STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

Docket No. DE 11-250

Public Service Company of New Hampshire

Investigation of Merrimack Station Scrubber Project and Cost Recovery

MOTION FOR REHEARING OF ORDER NO. 25,445

January 23, 2013

Pursuant to RSA 541:3 and Rule Puc 203.33, Public Service Company of New Hampshire ("PSNH" or the "Company") respectfully moves the New Hampshire Public Utilities Commission ("Commission") to reconsider and rehear Order No. 25,445 ("the Order") issued in the above-captioned matter on December 24, 2012. In particular, pursuant to RSA 541:4, the Order's conclusions concerning the overall legal mandates included in the Mercury Emissions Program, RSA 125-O:11-:18 (enacted by the Legislature in 2006) and the Order's interpretation of RSA 125-O:17, are incorrect, unlawful or unreasonable.

In support of this Motion, PSNH states as follows:

Introduction

To avoid unnecessary duplication, PSNH incorporates herein by reference the contents of its August 28, 2012, "Memorandum in Response to Commission Order 25,398" filed in this docket.

RSA 125-O:11-18 (Supp. 2012)[1] (the "Mercury Emissions Program" or "Scrubber law") required PSNH to construct a wet flue gas desulphurization system ("Scrubber Technology" or the "Scrubber") at its Merrimack Station on or before July 1, 2013, and further required that the Scrubber reduce mercury emissions from the Station by 80 percent on an annual basis (at a minimum) after that date.[2] Despite that clear and unequivocal statutory mandate, the Commission now construes RSA 125-O:17, II ("Subpart II"), which allows for limited variances from the mercury emissions reduction requirements of the statute, to permit a variance from *both* the "80% reduction level and from *any installation of mercury reducing technology*." Order at 25 (emphasis added). The Commission reasons that because Subpart II permitted PSNH to request an alternative to the 80 percent reduction requirement, it "could have sought a lesser level of reduction, *even down to no reduction* at Merrimack Station" by requesting "a retirement of the Station itself." *Id.* (emphasis added). This reading transforms the variance provision, which deals solely with "the mercury emissions reduction requirements" of the Scrubber law and has nothing to do with the obligation to construct the Scrubber, into a waiver and *de facto* repeal of the Mercury Emissions Program's unequivocal statutory obligations.

RSA 125-O:17, II permits a variance from the "mercury emissions reduction requirements" of the statute based on, among other factors, "economic infeasibility." Since the Commission finds that Subpart II permitted PSNH to seek a "variance" of its obligation to construct the Scrubber, it concludes that PSNH could have done so based on the potential economic infeasibility of construction; that is, because of a "significant escalation of cost." Order at 25. Building on that logic, it concludes that as part of its review of prudent costs of complying with the requirements of the Mercury Emissions Program, pursuant to RSA 125-

[1] All references to RSA 125-O:11-18 are to the 2012 supplement.

[2] The Scrubber was successfully installed and tested after being placed into commercial operation and has resulted in mercury reductions in excess of the mandated mercury emissions reduction requirement.

O:18, it may consider whether, at some point, PSNH should have determined that constructing the Scrubber was "infeasible" for financial reasons, and should therefore have sought a variance from the statutory mandate requiring that "[t]he owner shall install and have operational scrubber technology to control mercury emissions at Merrimack Units 1 and 2 no later than July 1, 2013." RSA 125-O:13, I. The Commission will therefore determine in this hearing whether: (1) if such a variance could have been sought, should one have been sought; (2) if so, whether the N.H. Department of Environmental Services ("DES") would have granted that request: and, (3) if granted, what, if any, costs incurred after that point were not prudently incurred.

The Order's reading of the variance provision of RSA Ch. 125-O:17 is plain error. It would grant DES the power to repeal the express statutory mandates in RSA 125-O:13, I and II, and to thereby unravel the carefully constructed statutory scheme enacted by the Legislature which required construction of the Scrubber as part of an integrated "multiple pollutant reduction" strategy. RSA 125-O:11, VIII. The Legislature granted no such power to the Commission or DES, explicitly or implicitly. The Order not only misconstrues the statute and ignores the real life, practical aspects of how the statute works, and of how a large-scale construction project such as the Scrubber must proceed – it is also inconsistent with the Commission's prior orders as well as the non-severability provision in RSA 125-O:10.[3]

First, the Order is based on three faulty assumptions: (1) that PSNH had discretion whether or not to construct the Scrubber; (2) that the Legislature based its public interest findings concerning the construction of the Scrubber on a fixed or presumed cost so that "significant

[3] 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. *Appeal of Stonyfield Farm, Inc.*, 159 N.H. 227, 228-29 (2009). ("[T]he legislation specifically requires PSNH to install 'the best known commercially available technology . . . at Merrimack Station,' which the New Hampshire Department of Environmental Services (DES) has determined is the scrubber technology."); *Appeal of Campaign For Ratepayers' Rights*, 162 N.H. 245, 247 (2011) ("This case involves the installation of a wet flue gas desulphurization system (also known as a 'scrubber') at Merrimack Station, an electricity generating facility in Bow owned by the appellee, Public Service Company of New Hampshire . . . . The installation of such a system was mandated by the legislature in 2006.")

increases" above such a cost might be considered "imprudent"; and (3) that the Legislature ceded the oversight authority it specifically reserved in RSA 125-O:13,IX, and intended to allow DES to determine whether the statutory mandate to construct the Scrubber must be obeyed. Each of these assumptions is false. Moreover, each assumption has been explicitly rejected by the Commission in its prior orders relating to the Scrubber.

Second, the Order ignores the plain language of RSA 125-O:17. That section permits PSNH to request variances *only* from the *mercury emissions reduction requirements* of the statute and *only* in two instances: (1) to vary the *schedule* for meeting those requirements; and (2) to vary the *percentage* of mercury reduced. The mercury emissions reduction requirement of the statute is found in RSA 125-O:13, II: "Total mercury emissions from the 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." Nothing in Section 17 speaks to or permits a variance – let alone a waiver– from the statutory mandate found in RSA 125-O:11 and RSA 125-O:13, I, to construct the Scrubber; technology which the Legislature and DES found to be the "best known commercially available technology." RSA 125-O:11, II. Therefore, PSNH could not have sought a "variance" of its duty to construct the Scrubber from DES, and the Commission has no authority to determine, as part of its prudence review, that the Scrubber should not have been constructed – for economic reasons, or any other reason. The Legislature itself determined the public interest and feasibility of the Scrubber when it passed the statute and required PSNH, as a matter of law, to have specific scrubber technology installed at a specific location by a specific date. Only the Legislature had the power to change that statutory determination and to repeal or amend the law requiring that the Scrubber be built, either because of a "significant escalation of cost," or for any other reason.

Third, the Order ignores the fact that a variance based on an "alternative reduction requirement" could *never* be requested during construction. Thus, Subpart II could *never* serve as a basis for stopping construction, for PSNH seeking a variance from those requirements during construction, or for allowing the Commission to conclude that the failure to seek a variance during construction rendered some of the costs of construction "imprudent." This is so because until the Scrubber was operational, the emissions measurement criteria in RSA Ch. 125-O could not be applied. RSA 125-O:11, III specifically notes that compliance with the 80 percent emissions reduction requirement would be determined only "after a period of operation has reliably established a consistent level of mercury removal." It was impossible to know whether the 80 percent mercury emissions reduction requirement of the statute had been met, or whether an alternative reduction requirement was needed, until after a period of operation of the Scrubber. Only then could the cost of meeting the 80 percent statutory reduction requirement, as opposed to staying with some hypothetical lesser level of reduction, be evaluated based on "economic infeasibility." Because the Commission finds that PSNH could have sought a variance during construction under Subpart II, the Order is plainly wrong, and contrary to the intent and the language of the statute.[4]

And, fourth, the Order misinterprets the authority of DES to grant PSNH "a variance from the mercury emissions reduction requirements" of the Scrubber law by concluding that such a variance grants DES the right to void the requirement to construct the Scrubber at all, thereby nullifying the public interest findings of the Legislature.

By ignoring the language of Section 17 and the overall statutory context, the Commission's construction of the statute unnecessarily puts Section 17 at odds with the rest of

[4] Of course, the entire point is moot. The Scrubber is operational and is exceeding the mercury emissions reduction requirements of the Scrubber law. There was thus no point at which PSNH could have, should have, or would have sought a variance from the emissions reduction requirement under Subpart II.

the statute and its mandate to construct the Scrubber, omits words from the Section, and adds words to the statute that do not appear in it. The Order also ignores the Commission's prior findings that PSNH had no discretion to exercise in constructing the Scrubber, the legislative finding that construction of the Scrubber was in the public interest, and the Legislature's specific reservation for itself of the authority to oversee the project, including the cost of construction. Likewise, the Order vests powers in the Commission that are beyond its statutory authority and jurisdiction and thus results in usurping powers granted to DES. Finally, the real world consequences of the Order demonstrate that the Commission's rejection of its own prior Orders and its reading of Section 17 sets bad public policy by essentially second-guessing the wisdom of the Legislature's actions and those of businesses striving to comply with laws.

All of these problems could have been avoided simply by reading the statute as a whole and in accordance with its plain language. By its terms, RSA 125-O:17, II is a variance, not a waiver, provision. It allows for a variance only from the mercury emissions reduction requirements of the statute and *not* from the duty to construct the Scrubber using the specified technology. The need for such a variance can only arise *after, not during*, construction. Only "after a period of operation has reliably established a consistent level of mercury removal" (RSA 125-O:11, III) could it be determined whether there was even a need for a variance from the mercury emissions reduction requirement of the law, and, if so, whether the extra cost required to meet the statutory reduction requirement was feasible in light of the actual performance of the Scrubber. Limiting variances under Subpart II to post-construction review of mercury reduction requirements is consistent with the language of the Subpart, the language of the entire statute, and with common sense. By contrast, the Commission's Order creates statutory and real world chaos. The Legislature retained the power to review the costs of the Scrubber during

construction and actually reviewed those costs, including the approximate $457 million price that was estimated in 2008.[5] There is no need, and no authority, for the Commission to review the issue of whether the Scrubber was simply "too expensive" because it exceeded some "presumed" price ($250 million) that appears nowhere in the law.

PSNH recognizes that the Order is actually captioned "Order Regarding TransCanada's Motions to Compel" and limited to a consideration of discovery requests and that the Commission has not concluded "whether the facts would have supported the grant of a variance." Order at 25. Thus, the Order is not dispositive of whether PSNH actually *could* or *should* have sought a variance at any point during construction, based on specific facts. Nevertheless, for the reasons set forth in this motion, PSNH submits that the Order should be reconsidered and that the Commission's review pursuant to RSA 125-O:18 should be limited to an assessment of whether the specific costs incurred by PSNH in fulfilling the Legislative mandate to construct the Scrubber were prudent.

I. The Commission's Order Is Inconsistent With Its Own Previous Orders and With the Provisions of RSA 125-O:11-18.[6]

Before turning to the specifics of RSA 125-O:17, and why the Commission's Order misinterprets that statute, it is worth noting the Commission has already rejected all of the assumptions on which its Order is based.

At the heart of the Order is a conclusion that PSNH had the ability to seek a variance from the obligation to build the Scrubber if or when it became too expensive, or "economically infeasible." Order at 25. ("[W]e disagree that PSNH had no opportunity or obligation to consider a variance in the face of a significant escalation in cost.") This finding was based on

[5] The actual project cost is $421 million – $36 million less than the $457 million estimate known by the Legislature.

[6] PSNH does not intend to restate its prior arguments in this memorandum. At the same time, because the Commission's Order is based on fundamentally flawed assumptions or premises that it has previously rejected, it is worth revisiting those prior orders.

three subsidiary findings or assumptions: first, that PSNH had some discretion whether or not to construct the Scrubber; second, that the statutory public interest findings were conditioned upon some "presumed cost" of construction; and third, that the Legislature delegated the authority to review the cost of building the Scrubber; that is, the "economic feasibility" of the Project itself, to DES or the Commission under RSA 125-O:17. Each of these assumptions is wrong, and the Commission has already rejected each of them.

First, the Commission previously ruled that the Legislative mandate to construct the Scrubber was "unequivocal" and that PSNH had no discretion regarding the decision to build it.

> 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.
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> 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.

Order No. 24,979 at 14-15. (Emphasis added.) Likewise, the New Hampshire Supreme Court has twice described RSA 125-O:11-18 as mandating the installation of the Scrubber. August 28th Memo at 15, fn. 9.[7] Thus, absent some intervention by the Legislature, PSNH had no discretion whether to build the Scrubber, and the Commission's finding to the contrary in the Order is inconsistent with the statute, the Supreme Court opinions, and its own prior orders.[8]

Second, the Commission has specifically rejected the assumption in the Order (at 25) that the Legislature's mandate was based on some "presumed" or fixed cost.

> 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.") As a result, the Commission's current conclusion that PSNH had the right to seek a variance based on "a significant escalation in cost" when "the Scrubber cost projections rose to nearly double the cost presumed by the Legislature when enacting the statute" (Order at 25), is directly contrary to its prior orders.

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[7] *See* footnote 3, *supra.* The Site Evaluation Committee has also recognized the statutory mandate requiring installation of the Scrubber. "Order Denying Motion for Declaratory Ruling," Docket No. 2009-01 (August 10, 2009) ("The statute also requires the installation of a wet flue gas desulfurization system (Scrubber Project) otherwise known as a 'Scrubber' at the Merrimack Station facility no later than the year 2013. *See*, RSA 125-O: 11. The Legislature found that the installation of scrubber technology was in the public interest of the citizens of New Hampshire and customers of the affected sources. In accordance with RSA 125-O, PSNH has begun construction of portions of the scrubber technology at the Merrimack Station facility.")

[8] In its December 8, 2009, Order No. 25,050 on rehearing of Order No. 24,979, the Commission stated: "Given the legislative finding that the scrubber project is in the public interest at RSA 125-O:11, we do not have the authority to transform the review of this financing request into a pre-approval proceeding relative to the scrubber project."

Third, as the language of Order No. 24,898 set out immediately above demonstrates, the Commission has specifically rejected the claim that the Legislature intended it, or any other agency, to review the overall cost of the Scrubber during construction. As the Commission has previously recognized, but completely ignores in the Order, "[t]he Legislature has….retained oversight of the scrubber installation including periodic reports on its cost. *See* RSA 125-O:13, IX." Order No. 24,979 at 15.[9] In the words of the Commission, oversight by the Legislature prevented it from reviewing the costs of the Scrubber during construction.

> 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.

Order No. 24,898 at 7-8.

> 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).

Contrary to these prior rulings, the Commission in Order No. 25,445 does an abrupt about-face and assumes the existence of authority to "second guess the Legislature's public interest finding[s]" through its reading of RSA 125-O:17, II. Implicit in its finding that PSNH

[9] The Commission does not even cite this subpart in its Order. *See also* footnote 17 *infra.*

could have sought not to build the Scrubber based on increases above a presumed cost is that RSA 125-O:17, II gave DES the authority to determine that construction of the Scrubber was "economically infeasible" above a certain cost, and thus the ability to either prevent its construction, or to prevent the recovery of the cost of construction above such cost pursuant to RSA 125-O:18.

The fundamental problem with the Order, as evidenced by the Commission's prior orders, is that the "economic feasibility" standard in RSA 125-O:17, II has nothing to do with undertaking the construction of the Scrubber. Instead, it relates *only* to a comparison of achieved mercury reduction with the statutorily mandated mercury emissions reduction requirement of 80 percent. The Legislature itself concluded that construction of the Scrubber was feasible and in the public interest, and should proceed on an expedited basis, when it enacted RSA 125-O:11-18 and required a particular technology to be built. The Legislature also determined that construction could be accomplished "with reasonable costs to consumers," RSA 125-O;11, V, and kept for itself the power to determine whether the costs became unreasonable. RSA 125-O:13, IX. By reserving to itself the review of whether the mandate continued to be economic, the Legislature divested any agency from making that decision. As this Commission has concluded in its prior Scrubber orders, and as the Supreme Court has found, the Commission is an agency of limited jurisdiction with "only those powers delegated to it by the Legislature." *See* Order 24,898 at 13 (citing *Appeal of Public Service Company of N.H.*, 122 N.H. 1062, 1066 (1982)); *see also In Re RCC Minnesota, Inc.*, 88 NH PUC 611, 615 (2003) (acknowledging that the Commission "must look to its statutory authority to determine whether it has jurisdiction.").[10]

[10] The "nature and extent of the Commission's authority" has repeatedly been defined by the New Hampshire Supreme Court. *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); *State v. New England Telephone &*

Because the Legislature determined the technological and economic feasibility of the Scrubber and granted no power to the Commission to directly or indirectly revoke the statutory mandate, the Commission's assumption of a power to review the Project's underlying feasibility through the variance provision is beyond its jurisdiction.

II. The Commission's Order is Contrary to the Plain Language of the Statute. RSA 125-O:17, II Does Not Allow a Variance or Waiver From PSNH's Obligation to Construct the Scrubber, and No Variance Could Be Requested During Construction Because No Alternative Reduction Requirement Could Be Determined Until the Scrubber Was Operational.

RSA 125-O:17 allows for variances in very limited circumstances. The Legislature vested DES with the right to consider requests for two exceptions to the statute's mercury emissions reduction requirement: to vary the *schedule* for meeting the mercury emissions reduction requirement by extending the date for compliance (Subpart I of Section 17), and to vary the *level* of reduction achieved by the Scrubber Technology where achieving that level is not possible because of energy crises, fuel disruptions, unavoidable disruptions in the operation of the plant or because achieving that level is economically infeasible. PSNH argued in its August 28th Memo, and the Commission's Order concedes, that RSA 125-O:17 is not a general variance provision permitting PSNH to request changes to the specific mandates of the statute. Order at 25. PSNH also argued, and the Commission likewise concedes, that a variance may be requested under Section 17 only if it "meets the criteria set forth within paragraphs I and II of the Section." *Id.* Neither of those subparts addresses the obligation to construct the Scrubber or its overall costs.

Telegraph Co., 103 N.H. 394, 398 (1961); *Appeal of Public Service Co.*, 122 N.H. 1062, 1072; *Appeal of Richards,* 134 N.H. 148, 158 (1991). As the Court has stated, "[t]he 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. Consequently, the authority of the PUC…is limited to that specifically delegated or fairly implied by the legislature and may not be derived from other generalized powers of supervision." *Appeal of Public Service Co.*, 122 N.H. at 1066 (citations omitted).

Despite conceding that Section 17 is limited to specific criteria, the Commission reads Section 17 to grant PSNH the power to request, and DES the power to determine, whether economic considerations would allow PSNH to avoid the statutory mandate by shutting down Merrimack Station. The Commission reaches this conclusion by finding that since the statute allows variances from the 80 percent mercury reduction requirement of the statute, PSNH could have requested an "alternative" reduction requirement of no emissions reduction at all by seeking to shut down Merrimack Station. This strained reading is contrary to the plain language of the statute and ignores the manner (in fact the *only* manner) in which an "alternative reduction requirement" can be determined under the statute.

By its plain language, Section 17 permitted[11] PSNH to request a variance (or change) *only* in the "mercury reduction requirements of this subdivision[12] by submitting a written request to [DES]." Nothing in the Section suggests that the statute permits a variance (or waiver) from any other requirement of the statute, including the mandate that the Scrubber be built in a certain way, by a certain date. Instead, Section 17 refers to variances from the "mercury emissions reduction requirements of this subdivision" namely, 80 percent. Put differently, Section 17 permits variance requests when a *known reduction level* achieved by the Scrubber is compared to the 80 percent requirement. By finding that some hypothetical reduction of mercury might prove to be "economically infeasible" without measuring the level of that reduction against the statutory standard, the Order reads the restrictions "from the mercury emissions reduction requirements of this subdivision" and "alternative reduction requirement" out of the statute; the suggestion that the Company could have sought permission from DES via a variance to allow

[11] Since the Scrubber is constructed and neither of the criteria set out in Section 17 came into play, all of this discussion relates only to hypothetical circumstances that did not occur.

[12] The "mercury reduction requirement" is found at RSA 125-O:13, II. *See* RSA 125-O:13, VII and VIII, both of which refer to "the mercury reduction requirement of paragraph II."

anything from no reduction in mercury emissions at all (that is, to continue emitting 100 percent of the baseline mercury emissions) or 100 percent reduction, as suggested by the Order (at 25), would have required DES to ignore the law's restrictions and institute a *de facto* repeal of the construction mandates found in the law.

Yet the Commission says that because the Legislature allowed DES to consider an "alternative reduction requirement," it must have meant to allow DES to consider a reduction requirement of zero – a total elimination of any requirement to reduce mercury emissions. Order at 25. The Commission's conclusion that PSNH could have requested a variance "from any installation of mercury reducing technology," by effectively requesting a reduction "down to no reduction…while pursuing a request to retire Merrimack Station" makes no sense when the overall structure of this statute is considered. Because the cost consideration in Subpart II, *i.e.* "economic infeasibility," relates only to the mercury emissions reduction requirement in that Subpart and not to the general mandate to "*install* mercury reducing technology" in RSA 125-O:13, I, the economic considerations in Subpart II must be read to apply only where there is a comparison between the 80 percent requirement and some alternative requirement. The most logical reading of Subpart II is that once the Scrubber becomes operational, and the level of reduction is known, PSNH could have requested a variance if it became economically infeasible to achieve the 80 percent level as opposed to some lesser level. The "economic infeasibility" standard therefore may only be used to determine whether, given the level or reduction actually achieved upon operation of the completed Scrubber, it is worth spending additional money that might be necessary to reach the mandated 80 percent standard. Given the specific mandates of the statute, it is inconceivable that the Legislature intended to allow another agency to review, and change or eliminate, its public interest determination that the Scrubber be built without

clearly defining and delineating such a delegation of authority. If it had intended such a result, it would have said so specifically and would have included specific authority for the grant of a waiver.[13]

The Commission's ultimate conclusion is that during construction of the Scrubber, PSNH could have sought a variance under Subpart II of Section 17 from the statutory mandate to construct the Scrubber. Order at 24-25. The Commission is simply wrong; that Subpart is not applicable at all. In this case, the condition precedent to a variance request under Subpart II *never* occurred, and *could never have* occured until the Scrubber was operational. Thus, PSNH could *never* have sought a variance under RSA 125-O:17, II during the construction of the Scrubber, and due to the exceptional performance of the Scrubber, there was no need to do so after the Scrubber was complete. A careful reading of the statute demonstrates why Subpart II of Section 17 cannot be read to allow a variance during construction and why the Commission's failure to recognize this fact undermines its entire determination and creates a number of legal and practical problems.

[13] *See, e.g.*, RSA 541-A:22, IV ("No agency shall grant waivers of, or variances from, any provisions of its rules without either amending the rules, or providing by rule for a waiver or variance procedure. The duration of the waiver or variance may be temporary if the rule so provides."); RSA 347-A:10 ("No supplier shall require any dealer to waive compliance with any provision of this chapter. Any contract or agreement purporting to do so is void and unenforceable to the extent of the waiver or variance."); RSA 382-A:9-602 ("Except as otherwise provided in Section 9-624, to the extent that they give rights to a debtor or obligor and impose duties on a secured party, the debtor or obligor may not waive or vary the rules stated in the following listed sections… ."); RSA 12-K:3 (providing wireless carrier may be allowed to construct ground mounted PWSFs, but "subject to any exceptions, waivers, or variances allowed or granted by the municipality"); RSA 483-B:6, III ("The commissioner shall have the sole authority to issue variances and waivers of the provisions of this chapter as specifically authorized by this chapter."). Notably, the last cited statute, RSA 483-B:6, III, is an express statutory grant of authority to the Commissioner of DES to grant variances and waivers. No such grant of authority to issue waivers was given to the Commissioner in RSA Ch. 125-O. In short, the Legislature, as evidenced by these statutory provisions, recognizes the distinction between a variance and a waiver. When the Legislature intends to allow a waiver, it knows how to say so, and says so specifically. And if the Legislature had intended to include waivers by references to variances, there would have been no reason to include the word "waiver" in these other statutes. *See Amherst v. Gilroy*, 157 N.H. 275, 279 (2008) ("The legislature is not presumed to waste words or enact redundant provisions and whenever possible, every word of a statute should be given effect.") (citations omitted).

The first step in concluding that Section 17 does not permit DES to consider *any* variance from mercury emissions reduction levels during construction is the recognition that by its express terms, and as evidenced by the first sentence of the statute, RSA 125-O:17 relates *only* to variances "from the mercury emissions reduction requirements" of the statute. As the Order notes, Subpart I permits a request to vary the *date* of mercury compliance set out in RSA 125-O:13, I and II , *i.e.* July 1, 2013, whereas Subpart II permits a request to vary the *amount* of reduction set out in RSA 125-O:13, II.[14] Order at 24. In both cases, the request for a variance is to be made to the DES, which supports the conclusion that the variances relate to mercury emissions reduction, an area in which DES has primary expertise.

What the statute provides is a mechanism by which, when an "alternative" level of reduction is requested, DES would consider the environmental value of either obtaining 80 percent as opposed to some other level achieved by the Scrubber once operational, and would consult with the Commission on, among other things, the economic impact of trying to obtain 80 percent. This limited grant of jurisdiction to DES to review mercury emissions reduction levels is completely inconsistent with the Commission's reading of Subpart II to permit a waiver from "any installation of mercury reducing technology" based on increased costs, or on any of the other factors spelled out in Subpart II. By construing the statute to allow a variance from the obligation to install any mercury reduction technology at all, the Commission has divorced the factors in Subpart II (and specifically "economic infeasibility") from the sole instance in which those factors were to be applied, namely, "[w]here an "alternative reduction requirement is

[14]Under RSA 125-O:17, 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." This requirement for PSNH to continue Scrubber construction and to include a date certain for final compliance while seeking a variance from the statutory in-service date further demonstrates that the variance requirements in RSA 125-O:17, were not intended to relieve PSNH from the obligation to build the Scrubber. If Section 17 was intended to have that meaning, Subpart I would have permitted a "variance" to never complete the Scrubber. Instead, that Subpart specifically mandates that even if a delay in construction is requested and granted, the Scrubber must be completed.

sought." Instead, the Commission has determined that those criteria may be used to totally eliminate the general mandates of the statute. As shown above, when the Legislature wishes to give DES the authority to grant a waiver of a statutory requirement, it says so explicitly. *See* footnote 13, *supra.*

Putting aside the fact that the Legislature retained jurisdiction over the cost of construction, if the Legislature had intended that an agency review the economic feasibility of construction, unrelated to the level of mercury reduction, why would it have chosen DES to conduct that review? The fact that DES reviews the variance is compelling evidence that the variance was to focus on environmental implications of varying the mercury emissions reduction requirement.[15] The Commission seems to concede this point, but then errs by ignoring *how* an "alternative reduction requirement" would be measured.

The second step in the analysis is to consider how the mercury emissions reduction requirements are described and are to be measured in the statute. RSA 125-O:11, the statute's "Statement of Purpose," provides that "*[a]fter* scrubber technology is installed…and *after* a period of operation has reliably established a consistent level of mercury removal at or greater than 80 percent," DES will continue to monitor to ensure that this level is maintained. (Emphasis added.) RSA 125-O:13, the "Compliance" section of the statute, provides that that "total mercury emissions…shall be at least 80 percent less *on an annual basis* than the baseline mercury input…..beginning on July 1, 2013." RSA 125-O:13, II. (Emphasis added.) Likewise, RSA 125-O:13, V provides mercury reductions "achieved through the *operation of the scrubber*

[15] In light of the fact that DES is charged with the administration of RSA Ch. 125-O, and specifically RSA 125-O:17, consider *Appeal of Ashland Elec. Dept. (New Hampshire Pub. Utilities Comm'n),* 141 N.H. 336, 340 (1996) ("Where statutory language is ambiguous…we examine the statute's overall objective, and give substantial deference to the interpretation of those charged with its administration.") In this case, that deference would be given to DES, not the public utilities commission. *See* RSA 125-O:2, IV, "'Department' means the department of environmental services."

technology greater than 80 percent shall be sustained insofar as the proven operational capability of the system, *as installed*, allows," and that DES shall determine the maximum sustainable rate of mercury emissions reduction." (Emphasis added.) Subparts VII and VIII of RSA 125-O:13 deal with situations in which "the mercury reduction requirement of [RSA 125-O:13] paragraph II" is not achieved. Read together, these sections establish that the mercury reduction requirements referred to in the statute generally, and in RSA 125-O:17 in particular, can *only* be determined on an annual basis, and *only after* the Scrubber is installed. This makes sense: as the statute states, the mercury reduction is to be achieved by the *operation* of the Scrubber. Accordingly, until the Scrubber is operational, no one would know how much the mercury emissions will be reduced and thus whether Subpart II applies at all.

Subpart II of Section 17 provides that a variance may be sought "where an alternative reduction requirement is sought." Since the level of the reduction itself would not be known until the Scrubber is operational, it follows that no request for an "alternative" to the 80 percent reduction requirement could be sought before the Scrubber is operational. Without knowing what the other level of reduction is, or whether the 80 percent requirement can be achieved, the statute would not permit a variance. Thus, until the Scrubber is operational, there is no ability to seek a relief under Subpart II at all. Put simply, Subpart II cannot serve as a basis for a "variance" during construction for *any reason whatsoever*. Accordingly, the Commission's conclusion that an "alternative" reduction requirement could be sought before the Scrubber was operational and without comparison to the level actually achieved is contrary to the plain language of Subpart II of Section 17. Because PSNH could not have sought a variance during construction, neither DES nor the Commission can now use its failure to do so to assess whether the cost of constructing the Scrubber was "feasible" or "prudent."

III. The Commission's Order Creates a Conflict with the Legislative Mandate to Build the Scrubber in RSA Ch. 125-O, Violates Principles of Statutory Construction, and Creates Illogical Results and Bad Public Policy.

The Commission's interpretation of RSA 125-O:17, II to allow PSNH to request, and thus DES to grant, an override or repeal of the mandate in RSA 125-O:13, II, by requesting that the Scrubber not be built does violence to the statute and is contrary to principles of statutory construction. This interpretation renders words in the statute meaningless, reads words into the statute that do not exist, causes two sections of the statute to conflict with one another, and would create uncertainty and confusion if actually implemented. None of these consequences is either appropriate or necessary.

First, as noted, a finding that RSA 125-O:17 permitted PSNH to request a variance from any obligation to construct the Scrubber based on economic infeasibility reads the words "alternative reduction requirement" out of Subpart II and the words "mercury emissions reduction requirements" out of the first sentence of the Section. Statutes must be read to give meaning to all of the words in the statute. *Amherst v. Gilroy*, 157 N.H. 275, 279 (2008) ("The legislature is not presumed to waste words or enact redundant provisions and whenever possible, every word of a statute should be given effect.") (citing *Marcotte v. Timberlane/Hampstead School Dist.*, 143 N.H. 331, 339 (1999)). If the Legislature had intended this result, it would have been easy to say so, by deleting the words "mercury emissions reduction requirements" from the first sentence of Section 17 and the words "alternative reduction requirement" from Subpart II. Only by ignoring those words (and thereby interpreting RSA 125-O:17 to permit a general variance from the statute, which the Order, at 24, agrees is not the case) can the statute be construed to allow "economic infeasibility" and the cost of constructing the Scrubber itself to

be relevant to whether the Scrubber is constructed, as opposed to the cost of achieving the 80 percent requirement as an alternative to another, lesser level of reduction.

Second, by construing the words "alternative reduction requirement" to allow DES to approve anywhere from no mercury reduction at all to 100 percent reduction, the Commission has effectively converted the "variance" provision into a complete waiver of both the statutory mercury reduction requirement and the statutory mandate that the scrubber must be installed and operational by July 1, 2013. Once again, if the Legislature had intended this result, it would have been easy to say so, by adding the words "or waiver" to Section 17 so that the first sentence provided that "the owner may request a variance *or waiver* from the mercury reduction requirements of this subdivision." The Legislature has done this very thing many times.[16] The Commission's reading is contrary to its own conclusion that nothing in Section 17 may be read to allow a general variance (Order at 24) and thus creates an internal inconsistency in the Order. By interpreting Section 17 to be a waiver provision, which totally abrogates the legislative authority, the Commission has improperly added words to the statute and changed the legislative intent. *Lorette v. Peter-Sam Inv. Properties*, 142 N.H. 208, 212 (1997) (In interpreting a statute, courts "can neither ignore the plain language of the legislation nor add words which the lawmakers did not see fit to include.") (quoting *Appeal of Public Serv. Co. of N.H.*, 141 N.H. 13, 17 (1996)).

Third, by reading the statute to allow PSNH to seek a "variance" not to install *any* mercury reduction equipment, and therefore not to build the Scrubber, based on cost, the Commission reads RSA 125-O:17 to be in direct conflict with RSA 125-O:11, I, III, V, VI, and VIII and RSA 125-O:13, I and II and IX. The Legislature mandated that the Scrubber be built in

[16] *See* footnote 13, *supra*.

a particular way, at a particular location, and by a particular date, and retained solely for itself the review of the cost of building the Scrubber during construction. As the Supreme Court has consistently held, whenever possible, the provisions of statutes should be read not to conflict with one another. *In re Meunier*, 147 N.H. 546, 549 (2002). ("One section of a statute should not be interpreted so as to contradict what has been clearly expressed elsewhere in the statute.") (citing *Cohen v. Town of Henniker*, 134 N.H. 425, 428-29 (1991)). The Order concludes that Section 17 permits DES to override that mandate whenever the cost of construction, or of meeting *any* mercury reduction, supposedly becomes too expensive. This reading is unnecessary and creates an illogical, if not absurd, result. Order at 25.

As shown above, Section 17 can easily be read in a way that does not create a conflict with the statutory mandate in RSA 125-O:13, I or II. By reading the Section to allow for limited variances only where the schedule for meeting the reduction requirement cannot be met, or where a reduced level of reduction is sought after construction, the mandate to construct remains intact. By contrast, the Commission's interpretation reads Section 17 to allow DES to repeal the mandate. In addition, by finding that Section 17 allows a "variance" not to build the Scrubber based on the cost of doing so, the Commission's interpretation is in direct conflict with the Legislature's retention of the authority to review those costs. RSA 125-O:13, IX.[17] Yet as PSNH demonstrated in its August 28th Memo (and as this Commission has found), the Legislature not only retained that review, but knowing the new $457 million cost estimate for the Scrubber, decided not to alter the Scrubber law's mandates or to set limits on the cost of construction when presented with two bills that would have accomplished exactly that result. August 28th Memo at 22-23. In short, the Commission's interpretation grants DES the implied

[17] The N.H. Supreme Court has noted the Legislature's retention of cost oversight as well: "PSNH must report to the legislature annually regarding its installation of the scrubber technology, including 'any updated cost information.' RSA 125-O:13, IX." *In re Stonyfield Farm, Inc.,* 159 N.H. 227, 229 (2009).

right to repeal the mandate and allows DES to usurp legislative functions, despite express Legislative action to the contrary. Given the specificity of the mandates in the statute, and rules of statutory construction, the Commission erred in doing so.

The Commission justifies its strained interpretation of RSA 125-O:17 to permit a "variance" from "any installation of mercury reduction technology" due to increased costs (and presumably its current reversal from its prior orders) by contending that "PSNH's interpretation that the law would have allowed PSNH, or another utility owner, to install scrubber technology costing many billions." Order at 25. Because it finds this result to be "illogical or absurd" and "contrary to common sense," the Commission finds that Section 17 must of necessity be construed to allow for a variance based on cost. *Id.* at 25. The Commission also finds that such a variance must be allowed because any other interpretation "would lessen from PSNH, or any other utility owner, the obligation to engage at all times in good utility management." *Id.* at 26. This is simply a straw man; nothing in the language of the statute permits such a conclusion, and PSNH never interpreted the statute to reach such a result. In fact, it is the Commission's interpretation, not PSNH's, that creates an illogical and unworkable result.

The Commission's decision that a variance must be allowed because any other interpretation would "lessen the obligation of PSNH…to engage in good utility management" flies in the face of its own, earlier determination. Recall the Commission's own finding in Order No. 24,979, that "[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." 94 NH PUC 311, 318-19 (2009) (emphasis added). For the Commission now to do an about-face after the Scrubber has

been built and say PSNH did indeed have the ability to exercise discretion regarding construction of the Scrubber is patently unfair, and creates a serious due process issue.

The Commission reads an implied ability to seek a general variance during construction into RSA Ch. 125-O based on arguments PSNH did not make and could not make. PSNH never contended that the cost of complying with the Scrubber mandate was unreviewable, or that it had free rein to build it without reference to "good utility management." Rather, PSNH has always contended that in *this particular statute*, in which the Legislature has mandated the construction of a particular technology by a particular date and has retained jurisdiction to review costs, it is the Legislature, and only the Legislature, that has the ability to review those costs during construction, and the authority to change the underlying statutory mandates. The statute is clear on that point: the authority to review the overall cost of meeting the mandate is left to the Legislature. RSA 125-O:13, IX. The Commission has so held: "The Legislature has retained oversight of the scrubber installation *including periodic reports on its cost.*" 94 NH PUC 311, 318-19 (2009) (emphasis added). Since there is a provision in the statute allowing for a review of overall costs of building the Scrubber, there is no reason to read one into Section 17 to avoid an "illogical or absurd result." Likewise, there is nothing in the statute that provides PSNH with the ability to avoid "good management." By virtue of RSA 125-O:18, the Commission always retains the right to review whether the costs incurred by PSNH to comply with the statutory construction mandate were "prudent." What the Commission may not do, however, is second-guess the Legislature and usurp the Legislature's oversight of the scrubber installation by voiding the statutory mandate to construct the Scrubber because it questions the project's cost.

The "economic infeasibility" considerations in RSA 125-O:17, II have nothing to do with whether the Scrubber should have been constructed. And contrary to the Commission's

concerns, this is not an instance in which a utility had free rein to spend "billions of dollars" or did not engage in "good utility management." Order at 25-26. This is not a hypothetical case; PSNH built the Scrubber at a cost disclosed to the Legislature; the Legislature monitored those costs as they were being incurred; the Legislature was well aware of the estimated $457 million cost of the Scrubber when it decided not to repeal, amend, or alter the statutory mandate to construct; and the Commission's own expert engineering consultant found that PSNH engaged in appropriate management of the project.

The actual facts relating to the project are as follows: PSNH was required to report annually "on the progress and status of complying with the requirements of [RSA 125-O:13] 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" by June 30th to the Legislature and *it did so* from 2008 to 2012, and will continue to do so as required by RSA 125-O:13, IX. As this Commission is aware, after PSNH reported the projected $457 million cost in a Form 10-Q filing with the SEC, the Commission directed PSNH to prepare "a comprehensive status report on its installation plans, an analysis of the anticipated effect of the project on energy service rates, and an analysis of the effect on energy service rates if Merrimack Station were not in the mix of fossil and hydro facilities operated in New Hampshire." Order No. 24,898 at 1. PSNH made that report and disclosed the cost of construction, and the Commission found that it had no authority to review those costs prior to construction given the public interest findings of the Legislature.

Not only did the Legislature reserve to itself oversight of the Scrubber project, it actually exercised that authority. The Legislature was well aware of the $457 million cost projection in the Fall of 2008. In January 2009 two bills (Senate Bill 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 House Bill 496, "AN ACT establishing a limit on the amount of cost recovery for the emissions reduction equipment installed at the Merrimack Station") were introduced. These bills were designed to delegate jurisdiction to the Commission to consider the Legislature's public interest findings and to cap prudent costs at $250 million. August 18th Memo at 22-23. Indeed, the purpose of SB 152 was expressly set forth in Section 1:

> The purpose of this legislation is to require the New Hampshire public utilities commission to investigate, in light of substantial cost increases now projected by Public Service Company of New Hampshire (PSNH), whether installation of the wet flue gas desulphurization system ("scrubber") at the Merrimack Station electric generating facility in Bow, as mandated by RSA 125-O:11 *et seq.*, is in the public interest of retail customers of PSNH.

The Legislature, with full knowledge of the $457 million project cost estimate, killed both bills, and in so doing, reiterated (through the Report of the House Science, Technology, and Energy Committee) that RSA 125-O:11-18 did not place "a specific limit on the cost." *Id.* at 23. The Legislature never once indicated that the increased cost did not justify an 80 percent reduction in mercury emissions, nor did the Legislature relieve PSNH from the legal mandate to construct the Scrubber. PSNH again reported the cost estimates to the Legislature in June 2009, and June 2010, with the same result. PSNH then completed the Scrubber at a cost of $421 million – nearly ten percent less than the estimate before the Legislature.

The flaws in the Commission's conclusion that Section 17 was intended to permit PSNH to request, and DES to review and possibly grant, a variance eliminating the mandate to construct the Scrubber at all, are clear. In order to reach the Commission's conclusion, one has to assume that the Legislature enacted a mandate as part of an overall multi-pollutant strategy, RSA 125-O:11, VIII; made public interest findings concerning the value of the Scrubber, RSA

125-O:11, I and II; required that the Scrubber be constructed with specific technology by a date certain, RSA 125-O:13; found that its installation would be accomplished with "reasonable costs to consumers," RSA 125-O:11,V; retained review of those costs for itself, RSA 125-O:13, IX; and incentivized PSNH to expedite construction, RSA 125-O:16, but then allowed DES to undo the entire statutory mandate, based on its determination of "economic infeasibility." One also has to assume (as the Commission did) that even though RSA Ch. 125-O:11-18 makes no mention of any specific "presumed cost" of construction, the Legislature must have based its public interest finding in the statute on a "presumed cost" (the Order pegs this at $250 million), and must have intended that DES have the authority to decide whether accomplishing the mercury reduction standards in the statute was worth the cost - - notwithstanding the Legislature's own decision not to alter its mandate knowing the new cost. Likewise, one would have to conclude that the Legislature vested DES, an environmental regulator, with primary jurisdiction to decide what constitutes, in the Commission's words, a "significant escalation in cost" of a utility project. This simply makes no sense.[18]

Moreover, the real-world practical consequences of requiring PSNH to constantly assess or reassess during construction whether changed circumstances required the filing of a variance request with DES further demonstrate the problems created by the Order. Before a shovel is in

[18] The Order addresses the ability of the Commission to indirectly review the prudence of constructing the Scrubber due to cost through the variance procedure in RSA 125-O:17, II. Yet even a more direct review of the decision by PSNH to complete the Scrubber as part of the prudence review in RSA 125-O:18 would achieve an illogical and untenable result under the statute. As shown above, the public interest findings in the statute were not based on any presumed cost and the Legislature had the power to review, and did review, the cost of completion during construction but refused to cap those costs at any particular level. This Commission's prior orders concluded that reviewing the costs in advance of completion would be contrary to the Legislature's public interest findings, because the Legislature had pre-empted any analysis of whether this project was consistent with the public good. As discussed herein, the Legislature was aware of a potential project cost of up to $457 million; the Legislature considered two bills that would have changed the underlying Scrubber law; and the Legislature decided not to change that law. The result of the Legislature's actions is that the construction of the Scrubber at a price of up to $457 million was acknowledged and accepted by the Legislature, as it left the law's mandates intact. The Commission's Order would undo this Legislative oversight and create a situation where, despite that Legislative review, PSNH faces litigation over whether it should have complied with the law's unequivocal mandates. Again, this is precisely the illogical and absurd reading the Commission says should be avoided.

the ground, financial commitments have to be made, contracts must be negotiated and executed, engineering designs must be completed, costly materials must be ordered to specification, and specialized work forces must be scheduled and prepared to mobilize. A project of this caliber and magnitude cannot be put on pause, with key personnel reassigned to other projects and forces demobilized, while the economics are reassessed and a variance is considered.[19]

For the Scrubber project, materials, fabrication and construction contracts were signed in October and November 2008, and the permit to begin construction was issued in March 2009. Construction efforts began within a few days of receiving that permit. During this period, the Commission engaged a consultant, Jacobs Consultancy, to review PSNH's construction practices in order to determine (during construction), whether those practices were prudent. Jacobs issued its report in September 2012, and found no problems with construction practices or techniques.[20]

[19] Recall the testimony of Robert R. Scott, then Director of the Air Resources Division of DES, during the Senate hearings on the Scrubber law, referenced in PSNH's August 28, 2012, "Memorandum in Response to Commission Order 25,398" at p. 22: "[W]hat we're concerned about is we don't want to have this as a method where we're constantly delaying the installation. By calling out scrubber technology in the bill, we're signaling PSNH from the word go to start to engineer, design and build scrubber technology right away."

[20] The real world consequences of seeking the variance which the Commission found was available to PSNH also demonstrate the absurd and illogical result of that decision. At the same time that PSNH had statutory obligations to build a Scrubber, at Merrimack Station, as soon as possible, with early completion incentives, and with completion required no later than July 1, 2013, it would be before DES seeking a variance that may, or may not, be granted by DES. Upon filing for such a variance, PSNH would immediately be faced with the Hobson's choice of determining whether to continue project construction in order to comply with the statutory mandates, or to stop construction, cancel any orders for materials or equipment that could be cancelled (or at least place them on hold), demobilize and lay off the project engineering team and construction workers, and pay all contractually required costs of taking these actions. The DES waiver process, including likely appeals to the Air Resources Council and potentially to the Supreme Court, would delay the project for months, if not years. If PSNH ultimately did not receive the requested variance from DES and had to remobilize the project, then the cost of the project going forward would be even higher and completion would be delayed for an extensive period of time. If PSNH did receive the requested variance, then it would find itself facing the arguments that due to the termination of the project prior to completion, under the "anti-CWIP" law, RSA 378:30-a, it could not recover the amounts the Company had expended in good faith to comply with the Scrubber law's mandates. That would lead to a Constitutional "takings" challenge and even more litigation that would otherwise be unnecessary. These "illogical or absurd" consequences would be avoided if the variance provision of the Scrubber law was construed to give it its intended meaning – as providing an opportunity for variations from the 80 percent emissions reduction requirement of the law as necessary upon completion of the Scrubber – and not deemed to provide an avenue for a complete waiver of, and resulting *de facto* administrative "repeal" of, the Scrubber law's unequivocal mandates and public interest determinations.

One further consequence of the Commission's reading of the variance provision in RSA 125-O:17, II provides additional evidence of the flaws in the Order. The Order not only allows the Commission to make an after-the-fact determination of whether a variance could, and therefore should, have been sought as part of its prudence review, it also requires the Commission to predict how DES would interpret the scope of the variance statute and what DES would have done had a variance been requested. Put differently, if the Commission decided that a variance should have been sought, it could not then find that subsequent costs were not prudently incurred, unless it also determined (as the Order suggests it has the power to do) that "the facts would have supported the grant of a variance." Order at 25. But in doing so, the Commission would usurp powers granted by RSA 125-O:17, II to DES.

These illogical and conflicting results are unnecessary. The plain language of Section 17 and of Subpart II does not require, or even permit, such a reading. When read with reference to mercury emission reduction requirements, the statute allows for a narrow exception to specific, objectively quantified requirements that must be measured after construction. This interpretation neither interferes with the Legislative mandate to build the Scrubber or the Legislature's retention of cost review nor does it violate the integrity of the statute when taken as a whole as required by the rules of statutory construction and the non-severability provision. And finally, although this is a pure hypothetical now that the Scrubber is operational and was completed within the costs known to and accepted by the Legislature, nothing in this reading would have interfered with the Legislature's right to have changed its mandate if it deemed such a change in law appropriate.

Conclusion

For all these reasons, and those set out in PSNH's August 28th Memo, the Commission should reconsider its Order and should limit the scope of this proceeding to a determination of whether specific costs incurred by PSNH to meet the Legislature's mandate were prudently incurred.

Respectfully submitted,

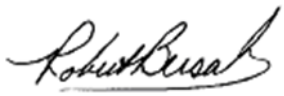
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Dated: January 23, 2012 By: 

Robert A. Bersak
Assistant Secretary and Associate General Counsel
Public Service Company of New Hampshire
780 N. Commercial Street
Post Office Box 330
Manchester, New Hampshire 03105-0330
603-634-3355
Robert.Bersak@PSNH.com

CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2013, 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) and Rule Puc 203.11 (c).



Robert A. Bersak
Assistant Secretary and Associate General Counsel
Public Service Company of New Hampshire
780 North Commercial Street
Post Office Box 330
Manchester, New Hampshire 03105-0330
(603) 634-3355
Robert.Bersak@psnh.com