THE STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

Public Service Company of New Hampshire

Docket No. DE 11-250

Objection of Public Service Company of New Hampshire to TransCanada's Third Motion to Compel

Pursuant to N.H. Code Admin. Rules Puc § 203.07(e), Public Service Company of New Hampshire ("PSNH" or the "Company") hereby objects to TransCanada's Third Motion to Compel dated October 9, 2012. TransCanada has most recently moved to compel responses to questions 4, 5 and 6 in its fifth set of data requests.

In support of this Objection, PSNH states as follows:

1. The questions in dispute, and their respective objections, raise issues that are substantially identical to those involved in TransCanada's first and second Motions to Compel dated July 16, 2012 and September 11, 2012, respectively.

2. Rather than repeat the matters and arguments set forth in the Company's July 26, 2012 Objection to the first Motion to Compel and the September 13, 2012 Objection to the Second Motion to Compel (the "Second Objection"), PSNH respectfully requests that the arguments therein be incorporated into and considered as part of this third Objection.

3. On September 12, 2012, the Public Utilities Commission ("PUC" or "Commission") issued the final report from Jacobs Consultancy regarding its review of the Scrubber Project. By Secretarial Letter dated September 14, 2012, the Commission extended the discovery deadline through September 27, 2012, solely for discovery on issues contained in the reports prepared by the Audit Staff and Jacobs. Subsequently, on September 27, 2012, TransCanada submitted data requests to PSNH ostensibly based upon the contents of the Jacobs report. PSNH timely objected to the three identified data requests in that set of questions on October 3, 2012.

4. In Order No. 25,398 dated August 7, 2012, the Commission called for the filing of legal briefs concerning "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." In that Order, the Commission also held in abeyance rulings on TransCanada's data requests identified in its first Motion to Compel related to the variance issues pending ruling after review of the legal briefs.

5. In Order No. 25,398, the Commission stated that "the resolution of these issues may be important in minimizing further discovery disputes involving similar questions and responses and in helping refine the scope of the docket for purposes of pre-filed testimony and hearing testimony." All of the questions in dispute as part of TransCanada's Third Motion to Compel are such "similar questions," and the resolution of this discovery dispute should be subject to the Commission's process established in Order No. 25,398.

6. TransCanada's additional questions and Third Motion to Compel open even wider the "Pandora's Box" that PSNH referred to in its Second Objection. In its Third Motion, TransCanada seeks "information about whether PSNH provided information to the NH Legislature or the NH Department of Environmental Services" (Third Motion, ¶3) prior to the enactment of 2006 N.H. Laws 105, "AN ACT relative to the reduction of mercury emissions" (the Scrubber Law, codified as RSA 125-O:11, *et seq.*). TransCanada further asserts that, "The data requests at issue in this Motion seek information about representations, or the lack thereof, that were made to the Legislature and/or state officials…" (*Id.*) and "TransCanada believes it appropriate and necessary to request information from PSNH about representations provided to executive and legislative branch officials at the time that this legislation was considered and ultimately enacted." (*Id.*, ¶7).

7. Appended to TransCanada's Third Motion to Compel is fifty-nine pages of the Scrubber Law's legislative history. TransCanada indicates that this legislative history reflects what the Legislature considered or relied upon when it enacted the Scrubber Law (*see Id.*, ¶6).

8. What the Legislature considered or what it relied upon when it chose to enact the Scrubber Law legislation, which the Governor duly signed into law, is well beyond the purview of this proceeding. "In this case, we are dealing with an issue of the delegation of legislative power. Subject to acknowledged constitutional limitations…the regulation of utilities and the setting of appropriate rates to be charged for public utility products and services is the unique province of the legislature. *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 313, 109 S.Ct. 609, 618, 102 L.Ed.2d 646 (1989); *The Minnesota Rate Cases*, 230 U.S. 352, 433, 33 S.Ct. 729, 754,

57 L.Ed. 1511 (1913); *see LUCC v. Public Serv. Co. of N.H.*, 119 N.H. 332, 340, 402 A.2d 626, 631 (1979)." *Appeal of Richards,* 134 N.H. 148, 162 (1991). The Commission only has those powers and authorities delegated to it by the Legislature. "The public service commission is an agency of limited powers and authority. While the legislature may delegate to such an agency certain of its own powers and authority, the exercise of such delegation does not extend beyond expressed enactment or its fairly implied inferences. The establishment of such an agency is of a special rather than general character, and power and authority not granted are withheld." *Petition of Boston & Maine Railroad,* 82 N.H. 116, 116 (1925); "The PUC is a creation of the legislature and as such is endowed with only the powers and authority which are expressly granted or fairly implied by statute." *Appeal of PSNH,* 122 N.H. 1062, 1066 (1982). In the Scrubber Law, the Legislature included a detailed "Statement of Purpose and Findings" at RSA 125-O:11, specifically finding that installation of scrubber technology was in the public interest and mandating the installation of that technology at PSNH's Merrimack Station as soon as possible. The Legislature did not delegate to the Commission the power to ignore or to change the Scrubber Law; the Commission has only the authority expressly granted by that law to allow recovery of all prudent costs of complying with the requirements of the Scrubber Law.

9. In reviewing the prudence of PSNH's compliance with the law, what is relevant is what the Scrubber Law, as enacted by the Legislature, mandates. It is clear that TransCanada is asking this Commission to second-guess the wisdom, desirability, or expediency of the statute enacted by the Legislature. Such second-guessing not only exceeds the authority delegated by the Legislature to the Commission, but is an exercise that has been soundly rejected by the courts. "It has been the established law in this state from the beginning that it is not the function

of the judicial branch of the government to pass upon the wisdom, desirability and expediency of statutes enacted by the Legislature. *Chronicle & Gazette Pub. Co. v. Attorney-General*, 94 N.H. 148, 151, 48 A.2d 478, 168 A.L.R. 879 [1946]." *Brown v. Lamprey*, 106 N.H. 121, 124 (1965). "This court has often stated 'that it is not the function of the judicial branch of the government to pass on the wisdom, desirability and expediency of statutes enacted by the Legislature.'" *Niemiec v. King*, 109 N.H. 586, 587 (1969). Citing to the U.S. Supreme Court, the New Hampshire Supreme Court has also stated, "we will not independently examine the factual basis for the legislative justification for the statute. … [C]ourts will not second-guess the legislature as to the wisdom of or necessity for legislation. *New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513, 2516, 49 L.Ed.2d 511 (1976)." *Carson v. Maurer*, 120 N.H. 925, 933 (1980).

10. In the instant proceeding, the Commission is acting in its judicial capacity:

> Due process is a flexible standard in the administrative law context. We expect and will require meticulous compliance with its mandates, however, in the case of the PUC because as long ago as 1929 this court recognized that the PUC was created by the legislature as a "state tribunal, imposing upon it important judicial duties." *Parker-Young Co. v. State*, 83 N.H. 551, 556, 145 A. 786, 789 (1929). When it is not acting in a rule-making capacity but in an adjudicative one, see 3 K. Davis, supra § 14:5, at 24-28, the procedural posture of the PUC is different. "If private rights are affected by the board's decision the decision is a judicial one."

Appeal of PSNH, 122 N.H. 1062, 1073 (1982).

11. In one of its earliest reported cases, the New Hampshire Supreme Court commented on what the proper remedy is when the wisdom of a particular legislative enactment is challenged:

> All public interests are proper objects of legislation; and it is peculiarly the province of the legislature, to determine by what laws those interests shall be regulated. Nor is the expediency, or the policy of such laws, a subject for judicial decision. The constitution has given to the general court full power and authority

> to make and ordain all such laws "as they may judge for the benefit and welfare of this state." Should we assume the power of declaring statutes valid or invalid, according to our opinion of their expediency, it would not be endured for a moment, but would be justly viewed by all, as a wanton usurpation, altogether repugnant to the principles of our government. Nor are these plaintiffs competent to call in question the validity of these laws in a court of justice, on the ground that they are injurious to the public interests. A law is only the public will duly expressed. . . .If these acts be injurious to the public interests, the remedy is to be sought in their repeal, not in courts of law.

Trustees of Dartmouth Coll. v. Woodward, 1 N.H. 111, 120-21 (1817).

12. Relevant to the instant case, during the 2009 legislative session TransCanada and others who dislike the Scrubber Law followed the very edict that the court pronounced in the *Dartmouth College* case - - that is, "the remedy is to be sought in…repeal, not in courts of law" - - when they asked the Legislature to reconsider the Scrubber Law . TransCanada and other parties to the instant proceeding participated in the legislative hearings regarding both SB 152, "AN ACT relative to an investigation by the public utilities commission to determine whether the scrubber installation at the Merrimack station is in the public interest of retail customers" and HB 496, "AN ACT establishing a limit on the amount of cost recovery for the emissions reduction equipment installed at the Merrimack Station." During the hearings on these 2009 bills, both the Senate and House were well aware that the cost of the Scrubber was then estimated to be $457 million.

13. TransCanada itself ensured that both houses of the legislature were aware of the increased estimated cost. During hearings on SB 152 TransCanada testified, "TransCanada supports efforts to have a complete review of the cost of the modifications done in an appropriate forum. And we urge you to require the PUC to do a thorough review of this huge expenditure, as

it would typically do for any utility that it regulates. We think it is irresponsible to allow the recovery of an unlimited and unexamined amount of ratepayer money to pay for these modifications on a power plant of this type and vintage." Statement of TransCanada to the Senate Committee on Energy, Environment and Economic Development on March 13, 2009. TransCanada also appeared before the House Committee on Science, Technology and Energy on March 5, 2009, supporting passage of HB 496, asking the legislature to limit the amount that PSNH could recover for installation of the Scrubber, and questioning the Company's decision not to seek a certificate from the New Hampshire Site Evaluation Committee. With full knowledge of the then-current $457 million cost estimate for the Scrubber, both houses of the legislature overwhelmingly rejected the overtures of TransCanada and others to change or limit the mandates contained in the Scrubber Law.

14. The decision of the Legislature when it enacted the Scrubber Law in 2006 and the Legislature's "ratification" of that enactment via its 2009 decision not to change that law set the bounds of relevance for this proceeding. As TransCanada states in its three motions to compel, the scope of discovery is limited to "information that is relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence." (*See, e.g.*, Motion 3, ¶8, citing to *Re Investigation into Whether Certain Calls are Local*, 86 NH PUC 167, 168 (2001)). The Legislature made its decision. The Legislature had a chance to reconsider that decision, and chose not to change it. "A legislative decision 'is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.' *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993)." *Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1127 (7th Cir. 1995). As noted earlier, the Commission, as an instrument of the

Legislature, has only those powers delegated to it; the exercise of such delegation does not extend beyond expressed enactment or its fairly implied inferences. *B&M Railroad, supra; Appeal of PSNH, supra.* Second-guessing a duly enacted law through "courtroom factfinding" (*FCC*, supra) or "examining the factual basis for the legislative justification for the statute" (*Carson, supra*) is not one of the powers delegated to the Commission. Hence, discovery questions involving information that seeks to question the "wisdom, desirability [or] expediency of statutes enacted by the Legislature" (*Brown* and *Niemiec, supra*) are beyond both the scope of this proceeding as well as the authority of the Commission.

15. In PSNH's Second Objection, the Company listed a "Pandora's Box" of issues which TransCanada implied should give rise to requests for "variances" from the mandate to comply with the requirements of the Scrubber Law. In its Third Motion, TransCanada expressly lists such matters, including: "when it became clear that it was much more expensive than originally reported, that the price of natural gas had plummeted, that migration of default service customers (the only customers by law from whom they could recover these costs) was increasing, that there were other regulatory requirements on the horizon that would add significantly to the costs of keeping Merrimack Station going, and that the economy had suffered a major setback that significantly reduced future demand for power." (Motion 3, ¶5). As PSNH noted in its Second Objection, TransCanada's list of issues clearly demonstrates its broad, ever-changing, and never-ending collection of matters that TransCanada asserts are relevant to this prudence proceeding. This is based on its position that the law is not really the law since it asserts the variance provision provided a magic loophole that permitted PSNH to avoid compliance with the mandates of the Scrubber Law whenever energy costs fluctuated, the migration of customers to

or from competitive supply changed, when a new law, regulation, permit, or court decision was issued or seemed likely to occur, or if the nation's economic conditions changed the demand for electricity.

16. TransCanada's renewed assertion that PSNH had limitless opportunities to avoid the clear mandate of the Scrubber Law continues to be just plain wrong. In the Company's Second Objection PSNH noted that the Legislature did not intend to provide an opportunity for a continuous series of Scrubber Project delays while PSNH filed multiple, cascading variance requests with DES. What the Legislature clearly and expressly directed was for PSNH to install and have operational scrubber technology at Merrimack Station as soon as possible.

17. As further support, the Commission is referred to the decision of the New Hampshire Supreme Court in *Appeal of Richards*. In *Richards*, the Court had the opportunity to discuss RSA Chapter 362-C, "Reorganization of Public Service Company of New Hampshire." The parallels between the situation before the Court in *Richards* and the Scrubber Law being considered by the Commission in the instant proceeding are numerous and worthy of discussion.

A. In *Richards*, at 158, the Court stated, "In this case, we are dealing with an issue of the delegation of legislative power. Subject to acknowledged constitutional limitations, considered below, the regulation of utilities and the setting of appropriate rates to be charged for public utility products and services is the unique province of the legislature. *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 313, 109 S.Ct. 609, 618, 102 L.Ed.2d 646 (1989); *The Minnesota Rate Cases*, 230 U.S. 352, 433, 33 S.Ct. 729, 754, 57 L.Ed. 1511 (1913); *see LUCC v. Public Serv. Co. of N.H.*, 119 N.H. 332, 340, 402 A.2d

626, 631 (1979)." In the instant docket, the Commission is dealing solely with the power delegated to it by the Legislature in RSA 125-O:18, regarding Cost Recovery.

B. In *Richards, id.*, the Court stated, "The rate element of the reorganization could have come to the PUC, in the normal course, under the existing statutory delegation and with all of the judicial requirements attached. However, the rate element of the reorganization was far from traditional, since it envisioned contractual protections for NU, through a contractual guarantee of rates designed to cover the cost of acquisition required to be paid by NU." In the instant docket, the Commission is dealing with the mandate in RSA 125-O:18 that provides, "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." (Emphasis added).

C. In *Richards* at 162, the Court determined that the Legislature had instructed the Commission to deviate from its traditional ratemaking process: "The legislature's omission of the phrase 'just and reasonable' from RSA 362-C:3 (Supp.1990), entitled 'Action by the Commission,' indicates that the legislature did not intend to require the PUC to undertake traditional ratemaking analysis. Had the legislature intended the PUC to do so, it could easily have made this an express requirement. It is not the function of this court to add provisions to the statute that the legislature did not see fit to include." Similarly, in the instant case, the Legislature directed that the Scrubber Project deviate from the traditional course. As the Commission determined in Docket No. DE 08-103 in Order No. 24,898, and upheld on rehearing in Order No. 24,914, "as a result of the Legislature's mandate that the owner of Merrimack Station install scrubber

technology by a date certain, and its finding pursuant to RSA 125-O:11 that such installation of scrubber technology at PSNH's Merrimack Station is in the public interest of the citizens of New Hampshire and the customers of the station, the Commission lacks the authority to make a determination pursuant to RSA 369-B: 3-a as to whether this particular modification is in the public interest." The New Hampshire Supreme Court upheld the Commission's decisions in Docket No. DE 08-103 in *Appeal of Stonyfield Farm*, 159 N.H. 227 (2009), a case in which TransCanada participated as an *amicus*. Had the legislature intended the Commission to question the mandate to install scrubber technology at Merrimack Station, it could easily have made that an express requirement of the law.

D. In Richards at 162-63, the Court noted:

> Interpreting RSA 362-C:3 (Supp.1990) so as to require the PUC to use traditional ratemaking analysis would also directly contravene the express intent of the legislature in enacting RSA chapter 362-C (Supp.1990). Cf. *Quality Carpets, Inc. v. Carter*, 133 N.H. 887, ---, 587 A.2d 254, 255 (1991) (stating that "[w]e will construe statutes 'so as to effectuate their evident purpose' " (quoting *State v. Sweeney*, 90 N.H. 127, 128, 5 A.2d 41, 41 (1939))). The court noted that the legislature expressly stated the reasons for its enactment of RSA chapter 362-C (Supp.1990) in the law itself.

In the instant case, the Scrubber Law included RSA 125-O:11, Statement of Purpose and Findings, which similarly set forth the express intent of the Legislature. That provision expressly found that installation of scrubber technology was in the public interest of the citizens of New Hampshire, expressly found that significant reductions in mercury emissions should occur as soon as possible; and expressly mandated that scrubber technology shall be installed at Merrimack Station.

E. In *Richards* at 163, the Court noted, "The predominant purpose of RSA chapter 362-C (Supp.1990) was to expedite the resolution of the PSNH bankruptcy by authorizing the PUC, upon a finding of public good, to approve and implement the agreement, which would resolve the PSNH bankruptcy by providing for a reorganization of the utility." It continued:

> An effort at traditional ratemaking would involve a complex process which, as we noted above, consists of a number of steps. *See Appeal of Conservation Law Foundation*, 127 N.H. at 633-40, 507 A.2d at 671-75. If RSA 362-C:3 (Supp.1990) were interpreted as Hilberg and CRR suggest, the PUC essentially would be required to hold a ratemaking proceeding which could take as long as one or two years. See C. Phillips, Jr., The Regulation of Public Utilities 732 (1985) (stating that " '[f]rom start to finish, the proceedings averaged more than ... 21 months for ratemaking.' " (quoting 4 Senate Comm. on Governmental Affairs, 95th Cong., 1st Sess., Study on Federal Regulation 7 (1977))). As a consequence of this interpretation of RSA 362-C:3 (Supp.1990), the resolution of the PSNH bankruptcy would be delayed rather than expedited, a result that was clearly not intended by legislature. Further, the agreement was not an appropriate subject for traditional ratemaking. Its contractual nature, its stipulated rate base and its extended term would have made traditional ratemaking a sham or exercise in futility.

In the instant case, the Legislature found, "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" (RSA 125-O:11, I); that "all…regulatory agencies and bodies are encouraged to give due consideration to the general court's finding that the installation and operation of scrubber technology at Merrimack Station is in the public interest" (RSA 125-O:13, I); and offered "Economic Performance Incentives" in RSA 125-O:16 to incent reductions in mercury earlier than the July 1, 2013 deadline for installation of the Scrubber. As in *Richards*, repetitive delays in the Scrubber Project caused by an unending stream of variance requests as suggested by TransCanada would have been contrary to the Legislature's express directive to expedite the construction of the

Scrubber Project in order to achieve the publicly beneficial reductions in mercury, sulfur oxides, and particulates emissions.

18. In the end, the Court in *Richards* found that by enacting RSA Chapter 362-C, the Legislature narrowly delegated specific authority to the Commission that deviated from traditional ratemaking. The Court found that the Legislature provided detailed reasons for that law, and directed the Commission to consider the PSNH post-bankruptcy rate plan on an expedited basis. In the instant case, the Legislature in RSA Chapter 125-O similarly provided detailed reasons for the law, mandated the Company to install a Scrubber at Merrimack Station on an expedited basis, and narrowly delegated specific authority to the Commission directing that the Commission shall allow PSNH to recover all prudent costs of complying with the requirements of this subdivision. As PSNH noted in its Legal Memorandum filed on August 28, 2012:

> 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. "[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).

19. The data requests of TransCanada seeking information which relate to the Legislature's deliberative processes question the wisdom, social desirability, or economic policy underlying the Scrubber Law, and are just not relevant to the prudence of PSNH's actions to comply with that law. What state senators or representatives knew during the 2005-2006 timeframe when the Scrubber Law was considered by the Legislature is a matter the General Court itself controls and

not a subject of the narrow authority delegated by the Legislature to this Commission for this matter. And, given the General Court's retention of oversight over the scrubber project including, "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," (RSA 125-O:13, IX) and the General Court's express consideration of the $457 million cost estimate in 2009 when both SB 152 and HB 496 were resoundingly rejected allowing the mandate of the Scrubber Law to stand unchanged, information regarding the legislative process is irrelevant to the actions taken by PSNH to comply with the law. The Commission should reject such spurious, irrelevant inquiries and deny TransCanada's Motions to Compel.

20. When the Legislature expressly found that, "***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***" (RSA 125-O:11, I) the intent of the mercury reduction law was set forth clearly and unambiguously. Given this clear statement of the public interest and the unequivocal statutory mandate to proceed expeditiously, there can be no doubt that the Legislature did not anticipate, nor intend to provide an opportunity for, a continuous series of Scrubber Project delays while PSNH filed multiple, cascading variance requests with DES in order to protect itself from the very imprudence claims asserted by the parties to this proceeding; nor did the Legislature delegate to the Commission authority to question the wisdom, desirability or expediency of the statute it duly enacted.

WHEREFORE, PSNH objects to TransCanada's Third Motion to Compel.

For the reasons expressed herein, PSNH respectfully requests that the Commission:

A. Deny TransCanada's Motion to Compel; and

B. Grant such other and further relief as justice may require.

Respectfully submitted this 16th day of October, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 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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