

**THE STATE OF NEW HAMPSHIRE
BEFORE THE
NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 11-250

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

INVESTIGATION OF MERRIMACK STATION SCRUBBER PROJECT AND COST RECOVERY

**JOINT MOTION FOR BIFURCATION OF COMMISSION STAFF AND ITS
CONSULTANT**

NOW COME 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 respectfully move this Honorable Commission, pursuant to RSA 363:32, to bifurcate Steven Mullen and Commission Staff involved in the development of Mr. Mullen’s testimony in this docket and Jacobs Consultancy representatives who worked on their study of Merrimack Station. In support of this Motion, the Moving Parties state as follows:

1. The Moving Parties rely upon RSA 363:32 to support this Motion.

Pursuant to RSA 363:32, the Commission may designate members of its staff as “staff advocates” and “decisional employees.” Such designations are made in specific dockets and generally continue for the duration of the docket. Once designated as staff advocates, such staff members may not communicate concerning the docket with the Commissioners or with decisional employees and vice versa. The only communications allowed between staff advocates and Commissioners or decisional employees are those conducted

following a notice and with an opportunity for all parties in the docket to participate. This statute gives the Commission authority to bifurcate at any time during an adjudicative proceeding for good reason, including: (1) when the Commission determines that such members of its staff may not be able to fairly and neutrally advise the commission on all positions advanced in the proceeding; (2) the proceeding is particularly controversial and significant in consequence; (3) the proceeding is so contentious as to create a reasonable concern about staff's role; or (4) it appears reasonable that such designations may increase the likelihood of a stipulated agreement by the parties. *See e.g.* DE 11-184; DE 10-195; DG 07-072; DW 10-141, DW 07-105, DW 10-043 and DW 11-021.¹

2. This docket raises several of the above issues and warrants bifurcation. It concerns the prudence of Public Service Company of New Hampshire's spending approximately \$420 million on the scrubber project at Merrimack Station, the PSNH-owned generation station in Bow, and whether the Company should be allowed to recover some or all of the total amount invested in the scrubber project from default service customers. *See* RSA 125-O:18. This docket has an extensive procedural history with numerous contested motions to compel and requests for rulings regarding the scope of the prudency review. It is currently scheduled for hearings in March of 2014. The Moving Parties have full rights of participation in this proceeding.

¹ DE 11-184 was the Joint Petition for Approval of Power Purchase Agreements and Settlement Agreement, where the Commission of its own initiative in the Order of Notice designated staff members as advocates because they had been involved in negotiating the purchase power agreements; DE 10-195 was the PSNH Petition for Approval of a PPA between PSNH and Laidlaw where the Commission designated staff on the basis that it was a particularly controversial case and of significant consequence and that it would enhance the public's confidence in the fairness of the proceeding (Howland letter of January 21, 2011); DG 07-072 was the KeySpan Energy Delivery New England/Northern Utilities, Inc. docket where the Commission bifurcated Staff on the basis that the matter was particularly contentious and significant in consequence, 92 NH PUC 389, 394 (2007); DW 07-105 et al was the Lakes Region Water Company docket where the Commission determined that as a result of the nature of the disputes described in the pleadings that a discretionary designation was reasonable (Howland letter December 9, 2011).

3. The Company's investment in this project goes well beyond the average rate case investment in a physical plant. Relative to the size of the Company (i.e., its existing asset and capital base), \$420 million represents an enormous increase in resources. In 2008, before investing in the scrubber project, the Company had a net electric utility plant of less than \$1.4 billion (inclusive of construction work in progress) and capitalization of \$1.1 billion. (Source: Northeast Utilities SEC Form 10-K for the year ended December 31, 2008.) A possible increase in utility plant investment of close to one half billion dollars undoubtedly is significant.

4. In addition, while the financial impact to PSNH as a Company is huge, the retail customer impact is even larger. New Hampshire law requires that the prudent costs of the Clean Air Project be recovered only from default service customers, which is a diminishing portion of PSNH's total retail service. Approximately one half of PSNH's retail customer load is currently served by competitive electric suppliers. Therefore, only one half of the total PSNH service territory load will bear the entire cost of whatever portion of the scrubber investment is allowed into rates based on the current situation, and that could change over time.

5. The scrubber project generates a high level of interest from the general public and receives a great deal of press coverage. Since the project's inception in 2006 before the legislature, different groups representing a wide variety of constituents—environmental, business, competitive supplier, residential and political—have weighed in on the impact of this project. In his prefiled testimony, at page 29, Mr. Mullen noted the “extensive media coverage” of this matter and said that “the Scrubber project has generated lots of controversy due in large part to the large capital cost.” Therefore it is

particularly important to avoid even the appearance of partiality on the part of staff advising the Commissioners during the decision making process.

6. On December 23, 2012 Commission Staff member Steven Mullen filed testimony in this docket, testimony which supports PSNH's position that it should receive full recovery from ratepayers of the money it invested in the scrubber project. On that same date Frank DiPalma and Larry Dalton from Jacobs Consultancy filed testimony on behalf of the Staff. In addition, each of the parties to this motion filed testimony that contradicts PSNH's and Staff's testimony in this docket.

7. This is a heavily litigated docket; all parties to the docket have invested a significant amount of time and resources in the docket and it is more than two years old. Given that Mr. Mullen is the sole non-PSNH witness to put forth testimony in favor of PSNH recovering all costs associated with installing the scrubber, the other parties to the docket must seek further data from him and cross examine him at hearing. Under these circumstances, to allow Mullen/PUC staff to have ex parte communication in advance of the contested hearing in this matter would create the appearance of bias, especially if the Commission ultimately rules in favor of PSNH.

8. Moreover, as is clear from the convoluted procedural history in this case, the bases for bifurcation delineated in RSA 363:32 exist in this docket: (1) the docket concerns an issue or matter which is particularly contentious or controversial and which is significant in consequence, RSA 363:32(I)(a)(2); and (2) Staff and its consultant have committed "to a highly adversarial position in the proceeding" raising significant questions about whether Mr. Mullen and any other staff members involved in preparing

the testimony would “be able to fairly and neutrally advise the commission on all positions advanced in the proceeding, RSA 363:32(I)(a)(1).

9. For the above reasons, the Moving Parties respectfully request that, consistent with precedent of the Commission and in the public interest, the Commission grant this request for bifurcation.

10. The Moving Parties have circulated a draft of this motion to the Staff and the other parties to the docket and they take the following positions: Staff and PSNH oppose the motion. All other parties join the motion.

WHEREFORE, the Moving Parties respectfully request that this honorable Commission:

A. Grant the request to bifurcate Mr. Mullen and other Staff members who assisted in developing Mr. Mullen’s testimony and Jacobs Consultancy; and

B. Grant such other relief as may be just and equitable.

Dated: January 22, 2014

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of January 2014, a copy of the foregoing Joint Motion was sent electronically or by First Class Mail to the service list.



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