

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
THE ‘USED AND USEFUL’ RATEMAKING CONCEPT

Public Service Company of New Hampshire (“PSNH” or the “Company”), in accordance with Rule Puc 203.07, hereby moves to strike all testimony addressing recommendations that the Commission has authority to limit the recovery by PSNH of all prudent costs of complying with the requirements of the Scrubber Law (RSA 125-O:11 – 18) through the application of a new ratemaking standard that looks at the degree to which prudently incurred investments are "used and useful". The Scrubber Law at RSA 125-O:18 provides express statutory authority providing that PSNH “*shall* be allowed to recover all prudent costs of complying with the requirements” of the Scrubber Law. (Emphasis added.) Such testimony appears specifically in portions of the testimony of Stephen R. Eckberg (“Eckberg”) submitted by the Office of Consumer Advocate (“OCA”) and Michael E. Hachey (“Hachey”) may also appear in other parties’ direct testimony, cross-examination testimony, or rebuttal testimony.

On December 23, 2013, OCA submitted the pre-filed testimony of Mr. Eckberg, who is employed by the OCA as a Utility Analyst. In that testimony Mr. Eckberg states that under the requirements of RSA 378:27 and RSA 378:28, the Commission may limit PSNH’s recovery of the prudent investment made by PSNH to comply with the Scrubber Law. Similarly, Mr. Hachey’s

testimony of the same date alleges that the “used and useful” ratemaking principal applies to the scrubber project. This testimony conflicts with RSA 125-O:18, a later enacted and more specific statute.

RSA 125-O:18 specifically prescribes as a matter of law the amount of prudent investment PSNH may recover in its efforts to comply with the Scrubber Law. The Section expressly provides, “If the owner is a regulated utility, the owner **shall be allowed to recover all prudent costs of complying** with the requirements of this subdivision in a manner approved by the public utilities commission.” (Emphasis added). RSA 125-O:18 thus mandates that PSNH – a regulated utility that is the owner of the “affected sources” identified in RSA 125-O:12, I, **shall** be allowed to recover **all prudent costs** of complying with the Scrubber Law. Any other statute or ratemaking principle that conflicts with this statutory mandate cannot co-exist with this specific mandate. Likewise, any statute that purports to limit the ability of PSNH to recover **all prudent costs** cannot be reconciled with the express cost recovery statute enacted for the scrubber project. In sum, by enacting RSA 125-O:18, the Legislature has already determined that the Scrubber should be installed at Merrimack Station, has determined through its public interest findings in RSA 125-O:11 that this installation is in the public interest and has determined that the prudent costs of compliance with the statute shall be recovered.

This Commission and the New Hampshire Supreme Court have often noted that the use of the word “shall” in a statute constitutes a mandate. *See e.g., State v. Cheney*, 2011-465, 2013 WL 5943922 (N.H. Nov. 7, 2013). “The use of the word ‘shall’ in a statute is generally regarded as a command, *see State v. Fournier*, 158 N.H. 441, 446, 969 A.2d 434 (2009)... .”; *New Hampshire Electric Cooperative*, 76 NH PUC 72, 75 (1991) (“the word ‘may’ makes enforcement of a statute permissive and ... the word ‘shall’ requires mandatory enforcement.”).

The Commission first ruled on the nature of the Scrubber Law and its relationship to other contradictory laws in Order No. 24,898, wherein it held: “Having disposed of arguments that the provisions are reconcilable, the inquiry then shifts to which of the two conflicting statutes prevails.” Order No. 24,898, September 19, 2008, at 8. In that Order, the Commission ultimately held that the later, more specific, Scrubber Law prevailed:

We conclude that the proper interpretation of the conflicting statutes in this situation is that the Legislature intended the more recent, more specific statute, RSA 125-O:11, to prevail. 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 annual 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.

Id. at 9 (internal footnote omitted).

Mr. Eckberg claims that RSA 378:27 and RSA 378:28 provide the Commission with authority to allow PSNH recovery of less than the prudent costs incurred of complying with the Scrubber Law; RSA 125-O:18 provides otherwise. In RSA 125-O:18, as in RSA 125-O:11 discussed in Order No. 24,898, the Legislature enacted a specific mandate that PSNH **shall** be allowed to recover **all prudent costs** of complying with the Scrubber Law. If the Commission were to rule that other contradictory laws or ratemaking principles may be used to negate this specific mandate, it “would be nullifying the Legislature’s” mandate “rendering it meaningless.” Order No. 24,898 at 9.

As a result, any testimony from Mssrs. Eckberg or Hachey or any other witness seeking to limit the mandate contained in RSA 125-O:18 providing for recovery of **all** prudent costs incurred by PSNH to comply with the Scrubber Law should be deemed irrelevant and outside the scope of

this proceeding, and therefore stricken and the Commission should enter an order excluding all such testimony from this docket.

WHEREFORE, PSNH respectfully moves this Commission to :

- A. Rule that any testimony seeking to limit the mandate contained in RSA 125-O:18 providing for recovery of *all* prudent costs incurred by PSNH to comply with the Scrubber Law should be deemed irrelevant and outside the scope of this proceeding;
- B. Accordingly strike all testimony submitted by any witness relating to the ability of the Commission to limit the mandate contained in RSA 125-O:18 providing for recovery of *all* prudent costs incurred by PSNH to comply with the Scrubber Law; 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

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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.

A handwritten signature in black ink, appearing to read "Robert Bersak". The signature is written in a cursive style with a prominent initial "R".

Robert A. Bersak