



**Public Service
of New Hampshire**

780 N. Commercial Street, Manchester, NH 03101

Public Service Company of New Hampshire
P. O. Box 330
Manchester, NH 03105-0330

A Northeast Utilities Company

Robert A. Bersak
Assistant Secretary and
Associate General Counsel

(603) 634-3355
Robert.Bersak@psnh.com

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Ms. Debra A. Howland
Executive Director and Secretary
New Hampshire Public Utilities Commission
21 Fruit Street, Suite 10
Concord, New Hampshire 03301



**Re: *Docket No. DE 11-250, Public Service Company of New Hampshire,
Investigation of Merrimack Station Scrubber Project and Cost Recovery***

Dear Secretary Howland:

Public Service Company of New Hampshire (“PSNH”) wishes to bring to the attention of the Commission a recent New Hampshire Supreme Court decision which is relevant to Commission’s deliberations regarding Docket No. DE 11-250.

Yesterday (March 13, 2013), the Supreme Court rendered its decision in *In the Matter of S. Rebecca Carmody and Craig T. Carmody*, Case No. 2012-135, ___ N.H. ___ (2013). In that decision, the Court once again had the opportunity to discuss the meaning and import of the word “shall” when used by the words of a statute. Citing to *Appeal of Rowan*, 142 N.H. 67, 71 (1997) the Court has once again reaffirmed that “It is the general rule that in statutes the word ‘may’ is permissive only, and the word ‘shall’ is mandatory.” *Carmody, slip op.* at 2.

PSNH has noted on several occasions that the Scrubber Law’s repeated use of the word “shall” created a mandatory duty of compliance. *See e.g.*:

- PSNH’s Memorandum of Law, September 2, 2008, Docket No. DE 08-103, *passim*. (“The use of the word “shall” in the Scrubber Law emphasizes the Legislature’s intent that installation of a scrubber at Merrimack Station is “commanded” and is “mandatory.” Indeed, within the Scrubber Law, the General Court used the word “shall” sixty times! There can be no doubt of the mandatory and unequivocal direction expressed in the Scrubber Law.” (pp. 9-10 (BATES 51-52))).
- Brief of Public Service Co. of New Hampshire, May 6, 2009, N.H. Supreme Court Docket No. 2008-0897, *Appeal of Stonyfield Farm, passim*. (“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

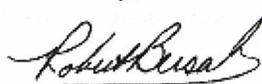
installation of this particular technology is in the public interest (Section 11, VI), and the finding that continued purchase of mercury credits is not in the public interest (Section 11, VII). (Fn. 16, p 20). (This Brief is included in the record of Docket No. DE 08-103.)

- Memorandum of Public Service Company of New Hampshire in Response to Commission Order 25,398, August 28, 2012, Docket No. DE 11-250, *passim*. (“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). (Fn. 10, p. 18).
- PSNH’s Motion for Rehearing of Order No. 25,445, January 23, 2013, Docket No. DE 11-250, *passim*. (“The Commission’s Order also ignores two N.H. Supreme Court decisions, each of which noted the unequivocal statutory mandate requiring PSNH to build the Scrubber.” (Fn. 3, p. 3).

Premised upon the Scrubber Law’s inclusion of the word “shall” five dozen times, the Supreme Court has already stated that, “To comply with the Mercury Emissions Program, PSNH must install the scrubber technology and have it operational at Merrimack Station by July 1, 2013.” *Appeal of Stonyfield Farm*, 159 N.H. 227, 229 (2009) and “The installation of such a system was mandated by the legislature in 2006.” *Appeal of Campaign for Ratepayers’ Rights*, 162 N.H. 245, 247 (2011).

Yesterday’s decision by the Court in *Carmody* again reaffirms the mandatory duty placed on PSNH by the Legislature in the Scrubber Law that it *shall* install Scrubber technology, at Merrimack Station, no later than July 1, 2013, that reduces total mercury emissions by at least 80 percent, and, should PSNH fail to achieve these mandates, it “*shall* be deemed in violation of this section”.

Sincerely,



Robert A. Bersak
Assistant Secretary and
Associate General Counsel

cc: Service List, Docket No. DE 11-250

DOCKET

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