STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

Public Service Company of New Hampshire

Investigation of Merrimack Station Scrubber Costs and Cost Recovery

Docket No. DE 11-250

OBJECTION OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE TO THE JOINT MOTION FOR REHEARING, CLARIFICATION AND/OR RECONSIDERATION OF ORDER NO. 25,506

Public Service Company of New Hampshire ("PSNH") objects to the Joint Motion for Rehearing, Clarification and/or Reconsideration (the "Motion") of Order No. 25,206 of the Public Utilities Commission ("the Commission") filed by the Office of the Consumer Advocate, TransCanada Power Marketing, Ltd., TransCanada Hydro Northeast, Inc., the Conservation Law Foundation and the Sierra Club (collectively, the "Scrubber Opponents") on May 28, 2013.

The Motion should be denied. For five years, the Scrubber Opponents have argued that this Commission (or the Courts) can consider whether the wet flue gas desulphurization system or "Scrubber" installed at PSNH's Merrimack Station should be built at all. Again and again they have asserted that the Commission can-and should-determine whether the "decision" by PSNH to install the Scrubber was prudent. Again and again the Commission has rejected these arguments, and has concluded that construction of the Scrubber was mandated by the New Hampshire Legislature, and did not constitute a "utility management choice among a range of options." And again and again, the Commission has ruled that given this mandate, it has no jurisdiction to consider whether the Scrubber should have been built, or whether at some unspecified cost it became "too expensive."

Despite these prior decisions, the Scrubber Opponents contend in this Docket that the variance provision in RSA 125-O:17 ("Section 17") indirectly grants the Commission the power to undo the Legislative mandate by evaluating, as part of its prudence review, whether at some point during Scrubber construction, PSNH could (and therefore should) have determined that the cost of construction exceeded the Scrubber's public interest benefits and requested a variance from the Legislative mandate.

The Commission initially interpreted Section 17 to permit such a variance (Order No. 25,445). However, following PSNH's Motion for Rehearing, in Order No. 25,506 the Commission recognized that its decision in Order No. 25,445 was inconsistent with its prior orders and with the Legislative mandate expressed in RSA 125-O:11 and 13. Order No. 25,506 also reaffirms the Commission's prior orders finding that nothing in the RSA Ch. 125-O, including Section 17, suggests (let alone actually provides) that PSNH had the option not to construct the Scrubber or to retire Merrimack Station as an alternative means of mercury reduction. And once again, the Commission has reaffirmed what the Scrubber Opponents know by virtue of their own attempts to have the Legislature undo its mandate; namely, that the Legislature, not the Commission, is the appropriate place to complain about the statutory mandate to construct the Scrubber. Simply put, the Commission has now reiterated that it has no jurisdiction to evaluate whether the Scrubber should have been built, or whether the cost of that technology was too high. Instead, it has defined the scope of its prudence review to be limited to an assessment of whether the actions PSNH took to comply with its legal obligation to install the Scrubber were prudent. The Commission's Order is correct and should not be disturbed.

The Scrubber Opponents make three arguments: (1) the Commission's Order No. 25,506 is "unlawful and unreasonable;" (2) that Order No. 25,445 was just a "discovery order"

"hypothesizing" about the variance provision of the law and therefore the grant of rehearing was unnecessary; and (3) Order No. 25,506 should be "clarified" to find that "independent of the variance provision" in RSA 125-O, the Commission can still consider whether PSNH should have "resisted" the statutory mandate[1] and studied "the advisability of constructing this project." None of these arguments has merit, or offer a basis for reconsideration.

The Commission's Order No. 25,506 is alleged to be "unlawful and unreasonable," because PSNH supposedly did not offer sufficient reasons to reconsider Order No. 25,445. The Scrubber Opponents also claim, without supporting legal citation, that a finding of conflicts between orders of the Commission is an insufficient basis for reconsideration. Finally, they claim that the Commission did not offer a reason for its decision, and therefore Order No. 25,506 is "unlawful and unreasonable," Motion at 2-5. These arguments are frivolous. In the very same pleading that the Scrubber Opponents claim Order No. 25,506 to be "unlawful," they rely upon RSA 365:28 and concede that the Commission may at any time change its mind, is not bound by its prior orders, and may modify any order pursuant to RSA 365:28.[2] RSA 365:28 resolves the issue. The statute, which is liberally construed, allows the Commission "at any time.....to alter, amend....or otherwise modify any order made by it." *Appeal of Office of Consumer Advocate*, 134 N.H.651, 657 (1991); *Meserve v. State,* 119 N.H. 149, 152 (1979). Thus, the Commission has broad discretion to modify its prior Order even if PSNH had not moved for reconsideration.

The Commission's Order is legally correct. It is also supported both by its prior orders and by decisions of the New Hampshire Supreme Court. Many of these orders were set out in

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[1] *See* fn. 9, *infra*, for a discussion of the Scrubber Opponent's innovative legal theory that PSNH should have decided to ignore the law.

[2] For a description of a change of position by a court, see *City of Erie v. Pap's A.M.*, 529 U.S. 277, 316-317 (2000) (Souter, J., concurring), citing *McGrath v. Kristensen*, 340 U.S. 162, 178 (1950) (Jackson, J., concurring).

PSNH's Motion for Rehearing (at 7-12) and served as a basis for that Motion. The Commission cites to Order No. 24,898 which, standing alone, serves as a basis for the Commission to decide that interpreting Section 17 to allow consideration of the retirement of Merrimack Station was erroneous and merited reversal.[3] Thus, PSNH offered sufficient grounds for the Commission to reconsider its Order and the Commission provided a plain statement of the reasons for its decision.[4]

But lest there be any doubt that the Commission correctly concluded that nothing in RSA Ch. 125-O, including Section 17, allows the Commission to consider whether the Merrimack Station should have been retired as a "method of meeting the emissions reduction requirements" (Order No. 25,506 at 17) of that statute, one need look no further than the language of this Commission's orders.[5]

- "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 set of circumstances; or establish some other rate mechanism. Therefore we must accede to its findings." Order No. 24,898 at 12-13.

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[3] The Scrubber Opponents assert that conflicts between two orders of the Commission or contradictory findings in the orders are an insufficient cause for rehearing or for a order modification of a prior order. Motion at 5. They cite no authority for this proposition. Nor could they, in light of RSA 365:28. The Scrubber Opponents apparently contend that even if the Commission believes that it has erred in an order, it must let the error stand despite the plain language in RSA 365:28 to the contrary.

[4] The Scrubber Opponents also contend that the Commission's order is "unlawful" because it does not comply with either RSA 541-A:35 or RSA 363:17-b, III. But neither of those statutes is applicable. RSA 541-A:35 requires only that findings of fact be accompanied by a "concise and explicit statement of the underlying facts supporting the finding." The Commission ruled as a matter of law, and provided a basis for its decision. RSA 363:17-b, III requires that "final orders" include a "decision on each issue including the reasoning behind the decision." Even assuming that the Order in question is a final order (which it is not), the Commission satisfied this standard by ruling on the sole issue presented to it on reconsideration (the scope and meaning of Section 17) and provided the reasoning for its decision. The Scrubber Opponents simply do not agree with the decision.

[5] The Scrubber Opponents argue that because the purpose of RSA Ch. 125-O is "to reduce pollution," it follows that the statute cannot be construed to eliminate shutting down the plant. Apart from the fact that this construction would ignore the plain language of the statute mandating construction of the Scrubber *at a specific plant* to reduce emissions *at that plant*, the Scrubber Opponents are wrong. The Legislature also identified a number of other considerations as part of the statutory mandate including "electric reliability" and "the public interest" – a broad category which would encompass matters including jobs and taxes. RSA 125-O:11, V.

- "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 9.

- "[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. 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." Order No. 24,979 at 15.

- "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." Order No. 24,979 at 15.

- "[I]t was the Legislature who determined that the scrubber technology is in the public interest and, therefore, any modification or rescission of that finding logically rests with that body. Consequently, we may not revisit or review the finding." Order No. 24,979 at 17.

The Commission's decisions are further supported by the New Hampshire Supreme Court, which has twice described RSA Ch. 125-O as a mandate to install the Scrubber technology to meet the emissions reduction requirements of the statute. *Appeal of Stonyfield Farm*, 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"; "To comply with the Mercury Emissions Program, PSNH must install the scrubber technology and have it operational at Merrimack Station by July 1, 2013."); *Appeal of 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...The

installation of such a system was mandated by the legislature in 2006.")[6] In sum, the Commission correctly determined that there is a statutory mandate to install the scrubber which prevented its prior decision that PSNH "could have sought a variance to comply with RSA 125-O through means other than the scrubber technology, including retirement of Merrimack Station" and that Order No. 25,445 should be reversed. Order 25,506 at 17.[7]

The Scrubber Opponents attempt to minimize the Commission's decision by contending that the Order it reconsiders (No. 25,445) was only a "discovery order" and thus was only intended to "provide direction to the parties" in discovery. Motion at 4. Again, the Scrubber Opponents are wrong. When the Commission first considered the discovery requests in August 2012, (Order No. 25,398) it directed the parties to file memoranda on the meaning of Section 17. It did so not just to provide direction on how to answer particular discovery requests or for their relevance, but to address, among other issues "the types of variances requests that may be made under [Section 17]" and whether PSNH had a duty to seek a variance in order to obtain cost recovery in a prudence proceeding under RSA 125-O:18. Order No. 25,398 at 10. The

[6] The Site Evaluation Committee also noted that the "Scrubber Bill" codified in RSA Ch. 125-O "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." Order Denying Motion for Declaratory Ruling, NHSEC Docket No. 2009-01, August 10, 2009, *slip op.* at 2. The N.H. Department of Environmental Services has also ruled that PSNH was subject to a mandate to install the scrubber. "The owner shall install and have operational scrubber technology to control mercury emissions at Merrimack Units 1 and 2 no later than July 1, 2013." Title V Operating Permit No. TV-0055, September 7, 2011, at 13; "...PSNH Merrimack must install an FGD system which will also reduce SO2 emissions by at least 90 percent below uncontrolled levels by July 1, 2013." Title V Operating Permit Findings of Fact and Director's Decision, March 15, 2010, at 16.

[7] The Scrubber Opponents complain that Order 25,506 is erroneous because it is inconsistent with Order No. 24,914 (November 12, 2008) in which the Commission ruled that RSA 125-O:17 provided a basis for it consider whether PSNH had been prudent "in proceeding with the installation of scrubber technology." Motion at 6. The Scrubber Opponents are correct that the orders conflict, but it gains them nothing. Order No. 24,914 pre-dates the Supreme Court's decisions in *Stonyfield* and *CRR*, as well as the Site Evaluation Committee and NH DES pronouncements cited in fn. 6. Order 25,506 is the Commission's effective reversal of Order No. 24,914. It was that earlier order, together with disputes over discovery requests that began the current controversy in this docket. That, among other considerations, caused the Commission to request memoranda on the proper interpretation of Section 17 in August 2012, in order to help refine the scope of this docket. *See* Order No. 25,398 at 7 and 10. Order No. 25,506 resolves the conflict by ratifying the prior Commission ruling in Order No. 24,898 that "[n]owhere 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," thus annulling Order No. 24,914. Order No. 25,506 is consistent with the Orders cited above at 4-5.

Commission specifically noted that a resolution of these issues would be important both to "minimize[..] further discovery disputes involving similar questions and *in helping to define the scope of the docket for purposes of pre-filed testimony and hearing testimony.*" *Id.* (Emphasis added.)

The meaning of the August 2012 Order is plain: the Commission was concerned about the scope of the hearing in this Docket as it related to both testimony and discovery. Consistent with the Commission's decision in Order No. 25,398, Order No. 24,445 and the reconsideration of that Order in Order No. 25,506 have, in fact, determined the scope of the hearing in this Docket. Indeed, if Order No. 24,445 was simply a "discovery order" there would have been no reason for the Commission to reconsider it, since the discovery that was compelled by that order had been answered and the discovery issues were therefore moot.[8] The Commission was not "hypothesizing," as the Scrubber Opponents argue. Motion at 4. Rather, as the August 2012 Order recognized, determining the scope and meaning of Section 17 was important to the conduct of the hearing in this proceeding. Order 25,398 at 10.

Lastly, the Scrubber Opponents request that the Commission "clarify" that its statement that "PSNH, like any other utility owner, maintained the obligation to engage in good utility management" (Order No. 25,506 at 17) means that the Commission will "still consider, and the parties can therefore provide testimony" on the issue of whether "independent of the variance provision in [RSA Ch. 125-O]" a "prudent utility" would have "fail[ed] to comply" with the law or delayed such compliance in order to question the unequivocal mandates contained in the law. Motion at 7, 10. Apart from a concession by the Scrubber Opponents that nothing in RSA Ch.

[8] As the Commission is aware, PSNH's Motion for Reconsideration did not address discovery at all. And with good reason. PSNH had already answered all the discovery ordered by Order No. 25,445. The Commission was aware of and rejected this very mootness argument which was encompassed in TransCanada's "Objection to PSNH Motion for Rehearing" dated January 28, 2013, at para. 13, and paraphrased in Order No. 25,506 at 14.

125-O allows such consideration, there are at least three problems with this request for "clarification." First, the request asks the Commission to "clarify" that it did not mean what it said in the Order. Second, the request is - as the Commission has found - directly contrary to the language of RSA 125-O mandating construction of the Scrubber.[9] Third, the Scrubber Opponents fail to identify any independent statutory authority allowing the Commission, an agency of limited jurisdiction, to consider whether the Legislature's decision to construct the Scrubber was "prudent." There is good reason for this omission; there is no such authority. A consideration of the wisdom of constructing the Scrubber "independent" of RSA Ch. 125-O would be directly contrary to the will of the Legislature and the mandate of the statute.[10]

The Commission's statement in Order No. 25,506 that PSNH has an obligation to "engage in good utility management" is not at all inconsistent with the finding that it had no discretion to build the Scrubber. PSNH has always contended, and does so again today, that the Commission retains the authority to determine whether, in the mandated construction of a specified technology at Merrimack Station, PSNH used prudent construction techniques and

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[9] Incredibly, the Scrubber Opponents state that "nowhere in the law does it say that PSNH was 'mandated' to keep Merrimack Station open." Motion at 7. By this they apparently mean nowhere other than the 60 instances in which the Legislature used the word "shall" in RSA Ch. 125-O referring to the duty to install specific technology at the Station. Describing the duty as an "alleged" mandate, they assert that there "are no sanctions in the law if [PSNH] fails to comply" with the law. Nonsense. The Scrubber Opponents' remarkable proposition that PSNH could simply decide not to comply with a statute is unsupported by any legal authority whatsoever and "leads to an absurd result contrary to common sense and principles of statutory construction" (Motion at 7). Moreover, the Scrubber Opponents seem to have forgotten that RSA 125-O:7, which applies to the entirety of RSA Ch. 125-O and is part of the non-severable provisions of the chapter as set forth in RSA 125-O:10, provides for enforcement of any violation by injunction, civil forfeitures of $25,000 per day of violation, criminal punishment as a misdemeanor for natural persons or as a felony for any other person, and administrative fines imposed by NH DES.

[10] The Scrubber Opponents have identified no statute enacted since RSA 125-O:11-18 was enacted in 2006 that would grant such authority and any prior authority would be trumped by the more specific, and later enacted statute. *See* Order No. 24, 979 dated June 19, 2009 at 15: ("[T]he 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."

incurred prudent costs in carrying out the Legislative mandate. That is the proper scope of this proceeding, as the Commission has found.

The Commission's Order on Rehearing is governed by and consistent with the Commission's prior orders and order of various other agencies. In myriad dockets, in many different forums, the Scrubber Opponents have contested the express meaning of the Scrubber Law or have tried to prevent recovery of the cost of construction of the Scrubber.[11] It is time they stopped beating this horse. It died long ago.

[11] *See e.g.,* NHPUC Dockets 08-103, *Investigation of PSNH Installation of Scrubber Technology Station*; 08-145, *Investigation into Modifications to Merrimack Station*; 09-033, *Petition for Approval of the Issuance of Long Term Debt Securities*; 10-122, *Petition for Authority to Issue Long and Short Term Debt;* 11-250, *Investigation of Scrubber Costs and Cost Recovery*; N.H. Site Evaluation Committee Docket No. 2009-01, *Motion for Declaratory Ruling Regarding Modifications to Merrimack Station Electrical Generating Facility*; N.H. Department of Environmental Services, *Title V Operating Permit No. TV-0055*; N.H. Air Resources Council Dockets 10-06-ARC, *Appeal of NH Sierra Club re: Title V Permit*; 09-12-ARC, *Appeal of Freedom Logistics, LLC and Halifax-American Energy, Co., LLC re: Flue Gas Desulpherization System Temporary Permit No: TP-0008*; 09-11-ARC, *Conservation Law Foundation Appeal of Temporary Permit No: TP-0008*; 09-10-ARC, *New Hampshire Sierra Club Appeal of Temporary Permit No: TP-0008*; New Hampshire Supreme Court *Appeal of Stonyfield Farm, et al.,* 159 N.H. 227, 231 (2009); *Appeal of Campaign for Ratepayers' Rights*, 162 N.H. 245, 252 (2011); *Appeal of New Hampshire Sierra Club*, Case No. 2010-0683 (appeal dismissed, December 1, 2010); United States District Court, D.N.H., *Conservation Law Foundation v. PSNH,* Civil Action No. 11-353-JL; U.S. Environmental Protection Agency, *NPDES Permit No. NH0001465*; New Hampshire General Court, 2009, S.B. 152 "relative to an investigation by the PUC to determine whether the scrubber installation at the Merrimack station is in the public interest of retail consumers," (deemed inexpedient to legislate); H.B. 496 "establishing a limit on the amount of cost recovery for emissions reduction equipment installed at Merrimack Station," (deemed inexpedient to legislate).

Respectfully submitted,

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Dated: May 31, 2013 By:_____

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CERTIFICATE OF SERVICE

I hereby certify that on May 31, 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).

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