

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 OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
TO STRIKE TESTIMONY RELATING TO PSNH'S ABILITY TO RETIRE
MERRIMACK STATION AS A MEANS OF AVOIDING COMPLIANCE
WITH RSA 125-O:11-18

Public Service Company of New Hampshire ("PSNH") in accordance with Rule Puc 203.07, hereby moves to strike any testimony relating to whether PSNH could have, and therefore should have, retired Merrimack Station as an alternative to installing the Scrubber. This Commission has already determined that retirement of the plant was not an option that PSNH could have pursued. The Commission's prior orders make clear that neither RSA 125-O:18 or RSA 369-B:3-a permits the Commission to consider plant retirement as part of this docket.

Applicable Testimony

Several of the witnesses who submitted testimony on December 23, 2013, opine that PSNH could-and therefore should- have sought to retire the plant as a means of avoiding the mandate in RSA 125-O:13 to construct the Scrubber by July 1, 2013. These witnesses do not explain how retirement would have voided or repealed the statutory mandate in RSA 125-O:13 to "install and have operational scrubber technology to control mercury emissions at Merrimack Units 1 and 2 no later than July 1, 2013" or what provision of New Hampshire law would have

permitted PSNH to do so. Nor do they explain, in light of the Commission's prior decisions, what authority the Commission has to consider retirement of Merrimack Station as "an alternative to installing scrubber technology as a means of mercury compliance." *See* Order No. 24,898 at 12.

The Commission's Prior Orders

In its very first Order concerning the Scrubber Law, the Commission definitively held that retirement of Merrimack Station was *not* an option PSNH could have considered as a means of complying with the Scrubber Law: "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*." Order No. 24,898, September 19, 2008, at p. 12 (emphasis added). Fifty one months later – after the scrubber had been installed and placed into service - the Commission issued a string of orders, including those issued in December 2012 (No. 25,445) (the "December Order"), May 2013 (No. 25,506) (the "May Order"), July 2013 (No. 25,546) (the "July Order") and August 2013 (No. 25,565) (the "August Order").¹

The December Order found that discovery on whether PSNH considered, or should have considered, retirement of Merrimack Station was relevant to the issues in this docket. In May, 2013, the Commission reversed itself on that issue, finding that its December Order was directly contrary to its prior 2008 decision in Order No. 24,898 and that "we will not disturb the prior Commission ruling in Order No. 24,898." Order No. 25,506 at 17. The language the

¹ As the Commission itself noted in the July Order, "The hearing on the merits will therefore not address current market or regulatory conditions but rather those conditions in place at the time of the decision-making under review; specifically the period of time after the Legislature's decision to require the Scrubber up to the point of the Scrubber's "substantial completion" in September 2011. *See* Order No. 25,445 at 26. At hearing, therefore, we will not admit evidence or allow cross examination on regulatory proposals or actions, market conditions or Company decisions that extend beyond September 2011." Order No. 25,546 at 9. Thus, the "regulatory condition... in place" prior to September 2011 was that retirement of the facility was not an option available to PSNH to comply with RSA 125-O.

Commission deemed to control and to be inconsistent with the December Order, was the same as that quoted above: “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*.” *Id.* at 17, quoting Order 24,898 at 12 (emphasis added). Hence, the Commission’s May Order specifically ratified the Commission’s September, 2008, finding in Order No. 24,898 regarding retirement, stating that no provision of RSA 125-O permitted the consideration of retirement as a means of complying with the Scrubber Law. The Commission therefore granted PSNH’s rehearing request, stating: “To the extent that Order No. 25,445 interpreted the variance provision, RSA 125-O:17 to allow retirement of Merrimack Station.....that portion of Order No. 25,445 alone is reversed.”

Admittedly, the Commission also went on to state that “we do not go so far as to conclude that PSNH had no management discretion in this matter” because it had an obligation to “engage in good utility management at all times.” *Id.* It thus concluded that the information sought by the Intervenors on retirement was “potentially relevant to whether PSNH exercised prudent utility management.” *Id.* at 18. But, the May Order did not state that “management discretion” included consideration of retirement during the Scrubber construction; nor could it, as in that very Order, the Commission held that retirement was not an option available to PSNH. Thus, the May Order held that although retirement of Merrimack Station was not a means of complying with the Scrubber Law, PSNH was directed to respond to data requests regarding potential retirement solely because they *might* lead to the discovery of relevant information.

The Intervenors then sought reconsideration of the Commission’s May Order Granting Rehearing. They requested “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 of the law,” PSNH should have considered whether to build the Scrubber.

TransCanada Motion for Reconsideration May 31, 2013 at 10. In its July Order, the Commission *denied* rehearing, stating that “we continue to find that our interpretation of RSA 125-O:17 and the inability of PSNH to use retirement as a means of obtaining a variance from the requirements of RSA 125-O in the [May Order] is the correct interpretation.” Order No. 25,546 at 7. Despite that clear statement, the Commission went on to say “[t]his does not mean that the possibility of retirement of Merrimack Station is immaterial to our analysis” *Id.* The Commission then construed Section 18 to provide it with jurisdiction (as part of its prudence review under that Section) to consider whether PSNH should have exercised discretion to divest the Station prior to or during construction. *Id.* at 8. More specifically, the Commission stated that “[w]hile under RSA 125-O, PSNH *had no discretion, and continues to have no discretion,* whether to install and operate the Scrubber *if it remains the owner and operator* of Merrimack Station, the Scrubber Law does not allow PSNH to act irrationally with ratepayer funds” *Id.* (Emphasis added.) Accordingly, the Commission concluded that Section 18 granted it the authority to review that discretion as to divestiture and that “under RSA 369-B:3-a PSNH retained the management discretion to retire Merrimack Station in advance of divestiture.” *Id.* (Emphasis added.)

Although the Commission concluded that PSNH had management discretion under Section 18 to divest and similar discretion under RSA 369-B:3-a to retire Merrimack Station, it did not explain why it had again raised retirement of the facility as a means of complying with the Scrubber law, at the same time that it had upheld its finding in Order No. 24, 898 that retirement was not a means of complying with the Scrubber Law. Nor did it explain how PSNH could avoid the mandate in RSA 125-O if it retired yet remained the owner of the Station since,

as the Commission conceded, in that case PSNH had no discretion not to install and operate the Scrubber.

Significantly, in the July Order the Commission specifically ruled on the scope of testimony that would be allowed in this proceeding:

The hearing on the merits will therefore not address current market or regulatory conditions but rather those conditions in place at the time of the decision-making under review; specifically the period of time after the Legislature's decision to require the Scrubber up to the point of the Scrubber's "substantial completion" in September 2011. See Order No. 25,445 at 26. *At hearing, therefore, we will not admit evidence or allow cross examination on regulatory proposals or actions, market conditions or Company decisions that extend beyond September 2011.*

Order No. 25,546 at 9 (emphasis added). The "regulatory condition... in place" prior to September 2011 was that retirement of the facility was not an option available to PSNH to comply with RSA 125-O, as the Commission held back in September, 2008, in Order No. 24,898. All the Commission's subsequent Orders on the subject were issued after the September 2011 cut-off established by the Commission in the July Order. Hence, as the Commission has already ruled, the only relevant regulatory condition that will be admitted is what was in place prior to September, 2011, *i.e.*:

- "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*." Order No. 24,898, September 19, 2008, at p. 12 (emphasis added).
- "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 125-0:13, 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, June 19, 2009, at p. 15 (emphases added).
- "[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 Stonyfield Farm, Inc.*, 159 N.H. 227, 228-9 (2009)

- The Supreme Court also said, “To comply with the Mercury Emissions Program, PSNH must install the scrubber technology and have it operational at Merrimack Station by July 1, 2013.” *Id.* at 229.

Finally, in its August Order (which followed PSNH’s request for reconsideration of the July Order), the Commission once again addressed the scope of this docket. The primary focus of the Commission’s analysis in that Order was divestiture. The Commission began that analysis by stating that the July Order had clarified that “the scope of this proceeding included a determination that PSNH retained the management discretion and duty of prudence to consider *divestiture*” under Section 18 and RSA 369-B:3-a. Order No. 25,565 at 6 (Emphasis added). Despite its earlier, contradictory findings,² the Commission also stated that “[f]rom the outset of proceedings before the Commission, we have characterized PSNH as having made a decision to proceed with the Scrubber Project” and to “*continue its ownership and operation of Merrimack Station,*” and the Commission concluded that PSNH had discretion to divest the Station under RSA 369-B:3-a and that no “[s]ection of the Scrubber Law, RSA 125-O:11-18, altered PSNH’s ability to do so.” *Id.* at 8 (Emphasis in original.)

Although the Commission’s focus in the August Order was divestiture, it nonetheless considered both divestiture and retirement. Returning to the issue addressed in the original Scrubber Order (No. 24,898), *i.e.* how to reconcile the authority of the Commission to consider

²See the Commission’s Order No. 24,979, June 19, 2009, at 15, where the Commission stated: “[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, 1,11; RSA 125-O:13, I. 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. at 15 (emphases added). And as this Commission is aware, the Commission has described RSA 125-O:11-18 as a “mandate” to install the Scrubber in many of its orders. See Secretarial Letter, August 22, 2008, Docket No. DE 08-103; Order No. 24,898, September 19, 2008, at 1, 7 and 10; Order No. 24,914, November 12, 2008, at 1; Order No. 25,332, February 6, 2012, at 1; Order No. 25,346, April 10, 2012 at 21 and 23.

divestiture, modification and retirement in RSA 369-B:3-a with the Legislative public interest determinations in RSA 125-O:11-18, the Commission sought to make its “reasoning in the [July Order] explicit,” concluding that the “public interest findings in RSA 125-O:11 do not preclude an inquiry under [RSA 369-B:3-a] into the public interest of a decision by PSNH to divest itself of Merrimack Station *or to retire that Station prior to divestiture.*” *Id.* at 13-14 (emphasis added). As to divestiture, the Commission found that it had authority to consider divestiture under RSA 369-B:3-a notwithstanding the enactment of RSA 125-O:11-18 because the public interest considerations in divestiture were different from installation, and because Section 18 “specifically directs that questions of cost recovery in the event of divestiture be addressed pursuant to [RSA 369-B:3-a.]” *Id.* at 15. With respect to retirement, although stating that “modification and retirement are not equivalent concepts and a public interest determination regarding one does not subsume a public interest determination regarding the other,” the Commission did not identify any provision of RSA 125-O:11-18 that granted it the authority to consider retirement as an alternative to the mandate requiring installation of the Scrubber. *Id.* at 15-16. This is not surprising given that in 2008, the Commission expressly found *that there was no such authority.* As a result, if the Commission asserts jurisdiction to determine whether PSNH should have considered retirement of Merrimack Station as an alternative to installing the Scrubber mandated by the Legislature, it must be because it believes it has that the general authority to do so under RSA 369-B:3-a. See July Order at 8.

However, in that same August Order, the Commission held, “PSNH prevailed on its interpretation of whether retirement of Merrimack Station was a recognized method of compliance with the mercury reduction requirements of RSA 125-O, *and* whether retirement would have formed a legitimate basis for a variance under RSA 125-O:17. It cannot then argue

that by accepting its position we have not provided it due process.”³ If PSNH had indeed “prevailed on its interpretation of whether retirement of Merrimack Station was a recognized method of compliance with the mercury reduction requirements of RSA 125-O,” then, consistent with this Commission’s first holding on this subject back in September, 2008 in Order No. 24,898, a decision which the Commission expressly ratified in its May Order, retirement of Merrimack Station is *not* an alternative to installing scrubber technology that would comply with the statute, and, hence, is *not* within the scope of this proceeding.

To the extent that the Commission now deems retirement as an alternative to constructing the Scrubber that is within the scope of this proceeding, it errs for three reasons. First, RSA 369-B:3-a provides the sole statutory authority to the Commission to consider whether PSNH can retire its generating assets or what costs may be recovered in that event. The Commission has already determined in Order No. 24,898 that as the later enacted statute, RSA 125-O:11-18, conflicts with RSA 369-B:3-a and divests the Commission of any jurisdiction.⁴ Second, the Commission concludes that PSNH could have considered retirement of Merrimack Station

³ To the extent that the Intervenor attempts to read the Commission’s May 2013 reconsideration of its December 2012 Order as limited to a consideration of retirement under RSA 125-O:17 and thus that the Commission may consider retirement separately under some other provision or RSA 125-O:11-18, this sentence in the August Order belies any such claim. The Commission unequivocally states that PSNH prevailed on its argument that RSA 125-O does not permit retirement as a means of complying with that law under section 17 or any other section.

⁴ The Commission’s jurisdiction to consider whether PSNH is permitted to modify, retire or divest assets is granted solely by RSA 369-B:3-a, which contains conditions precedent to any such modification, retirement, or divestiture that this Commission must find. The Commission held in Order No. 24,898 (at least as to modification) that since RSA 125-O conflicts the Commission’s authority to make public interest findings on those issues set out in RSA 369-B:3-a, the latter statute controls. The Commission asserted that as to divestiture, there is no conflict because Section 18 provides it with explicit authority to consider the prudence of PSNH’s actions “in the event of divestiture” and therefore to make findings under RSA 369-B:3-a, notwithstanding RSA 125-O:11-18. But it cited no similar explicit authority concerning retirement. With good reason: there is none. As the Commission recognized more than five years ago, “the Legislature would only need to make special notice that [RSA 369-B:3-a] would apply in the event of divestiture if it intended that [RSA 369-B:3-a] not apply absent divestiture, which is the case here.” *Id.* at 12. The “case there” was modification, but the Commission’s logic applies with equal force to retirement. The absence of any retention of jurisdiction for the Commission in RSA 125-O:11-18 as to retirement together with the specific statement that installation of the Scrubber is in the public interest removes any jurisdiction for the Commission to reconsider that finding on that issue. RSA 369-B:3-a addresses only three issues: modification, retirement and divestiture. As this Commission found, the Legislature saved its jurisdiction solely as to divestiture. *Expressio unis est exclusio alterius.*

because it had discretion not to continue to own and operate the Station. But if PSNH retired the Station, it *would* remain the “owner of the affected sources” (RSA 125-O:12, IV) and thus remain subject to the mandate in RSA 125-O:11 to install the Scrubber.⁵ Third, the Commission avoids the fact that retirement would nonetheless leave ownership of the Station with PSNH by concluding that retirement would not conflict with the public interest findings in RSA 125-O:11 because it would “at most render...the Legislature’s findings...moot in the event Merrimack Station ceased operation permanently” *id.* at 16. This conclusion is flawed. The public interest findings in RSA 125-O:11, VI and RSA 369-B:3-a are identical, and are broader than simply reducing mercury.⁶ Thus, apart from the fact that the Commission has no authority to “moot” Legislative findings,⁷ those findings cannot be ignored either by declaring that “modification and retirement are not equivalent concepts” *id.* at 15, or by assuming that sole purpose of the statute was mercury reduction.

Thus, as the Commission has held since its first September 2008 Order, retirement of Merrimack Station was *not* an option available to PSNH, and any discussion of retirement of that facility in lieu of installing the mandated scrubber technology is outside the scope of this proceeding.

Can it seriously be argued that if the Legislature had intended retirement of Merrimack Station to be a means of meeting the mercury reduction requirements in RSA 125-O:11-18, it

⁵ Recall the Commission’s own finding in the July Order: “ under RSA 125-O, PSNH had no discretion, and continues to have no discretion, whether to install and operate the Scrubber if it remains the owner and operator of Merrimack Station... ” Order No. 25,546 at 8.

⁶ *See e.g.* the legislative history of H.B. 496 during the 2009 legislative session: “The majority was also concerned that the passage of this bill would lead to a pause in or cancellation of the project. This would not only have significant environmental ramifications but also would lead to the loss of several hundred short term and long term jobs related to the construction and operation of the scrubber.” Science, Technology and Energy Committee, “Majority Committee Report” finding H.B. 496 “inexpedient to legislate,” on March 19, 2009.

⁷ As the Commission has recognized, it “ has only those powers delegated to it by the Legislature. *See, Appeal of Public Service Co. of N.H.*, 122 N.H. 1062, 1066 (1982).” Order No. 24,898 at 13.

would not have expressly said so by stating that the owner must either install the Scrubber or retire the Station? The Commission has already answered this question. *Retirement was not an option to installing the Scrubber.* Order No. 24, 898, and its own recognition in the May Order that the December Order was in direct conflict with Order No. 24,898 forecloses any such consideration.

Retirement of Merrimack Station was *not* an option available to PSNH and the “relevant regulatory conditions” of record prior to September 2011 all stated that the Scrubber Law mandated installation of the scrubber and that retirement was *not* an option available to PSNH.⁸ Hence, any discussion of retirement of that facility in lieu of installing the mandated scrubber technology is outside the scope of this proceeding, and , “At hearing, therefore, we will not admit evidence or allow cross examination on regulatory proposals or actions, market conditions or Company decisions that extend beyond September 2011.” Order No. 25,546 at 9

The Commission Has No Authority to “Moot” Legislative Findings

The public interest findings that the Commission would need to make concerning retirement under RSA 369-B:3-a are identical to those the Legislature has already made in RSA 125-O:11, VI and the Commission has already found the statutes to conflict as to those very findings (at least in the case of modification.) The Commission nevertheless asserts in the August Order that these findings do not conflict because in the case of retirement, these findings would be “rendered moot.” Order No. 24,565 at 16. That is, since there would be no mercury emissions from the Station at all, the mercury reduction objective of the statute would be met. This claim is flawed for two reasons.

⁸ This motion does not address issues relating to retirement or divestiture of generating assets by PSNH subsequent to the Company’s compliance with the mandate contained in the Scrubber Law, which are not issues relevant to the Company’s “prudent costs of complying with the requirements of” that Law. (RSA 125-O:18).

First, the Commission has no authority to “moot” Legislative findings based on its view of what the Legislature intended by those findings. As shown above, the language of RSA 125-O:11-18 does not permit any such “mooting.” On the contrary, that language makes clear that mercury reduction was to occur by the installation of a specific technology on a specific power plant. It is hard to imagine why the Legislature would make such specific findings if it intended Merrimack Station to be retired. Moreover, if the Legislature had intended such an option, it would have been easy to say so.⁹

Second, the Commission’s contention that the Legislative findings can be “mooted” rests on a flawed and inaccurate premise namely, that the sole purpose of RSA 125-O:11-18 was to reduce mercury and that retirement of Merrimack Station would achieve that goal because, upon retirement, no mercury would then be emitted from the plant. But what if the intent of the Legislature was also to create jobs or to insure electric reliability for the citizens of New Hampshire by continuing the operation of Merrimack Station while also reducing mercury? In that case, retirement of Merrimack Station would undermine the public interest findings of the Legislature.

This is hardly a hypothetical question: RSA 125-O:11, V specifically provides that “installation of scrubber technology will *not only* reduce mercury emissions significantly, but will do so *without jeopardizing electric reliability*, and with reasonable costs to consumers.” And as noted in footnote 5, *supra*, the Legislature specifically stated that the scrubber project should not be delayed or cancelled, as such actions would lead to the loss of several hundred

⁹ As the Commission stated in Order No. 24,898 at 7-8: “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.”

short term and long term jobs related to the construction and operation of the scrubber. Likewise, RSA 125-O:11, II provides that the “department of environmental services has determined” that the Scrubber was the best available technology because it “best balances the procurement, installation, operation and *plant efficiency costs* with the projected reductions in mercury.” (Emphasis added.) Put simply, the Legislature recognized that without the Scrubber plants like Merrimack Station might not be permitted to operate, that this would jeopardize electric reliability in the State, and that the Scrubber “best balanced” a number of considerations.

Thus, retirement of Merrimack Station was *not* an option available to PSNH, and any discussion of retirement of that facility in lieu of installing the mandated scrubber technology is outside the scope of this proceeding.

Testimony to be Stricken

For the reasons set forth herein, PSNH respectfully moves to strike the direct testimony filed in this proceeding that claims PSNH had the ability to retire Merrimack Station as an alternative to installing scrubber technology as a means of complying with the scrubber law. Specifically, PSNH moves to strike the following:

Testimony of Michael E. Hachey

Mr. Hachey’s testimony was submitted by Intervenor TransCanada Power Marketing, Ltd. and TransCanada Hydro Northeast, Inc. (together “TransCanada”). In sum, Mr. Hachey contends that PSNH was unreasonable in estimating future changes in the price of natural gas or in the regulatory environment. He asserts that “PSNH should have realized [these factors] by September 2008, at which point it should at a minimum have put a halt on any additional spending on the project until the economics could be further studied.” Hachey Testimony at

30/4-7.¹⁰ Hachey purports to be able to construe New Hampshire statutes and opines on their meaning, e.g. at 3/18-4/13, and concludes that there was no legislative mandate to construct the Scrubber because “[t]he law contains several provisions indicating that the Legislature did not institute a blind mandate which would require scrubber installment regardless of cost.” *Id.* 6/20-22.¹¹ According to Hachey, these provisions include the right to seek a variance under RSA 125-O:17, the option to “*have sought the PUC’s approval to retire the plant,*” the option to “study whether proceeding with the project still made sense” and the option to seek “amendments to or a repeal of the law.”¹² *Id.* 28/8-16.

Testimony of Matthew I. Kahal

Mr. Kahal is an independent consultant retained by Exeter Associates, Inc. His testimony was submitted by the Office of Consumer Advocate. Contrary to Hachey’s testimony, Kahal does not contend that PSNH should have pursued options not to construct the Scrubber in the summer of 2008. Instead, Mr. Kahal opines that PSNH should have continually studied the economics of construction at “six months, nine months, and/or one year after the Summer 2008” then pursued “alternative actions....that would meet the required mercury emissions reduction target and minimize the ratepayer burden.” Kahal 7/11-25. These options included the ability of PSNH to “Cancel the Clean Air Project and retire Merrimack units I and 2 at the compliance deadline of July 1, 2013.” *Id.* at 8/4-5. Other instances in which Mr. Kahal opines on the retirement of Merrimack Station include the following quotations from that testimony:

¹⁰ References to the page and line of the pre-filed testimony will be shown as follows “30/4” designating the page, and the line.

¹¹ By contrast, this Commission has ruled that “RSA 125-O does not: (1) set any cap on costs or rates.” Order No. 24,898 at 12-13.

¹² PSNH has filed a separate motion to strike testimony concerning PSNH’s ability to seek a variance. The Commission has ruled that PSNH could not have done so. Mr. Hachey does not say how PSNH would have sought a repeal when the legislature was not in session or what it should have done regarding construction while the legislative process played out.

- The Commission concluded that PSNH retained the management discretion to divest itself of the Merrimack Station under RSA 125-O:18 or to **retire** Merrimack Station under RSA 369-B: -a (sic), if appropriate. (Order, page 3.) *Id.* 16/10-13.
- In addition to the Merrimack plant **retirement** and for the divestiture option identified by the Commission, I believe that the Company had an explicit obligation to diligently and aggressively track the Project's economic viability in light of rapidly changing economic and market conditions and keep policymakers informed of all findings and risks promptly, thoroughly, and clearly. *Id.* 17/9-15.
- The "without" net present value ("NPV") of market energy and capacity is subtracted from the "with" NPV of a scrubbed Merrimack to obtain the customer net savings from Merrimack **retirement**. *Id.* 20/3-5.
- The largest uncertainty in the Study is the assumption of \$11 per MMBtu natural gas in 2011, escalating every year thereafter. This is the "driver" of expensive replacement market energy if the Merrimack unit were to be **retired**. *Id.* 22/3-6
- As a technical matter, the magnitude of the default load, by itself, does not determine whether or not the decision to scrub and continue to operate the Merrimack plant is an economic decision, as compared to the **retirement** decision. *Id.* 22/3-6.
- A declining default load should not cause a power plant deemed economically viable (when including scrubbing costs) to be **retired**. However, due to a potentially severe rate impact, it does suggest that the utility give tills issue heightened scrutiny, and it does color how the decision-makers view risk if economic viability is judged to be uncertain. *Id.* 31/11.
- Using the Company's model, which was supplied to the OCA, I recalculated the net benefits from retiring the Merrimack plant (with no scrubber) using updated natural gas prices (i.e., for the year 2011 escalated at 2.5 percent per year through 2027). Case 1 on that attachment is the Company's own base case which shows a \$190 million net cost (2012 NPV) to customers from retiring Merrimack rather than scrubbing. However, a mere \$1 per MMBtu gas price reduction eliminates and reverses that loss. A \$2 per MMBtu price reduction translates into a \$235 million customer savings from plant retirement, and a \$3 per MMBtu price reduction indicates a \$447 million savings from plant **retirement**. *Id.* 33/5-13.
- These "sunk" costs must be netted from the modeled **retirement** benefits to obtain the full picture regarding customer impacts from plant **retirement**. Nonetheless, the savings from retiring Merrimack (on July 1, 2013) and avoiding most of the scrubber costs are so large under a study update, that it seems clear that **retirement**, from an early to mid-2009 perspective, would be the more

economical decision. *Id.* 34/3-8.

- As noted by the Commission, policy options might include eventual plant **retirement** or divestiture. *Id.* 34/19-20.
- The \$63 million of pre-construction net book value must be netted from the **retirement** benefits because it appears that they are reflected as costs in the "with" case, Therefore, consistency requires including them in the "without" case. *Id.* 34 fn. 6
- Potential actions in the 2008/2009 time frame might have included:
 - Outright cancellation of the Clean Air Project, with the associated **retirement** of the two coal units by the July 1, 2013 compliance deadline.
 - Divestiture of the Merrimack Plant, which might require the new buyer to complete the scrubber. (It is conceivable that a new buyer could pursue other options such as **retirement** or repowering as a gas-fired plant.) *Id.* 51/11-16.
- In the case of a plant **retirement** or divestiture, with stranded costs securitized, the Commission could require a write down of some of the Merrimack net book value that otherwise would be securitized. *Id.* 52/17-19.

Testimony of Elizabeth A. Stanton

Ms. Stanton's testimony was submitted on behalf of the Conservation Law Foundation, Inc. Ms. Stanton testifies that PSNH should have conducted a "cashflow" analysis of Merrimack Station and that such an analysis would, among other things, compare "the cost of providing the same energy services should the unit be **retired**" and that "if the cashflow analysis showed a negative net present value over the period of life of the capital expense, then **retirement** would be less costly than continued operation and a prudent manager would recommend against continuing to finance the project." 6-7.¹³ Ms. Stanton then prepared such a cash flow analysis and based on her "familiarity" with RSA 369-B:3-a, concluded that it "would have been economically prudent for PSNH to consider divestiture or **retirement** of Merrimack Station" in early 2009. *Id.* 15-16.

¹³ Ms. Stanton's testimony does not contain line numbers.

Testimony of Dr. Ranajit Sahu

Dr. Sahu's testimony was submitted on behalf of the Sierra Club. Dr. Sahu testifies about PSNH's obligation to consider a number of "potential future environmental requirements" in order to "determine whether it made sense to proceed with the project." Sahu at 4.¹⁴ Although Dr. Sahu opines that PSNH should have taken these requirements into account, he does not provide any specific opinion on what PSNH should have done in the face of such requirement. He does, however, state that:

- "PSNH did not properly (or at all) consider the ramifications of proceeding with the Scrubber Project," *Id.* at 5.
- "[A] prudent utility would have considered the possibility of how such rules might affect the viability of already aging coal plants such as Merrimack or Schiller." *Id.* at 9.
- "I have seen no evidence that PSNH properly considered any of the above potential (and now real) regulatory impacts in its decision to proceed with the Scrubber Project." *Id.* at 9.

While Dr. Sahu does not draw any specific conclusion as to what PSNH should have done in light of these requirements, implicit in his testimony is that PSNH had the ability to ignore the Legislature's requirement that the Scrubber be installed at Merrimack Station by July 1, 2013.¹⁵ Since he opines that regulatory requirements would have "impacted the viability of [this] already aging coal plant" it is unlikely the Dr. Sahu believes there would have been a willing purchaser of the Station if PSNH had decided to divest it. This leaves retirement of the Station as the only available option and it is therefore expected that Dr. Sahu will opine on that issue.

¹⁴ Dr. Sahu's testimony also does not include line numbers.

¹⁵ Dr. Sahu states in a footnote that he is "aware that it is PSNH's current argument that it had no choice but to proceed with the project on the theory that it was a legal mandate from the legislature" but he offers no explanation as to why this "theory" is not correct.

WHEREFORE, PSNH respectfully moves this Commission to:

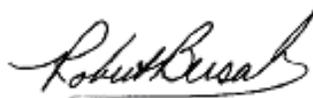
- A. Rule that any discussion of whether PSNH could have retired Merrimack Station as an alternative to compliance with the provisions of RSA 125-O:11-18 is irrelevant and therefore outside the scope of this proceeding;
- B. Accordingly strike all testimony submitted by any witness relating to the ability of PSNH to seek retirement of Merrimack Station as an alternative to compliance with the provisions of RSA 125-O:11-18; and,
- C. Grant such other relief as the Commission deems necessary and appropriate.

Respectfully submitted,

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Dated: December 31, 2013

By: _____



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Certification

I hereby certify that a copy of this Motion has been served electronically on the persons on the Commission's service list in this docket in accordance with Puc 203.11 this 31st day of December, 2013.



Robert A. Bersak