STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

Docket No. DE 11-250

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Investigation of Merrimack Station Scrubber Project and Cost Recovery

BRIEF OF THE SIERRA CLUB AND CONSERVATION LAW FOUNDATION IN RESPONSE TO ORDER NO. 25,398 CONCERNING THE VARIANCE PROVISION IN THE MULTIPLE POLLUTANT REDUCTION PROGRAM

Pursuant to the Commission's Order no. 25,398 dated August 7, 2012, the Sierra Club and Conservation Law Foundation hereby state the following:

1. On July 16, 2012, TransCanada filed a motion to compel seeking certain discovery from PSNH, and on July 26, 2012, PSNH filed an opposition. At issue in pertinent part between the parties was the relevance of certain discovery requests given the variance provision in the Multiple Pollutant Reduction Program, at 125:O-17.

2. On August 7, 2012, the Commission issued an Order on TransCanada's motion to compel, granting in part the motion. In this Order, the Commission further requested that the parties file legal briefs

> [R]egarding their views of the proper interpretation of RSA 125-O:10, RSA 125-O:17 and the cost recovery provisions of RSA 125-O:18, and how these statutes relate to one another, to the application of the standard for discovery of evidence, and to relevance Without limiting the generality of the foregoing, we are specifically interested in the parties' views regarding (i) the types of variance requests that may be made under RSA 125-O:17, given that it comprises two sentences followed by subsections I and II; (ii) the meaning of the phrases "alternative reduction requirement" and "technological or economic infeasibility" in RSA 125-O:17, II; (iii) the duty of PSNH to seek a variance from DES under RSA 125-0:17, if any, in order to obtain cost recovery under RSA 125-O:18; (iv) the meaning and application of the non-severability clause in RSA 125-0:10 for purposes of the prudence determination we must make under RSA 125-O:18; and (v) how RSA 125-O:10 and RSA 125-O:17 relate to one another and to the prudence determination we must make under RSA 125-O:18.

Order no. 25,398 at 10.

3. This brief addresses: the proper standard for discovery in this proceeding; the scope of the variance provision in RSA 125-O:17, and what impact, if any, does the non-severability provision in RSA 125-O:10 have on the variance provision.

Standards for Discovery before the Public Utilities Commission

4. As noted by the Commission, discovery requests are to be treated liberally. As per Superior Court Rule 35(b)(1): "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party". As such, New Hampshire "takes a liberal view of discovery. Absent some privilege and subject to control to prevent harassment, full discovery is favored". *Yancey v. Yancey*, 119 N.H. 197, 198 (N.H. 1979); *se also Johnston v. Lynch*, 133 N.H. 79, 94 (N.H. 1990) (discovery is "an important procedure for 'probing in advance of trial the adversary's claims and his possession or knowledge of information pertaining to the controversy between the parties") (citing *Hartford Accident etc., Co. v. Cutter*, 108 N.H. 112, 113 (N.H. 1967)).

5. Accordingly, parties must respond to discovery requests even where the ultimate legal issues they may pertain to have not yet been determined. Put another way, the discovery stage of an action is to be expansive, in which "full discovery" into material that may relate to the "claim or defense of any" party should be granted, and discovery is checked by privilege or control "to prevent harassment." Thus, legal arguments are most fully developed later with reference to the materials unveiled through the discovery process. As such, if a discovery request is relevant to a potential claim or defense, it

should be granted without first requiring that the ultimate viability of that claim or defense be tested as a prerequisite to discovery. Otherwise, the "liberal view of discovery" is greatly and perhaps prejudicially cabined.

6. Here, certain of TransCanada's discovery requests relate to a claim or defense concerning the variance provision of the Multiple Pollutant Reduction Program. In determining whether or not PSNH's responses to the requests should be compelled, the Commission should be careful not to pre-judge the ultimate application of such claim or defense concerning the variance provision to the present situation. Whether or not PSNH should have sought a variance from the requirements of the Multiple Pollutant Reduction Program under the provision, or the furthest extent of what such a variance could have covered, are not questions that need be reached to determine TransCanada's motion to compel. These are questions that are best resolved at a later stage of this proceeding, when all parties involved in the docket have had fuller opportunity to develop and apply facts to the law.

The Scope of the Variance Provision

7. The variance provision of the Multiple Pollutant Reduction Program provides PSNH the opportunity to seek amelioration of some or all of the statutorily mandated requirements in certain fact-specific scenarios, as is evident from a plain language reading of the text of the provision.

8. It is bedrock law that statutes are to be interpreted by first looking to what their language actually says:

> In order to interpret the relevant statutory language we must first examine its plain and ordinary meaning. If the language of the statutes does not unambiguously yield a meaning, or if the relevant statutes conflict, then we look to the Legislature's intent as revealed through a reading of the

> overall statutory scheme, legislative history and recognized rules of statutory construction.

Investigation of PSNH's Installation of Scrubber Technology at Merrimack Station, Order No. 24,898, 2008 N.H. PUC LEXIS 79, 11-12 (Sept. 19, 2008) (citing *Appeal of Pinetree Power, Inc.*, 152 N.H. 92, 96 (N.H. 2005) and *Petition of PSNH*, 130 N.H. 265, 282-83 (N.H. 1988)).

9. Here, the variance provision reads 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.

RSA 125:O-17. The provision thus contemplates variances granted in response to written requests to the Department of Environmental Services.[1] The potential variances pertain to the mercury emissions reduction requirements set forth in statute, and the provision notes two examples of variances: alternative schedules, and alternative reduction requirements. *Id.* In cases where alternative reduction requirements are sought, owners are directed to submit information substantiating the need—such as "economic infeasibility"—for the variance. *Id.*

10. Thus, the plain language of the variance provision contemplates variances to requirements for mercury reduction in a wide variety of potential situations, including situations in which performance of those requirements would otherwise be uneconomic.

11. Here, this would mean that, at the very least, there is a potential factual question as to whether or not PSNH could have or should have sought a variance under

[1] *See* 125-O:2 IV.

RSA 125:O-17 from the mercury reduction requirements of the Program. Such a question can only be fully resolved if discovery is allowed.

12. One could for example imagine situations in which ballooning costs for design and installation of a scrubber system—perhaps, if coupled with migration of PSNH customers to other providers—render it difficult if not impossible for PSNH to recover its costs through rate increases. In such a situation, it would perhaps be economically infeasible to comply with the mercury reduction requirement through installation of a "wet" scrubber system, and the legislature empowered PSNH to "request a variance" and instead meet some of the reduction requirements through other means. Such means could include, without limitation: different types of emissions controls such as dry scrubbers or activated carbon injection, installing controls on other PSNH facilities, restricting the operation of Merrimack Station, converting PSNH coal-fired boilers to run on cleaner fuels, etc. Since PSNH can only recover prudently incurred costs through its "default [energy] service charge" (RSA 125-O:18), a failure to use the variance provision to seek a less-costly, more flexible means of achieving the Program's ends may indeed render some of the costs incurred by PSNH non-compensable. *See e.g.,* Report and Fifteenth Supplemental Order No. 17,939 at 31-32 (N.H.P.U.C. Nov. 8, 1985)("A finding in a prudency review that the market for electricity will not support the level of rates will be relevant to determine whether capital investment not fully recoverable by rates was prudent in the first instance."). It is, again, not necessary to determine at this stage, prior to discovery being taken on the issue, whether or not factually this would be the case: it is enough at this stage that a claim or defense concerning the variance may potentially be viable.

The Variance Provision and Non-Severability

13. In face of this, PSNH appears to argue that the presence of a non-severability provision effectively reads the variance provision right out of the statute, nullifying it as a potential claim or defense in this action. However, PSNH's interpretation of the non-severability provision's interaction with the waiver provision does not comport with a plain-language reading of the statute.

14. As noted above, statutory provisions are to be interpreted by first looking to their plain language, and thereafter in part through reference to the statutory program as a whole. *See Investigation of PSNH's Installation of Scrubber Technology at Merrimack Station*, Order No. 24,898, 2008 N.H. PUC LEXIS 79, 11-12 (Sept. 19, 2008) (citing *Appeal of Pinetree Power, Inc.*, 152 N.H. 92, 96 (N.H. 2005) and *Petition of PSNH*, 130 N.H. 265, 282-83 (N.H. 1988)). Thus, in determining the interactions if any between different provisions of a statute, the Commission should look to the plain language of the provisions, and eschew interpretations of the provisions that would tend to render one or the other provision redundant, nonsensical, or unnecessary.

15. The applicable non-severability provision states that "[n]o provision of RSA 125-O:1 through RSA 125-O:18 shall be implemented in a manner inconsistent with the integrated, multi-pollutant strategy or RSA 125-O:1 through RSA 125-O:18" and thus, that the provisions "are not severable." RSA 125:O-10. Notably, the non-severability provision explicitly notes that the entirety of "RSA 125-O:1 through RSA 125-O:18" is to be interpreted in a comprehensive, integrated manner. *Id.* Even absent the bedrock canon of statutory interpretation that provisions in a statute are not to be read

out of the law, the non-severability provision provides a powerful statement that the all aspects of the enumerated statutes are to be incorporated.

16. PSNH appears to interpret this non-severability provision as nullifying the variance provision, claiming that to request a variance from the statutory requirements would somehow "sever" those requirements. Of course, this construction immediately "severs" the variance provision from the statutory scheme, rendering it meaningless. As such, PSNH's proffered and incorrect interpretation therefore posits a tension between the non-severability provision and the variance provision that simply does not exist. To the contrary, the non-severability provision ensures that no one provision—such as the variance provision—is interpreted out of the statute.

17. The variance provision may readily be interpreted in a way completely in harmony with the rest of the statute. It serves as a pressure release valve that allows the Department to modify the mercury reduction requirements in those situations that were not anticipated when the statute was penned, be they "technological or economic." RSA 125-O:17, I. Indeed, PSNH's narrow and erroneous focus on the non-severability provision as acting to nullify the variance provision likewise is in stark contrast with the Multiple Pollutant Reduction Program's (RSA Chapter 125-O) overall focus on regulatory flexibility and a variety of approaches to resolving pollution issues. *See, e.g.*, RSA 125:O-1 VI ("The general court also finds that the environmental benefits of air pollutant reductions can be most cost-effectively achieved if **implemented in a fashion that allows for regulatory and compliance flexibility** . . . . **[M]arket-based approaches**, such as trading and banking of emission reductions within a cap-and-trade system, **allow sources to choose the most cost-effective ways to comply** with

established emission reduction requirements. This approach also . . . **promotes the development and use of innovative new emission control technologies** . . . **rather than dictating expensive, facility-specific, command-and-control regulatory requirements**.") (emphasis added); *id.* at VII ("The general court also finds that energy conservation results in direct reductions in air pollutant emissions"). Any attempt to read the Multi Pollutant Program Statute in toto must necessarily take into account the Program's emphasis on achieving improvements in air quality through flexible means. PSNH's read of the statute would turn this on its head: using a provision designed to ensure that RSA Chapter 125-O is read as a whole to preference some parts of the statute (such as those requiring certain mercury controls) over other parts (such as those allowing the Department to craft flexible approaches to achieving the Program's objectives when the situation warrants).

18. Likewise, the non-severability provision also applies to the legislative mandate that PSNH's prudently incurred costs must be recovered "via [PSNH's] default energy service charge." RSA 125-O:18. One enumerated grounds for a variance, "economic infeasibility", must be interpreted in harmony with the statute's directive regarding cost recovery only through default energy service customers. By extension, PSNH's non-severability argument concedes that a relevant consideration in the Commission's prudency determination is the extent to which the market for electricity among its default energy services rate customers will or will not support the costs of the scrubber installation (i.e., economic [in]feasibility). *See*, Report and Fifteenth Supplemental Order No. 17,939 at 31-32 (N.H.P.U.C. Nov. 8, 1985).

19. As such, PSNH's actions concerning the variance provision as its costs to install a wet scrubber swelled has the potential to be quite relevant to a determination as to whether or not the costs it incurred were prudent. PSNH is attempting to avoid discovery by claiming that the variance provision was unavailable to it, but this argument fails to comport with the language of the statute.

Respectfully Submitted,

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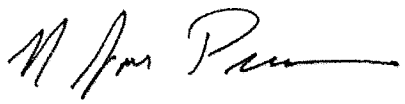
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief of Sierra Club and Conservation Law Foundation has been served electronically on the persons in the Commission's service list in accordance with Puc 203.11 this 28th Day of August, 2012.



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