STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

Public Service Company of New Hampshire

Investigation of Merrimack Station Scrubber Project and Cost Recovery

Docket No. DE 11-250

JOINT MOTION FOR REHEARING, CLARIFICATION AND/OR RECONSIDERATION OF ORDER NO. 25,506

NOW COMES the Office of the Consumer Advocate ("OCA"), TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast Inc. (together, "TransCanada"), the Conservation Law Foundation ("CLF") and the Sierra Club ("SC") (collectively, the "Moving Parties") and move the New Hampshire Public Utilities Commission, ("Commission") pursuant to RSA 541:3, to reconsider Order No. 25,506 (May 9, 2013). In support of this motion, the Moving Parties state:

I. PROCEDURAL HISTORY

The Moving Parties are all parties to this docket. For the complete procedural history please see DE 11-250, Order No. 25,445 (December 24, 2012).

On December 24, 2012 the Commission ruled on outstanding motions to compel and set forth its interpretation of the statutory provisions of RSA 125-O. See Order No. 25,445 (Discovery Order) at 24-26.

On January 23, 2013, PSNH filed its Motion for Rehearing of Order No. 25,445, to which TransCanada and the OCA objected on January 28, 2013; CLF and SC jointly objected to

PSNH's motion on January 30, 2013. On January 29, 2013, the Commission issued a secretarial letter suspending the docket's procedural schedule.

On May 9, 2013, the Commission issued Order No. 25,506 granting PSNH's Motion for Rehearing in Part (Rehearing Order). This Motion requests Rehearing, Clarification and/or Reconsideration of that Rehearing Order.

II. ARGUMENT

A. Order No. 25,506 is Unlawful and Unreasonable

Pursuant to RSA 541:3, the Commission may grant rehearing or reconsideration when a party states good reason for such relief and demonstrates that a decision is unlawful or unreasonable. *See Rural Telephone Companies*, Order No. 25,291 (Nov. 21, 2011) at 9. Good reason may be shown by identifying specific matters that were "overlooked or mistakenly conceived" by the deciding tribunal, *see Dumais v. State*, 118 N.H. 309, 311 (1978), or by identifying new evidence that could not have been presented in the underlying proceeding, *see O'Loughlin v. N.H. Personnel Comm'n*, 117 N.H. 999, 1004 (1977) and *Hollis Telephone, Inc., Kearsarge Telephone Co., Merrimack County Telephone Co., and Wilton Telephone Co.,* Order No. 25,088 (Apr. 2, 2010) at 14. A successful motion for rehearing does not merely reassert prior arguments and request a different outcome. *See Connecticut Valley Electric Co.*, Order No. 24,189, 88 NH PUC 355, 356 (2003), *Comcast Phone of New Hampshire*, Order No. 24,958 (April 21, 2009) at 6-7 and *Public Service Company of New Hampshire*, Order No. 25,168 (November 12, 2010) at 10. RSA 541:4 requires that a rehearing motion "set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable."

PSNH failed to show good reason for rehearing and did not demonstrate that the Commission's Discovery Order was unlawful, unreasonable or the result of mistake. The Moving Parties submit that the Commission got it right the first time when it stated PSNH could have sought a variance to comply with RSA 125-O through means that included retirement. Order No. 25,445 at 25. The Discovery Order primarily addressed discovery disputes and is consistent with prior orders in this docket. The Commission lawfully determined which discovery requests were relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence relevant to PSNH's prudence in constructing the scrubber. See *Re Investigation into Whether Certain Calls are Local*, 86 NH PUC 167, 168 (2001). The Commission typically allows "wide-ranging discovery" and will deny discovery requests only when it "can perceive of no circumstance in which the requested data would be relevant." *Re Lower Bartlett Water Precinct*, 85 NH PUC 371, 372 (2000). A party in a legal proceeding in New Hampshire is entitled to "be fully informed and have access to all evidence favorable to his side of the issue. This is true whether the issue is one which has been raised by him or by his opponent, and whether the evidence is in the possession of his opponent or someone else." *Scontsas v. Citizens Insurance Co.*, 109 N.H. 386, 388 (1969). Because the Order on which PSNH sought rehearing was an order addressing discovery it is important to keep in mind the Commission's broad discretion in granting discovery.

The Rehearing Order also briefly addressed the Discovery Order's interpretation of the RSA 125-O:17 variance provision. The Commission summarized its previous findings saying, "[w]e concluded that PSNH could have sought a variance in order to comply with RSA 125-O through means other than scrubber technology, including retirement of Merrimack Station." Rehearing Order at 17. The Commission went on to state that the Discovery Order partially

conflicted with an order issued in an earlier case, DE-08-103, Order No 24,898. (September 18, 2008)(Public Interest Order), but provides no further explanation of why it is changing the Discovery Order. The Commission's determination that an apparent conflict with an earlier order required granting PSNH's motion for rehearing is, for the reasons noted herein, unreasonable and an error of law.

In the Discovery Order when the Commission elaborated on the variance provision, it did so to provide direction to the parties to focus the questions on "either a narrow or an expansive interpretation of the provision," (Discovery Order at 23). The Commission statement from the Order challenged by PSNH (Motion for Rehearing at 13) is phrased in terms of what "could have happened." It is prefaced by the disclaimer: "Without concluding whether the facts would have supported the grant of a variance..." , after which the Discovery Order adds:

> ...PSNH, citing economic feasibility, could have requested a variance from the 80% reduction requirement, and could have sought a lesser level of reduction, even down to no reduction at Merrimack Station, while pursuing a request to retire Merrimack Station pursuant to RSA 369-B:3-a...

Id at 25.

The Commission is hypothesizing. There is no formal conclusion that PSNH must have requested a variance to be considered prudent or that other courses of action were not prudent, or even that any facts that might be uncovered during discovery and then presented at hearing would support this hypothetical. Therefore there was no reason for the Commission to grant PSNH's rehearing request; this language in the Discovery Order was insufficient to support PSNH's claim.

In the Rehearing Order, the Commission gave a cursory description of its decision stating:

> To the extent that Order No. 25,445 interpreted the variance provision, RSA 125-O:17, to allow retirement of Merrimack Station rather than installation of the scrubber technology as a method of meeting the emissions reduction requirements, that portion of Order No. 25,445 alone is reversed."

Rehearing Order at 17.

As a matter of law a state agency must provide the reasons for its decision. RSA 541-A:35. In addition the Commission has a specific statutory provision governing its conduct, RSA 363:17-b, III, which requires a final order on all matters presented to it that includes "a decision on each issue including the reasoning behind the decision." The Commission failed to do so here. Instead, the Commission found an apparent contradiction between two orders of the Commission, but it did not explain the reasoning behind the conclusion that the interpretation espoused in Order No. 24,898 should take precedence.

As the New Hampshire Supreme Court has noted, an administrative agency may change its mind. *Appeal of Public Serv. Co. of N.H*, 141 N.H. 13, 22 (1996) ("That the commission may have historically interpreted the public good as requiring monopolies in the provision of retail electric service does not preclude it from adopting a new paradigm based on changing concepts of what the public good requires. '[A]n administrative agency is not disqualified from changing its mind....' *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 417 (1993) (quotation omitted).") To just cite to the order in the prior docket without explaining why that reasoning is more appropriate than the reasoning the Commission used in the Discovery Order in this docket is contrary to the law. Moreover, for the reasons cited herein the Moving Parties submit that the more sound and appropriate interpretation of RSA 125-O is the one the Commission provided in the Discovery Order.

A conflicting statement alone is not sufficient cause for rehearing. The Commission is not bound by earlier orders as the Commission may modify any order pursuant to RSA 365:28.

Even if the subject matter in DE 08-103 regarding the "public interest" was exactly the same as the "prudence review" in DE 11-250 – which it is not- the Commission has the authority under RSA 365:28 to modify the prior order. Accordingly, even if the respective orders in DE 08-103 and DE 11-250 concerned the same subject matter, any potential conflict between them is not grounds for rehearing. It is important to note, however, that the subject matter in these cases is different for each docket and the order is being issued for different purposes. The 2008 docket considered a legislative determination of "public interest," and the 2011 docket addresses discovery regarding questions of utility "prudence." An order in one is not necessarily precedent setting for the other.

In addition, when the Commission focused on the language in the Public Interest Order it failed to take into consideration a later order in that same docket, in which it said:

> We found previously that we retained our authority to determine prudence, including "determining at a later time the costs of complying with the requirements of RSA 125-0:11-18 and the manner of recovery for prudent costs." We note here that although RSA 125-0:17 provides PSNH the option to request from DES a variance from the statutory mercury emissions reductions requirements for reasons of "technological or economic infeasibility," it does not provide the Commission authority to determine at this juncture whether PSNH may proceed with installing scrubber technology. RSA 125-0:17 does, however, provide a basis for the Commission to consider, in the context of a later prudence review, arguments as to whether PSNH had been prudent in proceeding with installation of scrubber technology in light of increased cost estimates and additional costs from other reasonably foreseeable regulatory requirements…

DE 08-103, Order No. 24,914 (November 12, 2008) at 13.

Whether or not the Discovery Order conflicts with the September 2008 Public Interest Order, it is absolutely consistent with the November 12, 2008 Order, which broadly characterizes the anticipated prudence review as including "arguments as to whether PSNH had been prudent ***in proceeding with*** installation of scrubber technology…" [Emphasis added.] As such there is no basis for the reversal made in the Rehearing Order.

B. Statutory Interpretation Does Not Support Commission Rehearing Order

In the Rehearing Order, the Commission seems to find that PSNH could have used the variance provision to seek an alternative schedule or an alternative reduction requirement but that PSNH did not have the option of retiring Merrimack Station. The Rehearing Order when read in conjunction with the Public Interest Order appears to suggest that for retirement to be an option it had to be stated in the law. This leads to an absurd result contrary to common sense and principles of statutory construction. Nowhere in the law does it say PSNH was "mandated" to keep Merrimack Station open. Logically, if the Legislature had intended that retirement of the plant would not be considered as an option - that is, elimination of the mercury emissions from this source - it would have put that in the law, which it did not do. Canons of statutory construction require the Commission give weight to the words of the statute:

> Absent an ambiguity we will not look beyond the language of the statute to discern legislative intent. *State v. Formella*, 158 N.H. 114, 116 [960 A.2d 722] (2008). Our goal is to apply statutes in light of the legislature's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme. *State v. Lamy,* 158 N.H. 511, 515 [969 A.2d 451] (2009). Accordingly, we interpret a statute in the context of the overall statutory scheme and not in isolation. *Id.*

State v. Etienne, 163 N.H. 57 (N.H. 2011) citing *State v. McKeown,* 159 N.H. 434, 435-36, (2009) at 72.

The Commission must not extend its interpretation of the scrubber law to prohibiting retirement as a means of complying with the purpose of the law just because there is no specific provision in the statute that said they could do so.

The purpose of RSA 125-O is to reduce pollution. It imposes a duty on the owner of a coal-fired power plant in the state to provide significant reductions in mercury emissions. It also includes a variance provision for considering alternative means of compliance. Regardless of the alleged "mandate" there are no sanctions in the law if the owner of the power plant fails to

comply. See RSA 125-O:13. The law cannot be construed to eliminate the most obvious means of compliance, retirement of the plant, unless expressly stated. See *State v. Etienne*, 163 N.H. 57 (N.H. 2011) at 75. citing *3 N. Singer & J.D. Singer, Statutes and Statutory Construction* § 61.1, at 314 (7th ed. 2008). (Statutes which impose duties or burdens or establish rights or provide benefits not recognized by the common law have frequently been held subject to strict, or restrictive, interpretation.)

In the Discovery Order the Commission recognized the absurdity of PSNH's proposed interpretation of RSA 125-O as requiring it to install the scrubber technology "at any cost." See Discovery Order at 25. The Rehearing Order appears to back away from the common sense approach to understanding the scrubber law and understanding it in the larger context. To interpret RSA 125-0:17 as foreclosing review of retirement as one possible course of action leads to a logical inconsistency if it means that PSNH had no choice but to construct the scrubber, even if economic conditions were such that the scrubber would be installed on a plant that a prudent utility would retire. The statute's purpose is to reduce emissions, not to ensure the continued operation of a 40 year old coal-fired power plant. Numerous examples of retirement of similar vintage, environmentally-challenged coal plants exist in the United States and Canada during this period. Eliminating consideration of this option by the Commission based on a strained interpretation of the law supports the PSNH view that constructing the scrubber constituted prudent "utility practice" and limits the ability of the parties to present a full prudence case. It also appears to ignore the Commission's ongoing obligation to ensure that PSNH ratepayers are protected from exorbitant rates that derive from bad utility decisions.

In addition, it is important to consider this argument in the context of the prudence section of the scrubber law, RSA 125-O:18. That statute says that if the owner is a regulated

utility it "shall be allowed to recover all prudent costs of complying with the requirements of this subdivision". The Moving Parties submit that elimination of all mercury emissions from the plant, which would have been accomplished by a retirement of the facility, would have complied with the most fundamental requirement of the law, the mercury reduction requirement. If that is the case and retirement, at least arguably, would have been a more prudent decision to make than to continue to construct the scrubber, then the Commission's interpretation is nonsensical and contrary to the law. It arbitrarily and unnecessarily limits consideration of the full spectrum of prudence as required, not just by this specific provision of the scrubber law, but also as one of the Commission's most fundamental responsibilities.

The Rehearing Order also fails to explain the result of its new interpretation and how that would coincide with what it said in the Discovery Order, i.e. that under the variance provision PSNH "could have sought a lesser level of reduction, even down to no reduction at Merrimack Station". Discovery Order at 25. Based on the wording of the variance provision, PSNH could have sought a variance of the reduction requirement down to zero, or it could have sought a variance in the schedule for the reduction, for example retirement by July 1, 2015 or some other date instead of reduction of at least 80% of mercury emissions by July 1, 2013. By not explaining the reasoning for its decision the Commission leaves many questions unanswered and many potential interpretations still on the table.

Since this is a discovery order the Moving Parties submit that the Commission must take the most expansive view of the law to allow discovery unless it could "perceive of no circumstance in which the requested data would be relevant." *Re Lower Bartlett Water Precinct*, 85 NH PUC 371, 372 (2000).

C. Clarification of the Rehearing Order

At a minimum the Moving Parties request the Commission clarify its decision. The Commission previously found that "PSNH, like any other utility owner, maintained the obligation to engage in good utility management at all times." Rehearing Order at 17. The Parties request an express finding that the Commission can still consider, and the parties can therefore still provide testimony on the issue of whether, independent of the variance provision in the law, a prudent utility would not have resisted and in fact would have embraced a study of the advisability of constructing this project before proceeding given what was happening in the market. The conditions in existence during the relevant time frame expected to be developed at hearing include: a) an increase in the migration of PSNH customers (a shrinkage in the only customers from whom PSNH could recover the scrubber costs under the law – RSA 125-O:18); b) a major decrease in natural gas prices cutting into projected income from the sale of power, capacity, and emission credits; c) a significant increase in the costs of the project (from $250 million to $457 million); and d) other reasonably foreseeable environmental regulations that would drive up capital and operating costs on a 40 year old coal-fired power plant. For purposes of argument, assuming the above-stated conditions were present, would studying the economic viability of proceeding with construction in 2008 and 2009 have been the prudent thing to do? Given the Commission's recent ruling, the Moving Parties request clarification that these matters are still within the scope of the Commission's prudence review and matters that the parties are free to develop through testimony and arguments.

III. CONCLUSION

For the reasons stated in this Motion the Commission should reconsider Order No. 25,506, or at a minimum clarify its order as requested.

WHEREFORE, the Moving Parties respectfully request this honorable Commission:

1) Grant reconsideration of Order No. 25,506 (May 9, 2013);

2) Strike its interpretation of Order No. 24,898 as being in conflict with Order No. 25,445; and

3) Grant such additional relief as is reasonable and just.

Respectfully submitted,

Susan W. Chamberlin
Consumer Advocate
Office of the Consumer Advocate
21 South Fruit Street, Suite 18
Concord, NH 03301
(603) 271-1174
Susan.chamberlin@oca.nh.gov

Zachary M. Fabish
Attorney for the Sierra Club
50 F Street NW, 8th Floor
Washington, D.C. 20001
(202) 675-7917
zachary.fabish@sierraclub.org

Douglas L. Patch
TransCanada Power Marketing Ltd.
TransCanada Hydro Northeast Inc.
By Their Attorneys
ORR & RENO, P.A.
One Eagle Square
Concord, NH 03302-3550
(603) 223-9161
dpatch@orr-reno.com

N. Jonathan Peress
Conservation Law Foundation
27 N. Main Street
Concord, NH 03301
(603) 225-3060
njperess@clf.org

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was provided via electronic mail to the individuals included on the Commission's service list for this docket today.

Susan W. Chamberlin

WHEREFORE, the Moving Parties respectfully request this honorable Commission:

1) Grant reconsideration of Order No. 25,506 (May 9, 2013);

2) Strike its interpretation of Order No. 24,898 as being in conflict with Order No. 25,445; and

3) Grant such additional relief as is reasonable and just.

Respectfully submitted,

Susan W. Chamberlin
Consumer Advocate
Office of the Consumer Advocate
21 South Fruit Street, Suite 18
Concord, NH 03301
(603) 271-1174
Susan.chamberlin@oca.nh.gov

Zachary M. Fabish
Attorney for the Sierra Club
50 F Street NW, 8th Floor
Washington, D.C. 20001
(202) 675-7917
zachary.fabish@sierraclub.org

Douglas L. Patch
TransCanada Power Marketing Ltd.
TransCanada Hydro Northeast Inc.
By Their Attorneys
ORR & RENO, P.A.
One Eagle Square
Concord, NH 03302-3550
(603) 223-9161
dpatch@orr-reno.com

N. Jonathan Peress
Conservation Law Foundation
27 N. Main Street
Concord, NH 03301
(603) 225-3060
njperess@clf.org

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was provided via electronic mail to the individuals included on the Commission's service list for this docket today.

Susan W. Chamberlin

WHEREFORE, the Moving Parties respectfully request this honorable Commission:

1) Grant reconsideration of Order No. 25,506 (May 9, 2013);

2) Strike its interpretation of Order No. 24,898 as being in conflict with Order No. 25,445; and

3) Grant such additional relief as is reasonable and just.

Respectfully submitted,

Susan W. Chamberlin
Consumer Advocate
Office of the Consumer Advocate
21 South Fruit Street, Suite 18
Concord, NH 03301
(603) 271-1174
Susan.chamberlin@oca.nh.gov

Zachary M. Fabish
Attorney for the Sierra Club
50 F Street NW, 8th Floor
Washington, D.C. 20001
(202) 675-7917
zachary.fabish@sierraclub.org

Douglas L. Patch
TransCanada Power Marketing Ltd.
TransCanada Hydro Northeast Inc.
By Their Attorneys
ORR & RENO, P.A.
One Eagle Square
Concord, NH 03302-3550
(603) 223-9161
dpatch@orr-reno.com

N. Jonathan Peress
Conservation Law Foundation
27 N. Main Street
Concord, NH 03301
(603) 225-3060
njperess@clf.org

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was provided via electronic mail to the individuals included on the Commission's service list for this docket today.

Susan W. Chamberlin