherwise, from what the Legislature considered. The Scrubber was completed for less than the amounts known by the Legislature during its 2009 session, when it rejected efforts to place a limit on Scrubber costs. This third attempt to interfere with PSNH's effort to construct the Scrubber in compliance with state law has no more merit than its prior attempts. This Commission, the Site Evaluation Committee, and the Supreme

[29] 16 C.J.S. Constitutional Law § 328.

[30] *U.S. v. American-Foreign S. S. Corp*., 363 U.S. 685 (1960).

[31] 16 C.J.S. Constitutional Law § 339.

Court (twice) have rejected TransCanada's efforts to interfere with the Legislature's mandate. This one should be rejected as well.

Respectfully submitted this 28th day of August, 2012,

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CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2012, I served an electronic copy of this filing with each person identified on the Commission's service list for this docket pursuant to Rule Puc 203.02(a).

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