**THE STATE OF NEW HAMPSHIRE**
**before the**
**PUBLIC UTILITIES COMMISSION**

Public Service Company of New Hampshire

Docket No. DE 11-250

**Response**
**of**
**Public Service Company of New Hampshire**
**to**
**OCA's Five Motions to Strike Dated August 6, 2014**

Pursuant to N.H. Code Admin. Rules Puc § 203.07(e), Public Service Company of New Hampshire ("PSNH" or the "Company") hereby responds to the Office of Consumer Advocate's ("OCA") five Motions to Strike dated August 6, 2014 (the "Motions").

1. ***What is the scope of this proceeding***? That question is central to the five Motions filed by OCA and must be answered before PSNH can determine whether it opposes or supports those Motions.

2. Is the scope of this proceeding limited to a review of the actions PSNH took to comply with the Scrubber Law to have scrubber technology installed and operational at Merrimack Station by July 1, 2013, based on either the existence of a statutory mandate or the reasonable belief of PSNH based upon the information and facts that were known or knowable at the time that such a statutory mandate existed? Or, does the scope of this proceeding presume that there was no such statutory mandate and that a reasonable utility could not have prudently believed that such a statutory mandate existed at the critical times periods based upon the information and facts known or knowable at that time?

3. Only if the scope of this proceeding is the former – limited to a traditional prudence review of the Company's engineering, design, procurement, installation, and commissioning of a capital project -- would PSNH agree with OCA's Motions - - and then some. If this proceeding proceeds on the basis that the Scrubber Law required PSNH to install the Scrubber - - as the Supreme Court of New Hampshire so-stated twice in its decision in *Stonyfield Farm*,[1] the Legislature itself stated in the "Majority Committee Report" of the House Committee on Science, Technology and Energy, concerning H.B. 496 dated March 19, 2009 (included as Attachment WHS-R-12 to Mr. Smagula's rebuttal testimony),[2] and as this Commission, the OCA, CLF, Sierra Club, TransCanada, the N.H. Air Resources Council, the Site Evaluation Committee, and others have repeatedly stated[3] -- or if a utility such as PSNH could have reasonably believed that such a mandate existed based upon the facts known or knowable, then the entirety of the testimony of PSNH witnesses Large/Vancho, Harrison/Kaufman, and Shapiro would be unnecessary, and portions of the testimony of Smagula and Reed would also be unnecessary. Similarly, the testimony of TransCanada witness Hachey, CLF witness Stanton, Sierra Club witness Sahu, and OCA witness Kahal would also be unnecessary, as well as portions of the testimony of OCA witness Eckberg.[4]

4. In its seminal decision regarding this issue, Order No. 24,898 dated September 18, 2008, the Commission held, "the Legislature has made the public interest determination and ***required***

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[1] *Appeal of Stonyfield Farm*, 159 N.H. 227 (2009): "…the [scrubber] ***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." (at 228-229, emphasis added); "To comply with the Mercury Emissions Program, ***PSNH must install the scrubber*** technology and have it operational at Merrimack Station by July 1, 2013." (at 229, emphasis added).

[2] "[T]he majority decided that … ***the legislature mandated in 2006 for PSNH to install the scrubber*** without placing a limit on the costs… ." (Emphasis added.)

[3] See Mr. Smagula's rebuttal testimony for the litany of occasions when this Commission, the intervenors to this proceeding, and others have admitted that the Scrubber Law required PSNH to install the Scrubber.

[4] PSNH may file appropriate motions to this effect as deemed necessary and appropriate.

the owner of the Merrimack Station, viz., PSNH, to install and have operational scrubber technology to control mercury emissions no later than July 1, 2013." (at 10, emphasis in original).[5] The Commission itself emphasized that the Scrubber Law ***required*** PSNH to install and have operational the Scrubber by July 2013.[6] *Id.* The Commission also found that "The legislative history supports a conclusion that the Legislature viewed time to be of the essence." *Id. at 11*. And the Commission found that the Scrubber Law's "reporting requirement also suggests the Legislature's intent to retain for itself duties that it would otherwise expect the Commission to fulfill… ." In that original Order, the Commission succinctly held:

> The Legislature has already made an unconditional determination that the scrubber project is in the public interest. 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 particular set of circumstances; or (3) establish some other alternative review mechanism. Therefore, we must accede to its findings.

*Id.* at 12.

In its Conclusion to Order No. 24,898, the Commission held, "the Commission's authority is limited to determining at a later time the prudence of the costs of complying with the requirements of RSA 125-O:11-18 and the manner of recovery for prudent costs." *Id.* at 13.[7]

[5] Note the definition of "viz.": " [Latin, A contraction of the term *videlicet*, to wit, namely, or that is to say.] A term used to highlight or make more specific something previously indicated only in general terms." By saying "viz., PSNH" the Commission specifically identified PSNH as the entity having the obligation to install and have operational the Scrubber.

[6] *See also* Order No. 24,914 at 1: "RSA 125-O:11 et seq. requires PSNH to install the scrubber technology at Merrimack Station in order to reduce Mercury emissions."

[7] *See also* Order No, 24,979 at 16: "[B]y statute, the Commission's regulatory oversight here is limited to after-the-fact determinations of whether costs incurred by PSNH in complying with RSA 125-O:11-18 are prudent. RSA 125-O:18. If the Commission determines such costs are prudent, PSNH may recover those costs through its default service charge. RSA 125-O:18."

5. When this proceeding began, PSNH filed a rate recovery request consistent with the Commission's conclusion in Order No. 24,898 (and similar finding in Order No. 24,979) and PSNH's reasonable belief of the existence of a statutory mandate requiring installation of the Scrubber. Per the statutory requirement of RSA 125-O:18, PSNH sought recovery of its prudent costs of complying with the requirements of the Scrubber Law.[8] As discussed in Mr. Reed's expert testimony at page 5, the prudence standard "typically incorporates a presumption of prudence, which is often referred to as a rebuttable presumption. Thus, per Justice Brandeis, the burden of showing that the decision is outside of the reasonable bounds falls, at least initially, on the party challenging the utility's actions." As also noted in Mr. Reed's testimony, this "rebuttable presumption" was endorsed by the United States Supreme Court in *West Ohio Gas Co. v. Public Utilities Commission of Ohio*, 294 U.S. 63 (1935), where on behalf of the Court, Justice Cardozo wrote:

> Good faith is to be presumed on the part of managers of a business. In the absence of a showing of inefficiency or improvidence, a court will not substitute its judgment for theirs as to the measure of a prudent outlay. (294 U.S. at 72).

This Commission itself has adopted the *West Ohio Gas* standard. In *Re PSNH*, 62 NH PUC 127, 128 (1977), the Commission held: "[ ] Justice Cardozo speaking for the U. S. Supreme Court in *West Ohio Gas Co. v Ohio Pub. Utilities Commission* (1935) 294 US 63, 72, 6 PUR NS 449 79 L Ed 761, 55 S Ct 316, has said 'Good faith is to be presumed on the part of the manager of a business.'"

[8] Recall that when PSNH filed its direct testimony in the permanent rate portion of this proceeding on June 15, 2012, the substantive orders issued by the Commission regarding the Scrubber were Order No. 24,898 (which noted that the Scrubber Law required PSNH to install the Scrubber); Order No. 24,914 (which noted that the Scrubber Law required PSNH to install the Scrubber); Order No. 24,979 (which noted that the Scrubber Law required PSNH to install the Scrubber); Order No. 25,332 (which noted that the Scrubber Law required PSNH to install the Scrubber); and Order 25,346 (which noted that the Scrubber Law required PSNH to install the Scrubber). The Supreme Court's decision in *Stonyfield Farm* had also been issued when PSNH filed its direct testimony (stating that the Scrubber Law required PSNH to install the Scrubber.) It was not until months after PSNH had filed its direct testimony concerning permanent rates, that a series of orders discussing the scope of this proceeding were issued.

6. Under the U.S. Supreme Court's standard adopted by this Commission, PSNH's traditional prudence case filing was entitled to deference, unless and until another party challenged the efficiency or providence of PSNH's actions.[9] The intervenors (OCA, TransCanada, CLF, and Sierra Club) did just that when they filed the testimony of their respective witnesses on December 23, 2013. Until the testimony of OCA, TransCanada, CLF, and Sierra Club was filed (the "Intervenors' Testimony"), PSNH's case was sufficient to meet the requirements of the prudence standard referred to in RSA 125-O:18.

7. PSNH's rebuttal testimony, including the sections referenced in OCA's Motions, was necessary to respond to the plethora of issues raised in the Intervenors' Testimony. The Intervenors' Testimony is all based on the fundamental premises that the Scrubber Law did not mandate PSNH to install the Scrubber and that a prudent utility should have known that the law did not create such a mandate. Building on those premises, the Intervenors Testimony contended that due to gas prices caused by fracking and other market conditions PSNH could and should have sought variances or retired or divested Merrimack Station. But none of that is relevant if either RSA 125-O mandated PSNH to construct the Scrubber or if a prudent utility reasonably believed that such a mandate existed based upon the information known or knowable at the time.

8. Thus, the initial question set forth by PSNH -- ***What is the scope of this proceeding***? – is raised by OCA's Motions and must be answered before any decision may be made on the relevance of the testimony identified in OCA's Motions as well as the relevance of the Intervenors' Testimony.

9. The Commission has repeatedly found that PSNH was ***required*** to install the Scrubber. As noted earlier, that finding was explicit and emphasized by the Commission in 2008 in Order

[9] *See Re PSNH*, 65 NH PUC 433 (1980) ("The commission is aware that one of the basic foundations of utility regulation is regulatory deference to utility management decisions.")

No. 24,898: "the Legislature has made the public interest determination and ***required*** the owner of the Merrimack Station, viz., PSNH, to install and have operational scrubber technology to control mercury emissions no later than July 1, 2013." (Order No. 24,898 at 10, ***emphasis in original***).[10] Later in 2008, in Order No. 24,914 at 1, the Commission repeated that finding: "RSA 125-O:11 et seq. ***requires PSNH to install the scrubber technology*** at Merrimack Station… ." (Emphasis added). In 2009, the Commission again unequivocally found that installation of the Scrubber was a "legislative mandate" and that PSNH had no choice in what it must do:

> [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, 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

Order No. 24,979, June 19, 2009, at 15 (emphases added). Similarly, in its Order Granting Temporary Rates in this proceeding, Order No. 25,346, the Commission held: "RSA 125-O:11 ***requires*** PSNH to build the Scrubber to reduce mercury… ." Order No. 25,346 at 23.

10. If the Commission decides that both the New Hampshire Supreme Court and the Legislature were wrong, that a half-dozen of the Commission's own prior Orders were also incorrect, and finds that the Scrubber Law did not contain a mandate requiring PSNH to install the Scrubber, that given the facts known and knowable at the time a reasonable utility should have known that the Supreme Court and the Commission's Orders were wrong, and that PSNH

[10] *See also* Secretarial Letter dated August 22, 2008, in Docket No. DE 08-103, "RSA 125-O:11, enacted in 2006, ***requires PSNH to install new scrubber technology at Merrimack Station*** by July 1, 2013 that will achieve at least an 80 percent reduction in mercury emissions." (Emphasis added.)

indeed knew or should have known that it had discretion regarding the Scrubber Law, it would also have to ignore the admissions of every intervenor to this proceeding and findings of sister agencies.[11] Only if the Commission decides not to give credence to its own prior decisions, as well as to ignore decisions of the Supreme Court, the Legislature, and other agencies, and admissions of every intervenor in this proceeding, would any of the material identified in the OCA's five Motions or contained in all of the Intervenors' Testimony be relevant. That just cannot be the case.

11. But, if the Commission decides that the proper path is to indeed disregard that vast body of judicial and administrative precedent and admissions, and similarly determine that a reasonable utility such as PSNH should have known that the same vast body of judicial and administrative precedent and admissions were incorrect, then PSNH would object to the Motions of OCA, and responds thereto below.

**ALL FIVE MOTIONS**

12. In all five of OCA's Motions OCA argues that references to the Legislature's 2009 decisions not to alter, amend, or repeal the Scrubber Law by finding both SB 152 and HB 496 inexpedient to legislate are irrelevant. That is just not the case.

13. This proceeding is a prudence review. The Commission approved the standard of prudence to which PSNH would be held in its Order No. 23,549 dated September 8, 2000:

> **Prudence:** The standard of care which qualified utility management would be expected to exercise under the circumstances that existed at the time the decision in question had to be made. In determining whether a decision was prudently made, only those facts known or knowable at the time of the decision can be considered.

[11] See footnote 3, *supra.*

(*See* Order No. 23,549, 85 NH PUC 536, 555 (2000).

14. OCA's own witness, Mr. Kahal, agrees that what was known or knowable to the Company at the time is relevant and must be considered: "An appropriate remedy should take into account the circumstances and context of PSNH management's decision-making, including legal or regulatory mandates and market uncertainties." Kahal testimony at page 8. Many of OCA's arguments in the Motions are directed at striking the very "circumstances and context" that its own witness testifies must be taken into account.

15. Moreover, in the Intervenors' Testimony supplied on behalf of TransCanada by Mr. Hachey, there are myriad references to the Legislature's actions in 2009 regarding SB 152 and HB 496. Indeed, Mr. Hachey includes as his Attachment 27 "Legislative History of SB 152, 2009 Legislative Session" that is sixty pages long.

16. The Legislature's actions rejecting SB 152 and HB 496 were facts that were "known or knowable" during the time period relevant to this proceeding. The Majority Report of the House Science, Technology and Energy Committee regarding HB 496 stating that the Scrubber law was a legislative mandate, that the Majority did not want the project paused or cancelled, and that the retention of hundreds of jobs was desired were also facts "known or knowable" during the time period relevant to this proceeding.

17. A reasonable person would use these statements from the Legislature's jurisdictional committee, along with all other "facts known or knowable" when determining what the proper course of action is.[12] The reliance of PSNH and its witnesses on the actions of the Legislature does not necessarily relate to the "truth of the matter asserted" (N.H. Rule of Evidence 801(c)).

[12] The Commission did just that in its Order No. 24,898, where it repeatedly used references to legislative history to come to its conclusions.

But it is in fact a necessary and proper part of assessing what a reasonable person would understand the Scrubber Law to mean based upon what was "known or knowable" at the time.

18. OCA argues that the actions of the Legislature in 2009 are not relevant, as a matter of law, to determine what RSA Chapter 125-O means. But the issue of whether legislative action killing bills may be used to interpret a statute is different from whether a party, in this case PSNH, under a mandate to act, might consider the Legislature's failure to change that mandate as relevant. And that is particularly true where, at the time the Legislature failed to pass a bill that would have given jurisdiction to this Commission to review (and presumably stop construction of the Scrubber) this Commission had already found that it had no such jurisdiction and that the Legislature had mandated construction.

19. For these reasons, OCA's Motions to Strike pertaining to references to the Legislature's actions during 2009 should be denied.

**MOTION TO STRIKE SECTIONS OF REBUTTAL TESTIMONY OF DRS. HARRISON AND KAUFMAN**

20. Drs. Harrison and Kaufman prepared an independent economic analysis of the economics surrounding the installation of scrubber as of two dates, mid-2008 and early-2009.

21. OCA claims that their analysis and accompanying testimony is irrelevant because it was conducted after the Scrubber was installed, that it is a hindsight review, and that it is improper rebuttal. OCA is wrong.

22. PSNH presented its direct case based upon this being a traditional prudence review of compliance with the Scrubber Law's mandate in accordance with the U.S. Supreme Court's presumption of prudence. Unless and until that rebuttable presumption was challenged, PSNH

had satisfactorily met its burden.[13] Only when the Intervenors' Testimony was filed challenging the rebuttable presumption of prudence did the plethora of issues beyond a traditional project prudence review become part of this proceeding. The earliest procedural schedule issued by the Commission on June 26, 2012, for this portion of the proceeding noted that PSNH had the opportunity to file Rebuttal Testimony. When the intervenors filed the testimony of Stanton, Hachey, Kahal, Eckberg and Sahu, they set the stage for the topics that PSNH would have to rebut. Hachey, Stanton and Kahal presented detailed economic analyses regarding the Scrubber Project. PSNH certainly has the right to rebut their testimony. That is exactly what Drs. Harrison and Kaufman did.

23. The analysis performed by Drs. Harrison and Kaufman is not a hindsight analysis as claimed by OCA. Drs. Harrison and Kaufman expressly testified that their analysis used information available in mid-2008 and early-2009 – i.e., information known or knowable at the requisite time periods. They did not use information that became available later - - which would have been the hallmark of a "hindsight" review. OCA's characterization of the work of Drs. Harrison and Kaufman as the "2014 Studies" is misleading. They specifically testified that their analysis was conducted based upon information from the mid-2008 and early-2009 time periods. Even OCA in its Harrison/Kaufman Motion at paragraph 2 admits that their analysis was "retrospective" and not hindsight.[14] If their analysis is considered to be improper "hindsight,"

[13] *See also* paragraph 5 through 7, *supra.*

[14] For cases differentiating between "retrospective" and "hindsight" *see Connecticut Light and Power Co.*, 43 FERC ¶ 63,029 (1988), and *Dakota Gasification Co*. 77 FERC ¶ 61,271 (Dec. 18, 1996) (The ALJ also stated that "a determination of the prudence of any given set of actions must be retrospective and fact specific, rather than one based on current circumstances.")

then the analyses presented in the Intervenors' Testimony would suffer from that same flaw, and must be similarly stricken.[15]

*24.* Indeed, during discovery, OCA was asked about the relevance of the Report prepared by Commission Staff and The Liberty Consulting Group for this Commission in Docket No. IR 13-020 titled "*Report on Investigation into Market Conditions, Default Service Rate, Generation Ownership and Impacts on the Competitive Electricity Market*" dated June 7, 2013. That report was identified and referenced in the testimony of OCA witness Kahal. In response to PSNH data request PSNH 1-27, OCA responded that

> This report is relevant to prudence because it provides information on the present cost effect of a finding of imprudence. The 2013 Liberty Consulting Report documents and analyzes the scrubbed Merrimack plant's market value and its potential adverse rate impact on default customers. It concludes that the plant today is highly uneconomic relative to its net book value. That is, if the Staff-Liberty Report is "wrong" and the scrubbed Merrimack plant is cost-effective today (relative to its book value and operating costs) as compared to the wholesale market, then the dollar impact of any imprudence may not be at issue in this docket. That is, while PSNH may have been imprudent in its conduct, in this scenario customers were not harmed.

The analysis supplied by Drs. Harrison and Reed is equally relevant under this standard espoused by OCA's response to PSNH's data request.

25. OCA next asserts that the analysis prepared by Drs. Harrison and Kaufman is irrelevant because "These are new studies, never before seen by the parties and which played no role in the PSNH decision making process." In essence, OCA is saying that PSNH should not be allowed to rebut the Intervenors' Testimony. This is a preposterous claim. None of the analyses in the Intervenors' Testimony was previously seen by the parties, nor did it play any role in "the PSNH

[15] PSNH may file appropriate motions to this effect as deemed necessary and appropriate.

decision making process." Under OCA's argument, those analyses in the Intervenors' Testimony would similarly have to be stricken.

26. OCA also complains that Drs. Harrison and Kaufman analysis brings in wide ranging extraneous details and assumptions from data sources whose underlying reliability is not subject to analysis. That claim is similarly incomprehensible. Rebuttal testimony always "rebuts" someone else's facts and testimony. And, PSNH received and responded to hundreds of data requests on its rebuttal testimony, providing well over a thousand pages of documents, allowing OCA and other parties to test the assumptions of the witnesses.

27. For these reasons, OCA's Motion to Strike pertaining to the testimony of Drs. Harrison and Kaufman should be denied.

**MOTION TO STRIKE SECTIONS OF REBUTTAL TESTIMONY OF MESSRS. LARGE AND VANCHO**

28. Messrs. Large and Vancho presented testimony to present and discuss the economic analyses they conducted regarding the scrubber project on behalf of PSNH.

29. OCA claims that their testimony referring to the Legislature's decision not to enact either SB 122 or HB 496 in 2009 is irrelevant. The OCA is wrong.

30. PSNH incorporates paragraphs 12 to 19, *supra.*

31. The reference to the 2009 legislative efforts contained in the testimony of Messrs. Large and Vancho was to provide their reasons why further economic analyses of the Scrubber Project were unnecessary. Whether their understanding of the Legislature's actions were right or wrong, their testimony accurately indicates why they took the actions they did during that timeframe. If

OCA's Motion was granted, it would place that portion of Messrs. Large and Vancho's testimony in a vacuum, unsupported by any foundation.

32. OCA also objects to a portion of testimony in which Messrs. Large and Vancho compare their analyses to the analysis performed by Drs. Harrison and Kaufman. OCA claims that since the Harrison/Kaufman testimony should not be allowed, the Large/Vancho testimony referring to it must also be stricken. For the reasons set forth earlier regarding OCA's Motion concerning Drs. Harrison and Kaufman, OCA's assertion is incorrect. In addition, Messrs. Large and Vancho's comparison of the results of their contemporary economic analyses to the results produced independently by outside expert economists (Drs. Harrison and Kaufman) further reveals why the testimonies of both Large/Vancho and Harrison/Kaufman are relevant. OCA cannot at the same time find it proper to allow the Intervenors' Testimony to criticize the analyses of Large/Vancho and simultaneously argue that the testimony of Harrison/Kaufman rebutting those criticisms is improper.

33. For these reasons, OCA's Motion to Strike pertaining to the testimony of Messrs. Large and Vancho should be denied.

**MOTION TO STRIKE SECTIONS OF REBUTTAL TESTIMONY OF MR. REED**

34. Mr. Reed presented testimony to respond to the Intervenors' Testimony relating to the prudence of PSNH regarding the Scrubber Project, as well as to Intervenors' Testimony suggesting that PSNH had viable alternatives to pursuing the Project. His testimony also rebuts specific claims made in the Intervenors' Testimony by Dr. Stanton and Messrs. Hachey and Kahal.

35. OCA claims that portions of Mr. Reed's testimony referencing legislative history, referencing documents from 2013, and "legal argument" should be stricken. OCA is wrong.

36. PSNH incorporates paragraphs 12 to 19, *supra.*

37. Mr. Reed was presented by PSNH as an expert witness. His qualifications and prior testimonial experience was set forth in detail in his testimony.

38. At page 23 of Mr. Reed's testimony, he was asked during what timeframe could installation of the Scrubber have been "reconsidered." He testified in essence that because installation of the Scrubber was mandated by law, action of the Legislature would be required to alter that mandate. His reference to the Legislature's decision to find SB 152 and HB 496 inexpedient to legislate in 2009 was to support his opinion that further "reconsideration" was reasonably foreclosed by the Legislature's decision. Clearly, in 2009 the Legislature did not change the Scrubber Law, despite having an opportunity to do so. That is the essence of Mr. Reed's reference to that Legislative effort. If OCA's Motion was granted, it would place that portion of Mr. Reed's testimony in a vacuum, unsupported by any foundation.

39. The circa-2013 documents referred to by Mr. Reed are discussed as part of his analysis of whether divestiture of Merrimack Station was a practical option available to PSNH. As part of his expert analysis, Mr. Reed's testimony notes that the length of time such a divestiture proceeding might have taken was a relevant consideration. As part of his analysis of that issue, Mr. Reed referenced an October, 2013, letter from the Commission Chair to the Chair of the Electric Restructuring Oversight Committee discussing the lengths of time necessary to conduct adjudicative proceedings before the Commission. Use of that document in the context put forward by Mr. Reed does not involve any "hindsight" analysis, nor does it violate the

proscription on the use of post-September 2011 "regulatory proposals or actions, market conditions or decisions" as claimed by OCA.

40. Finally, OCA complains that Mr. Reed's use of "legal analysis and interpretation of federal and state case law and Commission orders on the prudence standard" was improper as it amounts to "legal argument." As noted earlier, Mr. Reed is presented as an expert witness. Attachment JJR-1 to his testimony references at least a dozen prior occasions across the United States where he has testified regarding the proper "prudence" standard. Referencing Rule 703 of the New Hampshire Rules of Evidence, this Commission has previously held that the facts or data reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject need not be admissible in evidence. *Re Hampton Water Works*, 84 NH PUC 703, 704 (1999). Mr. Reed's testimony sets forth the facts or data he relied upon in forming his opinions.[16] If OCA's Motion was granted with respect to this issue, experts such as Mr. Reed would be confined to giving their opinions with no basis therefore whatsoever. That just cannot be – and is not – the case.

41. OCA's argument is further belied by the fact that its own witness, Mr. Kahal, included the very same type of testimony that OCA now claims is irrelevant. On page 16 of his testimony, Mr. Kahal includes references to Commission Orders to support his opinions regarding the proper prudence standard. Clearly, PSNH has the right to rebut Intervenors' Testimony, including that of Mr. Kahal, in a manner identical to what was contained in that Intervenors' Testimony.

42. Moreover, in the Intervenors' Testimony supplied on behalf of TransCanada by Mr. Hachey, there are myriad references to the Legislature's actions in 2009 regarding SB 152 and

[16] Note also NH Rule of Evidence 704: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact."

HB 496. Indeed, Mr. Hachey includes as his Attachment 27 "Legislative History of SB 152, 2009 Legislative Session" that is sixty pages long.

43. For these reasons, OCA's Motion to Strike pertaining to the testimony of Mr. Reed should be denied.

**MOTION TO STRIKE THE REBUTTAL TESTIMONY OF DR. SHAPIRO**

44. Dr. Shapiro presented testimony to present and discuss her study on the economic impacts of constructing a scrubber at Merrimack Station.

45. OCA claims that Dr. Shapiro's testimony should stricken because it discusses the legislative history of SB 152 and it addresses public interest benefits of the Scrubber which OCA says are not before the Commission. OCA is wrong.

46. PSNH incorporates paragraphs 12 to 19, *supra.*

47. Dr. Shapiro was presented by PSNH as an expert witness. Her qualifications and prior testimonial experience was set forth in detail in hers testimony.

48. In 2009, Dr. Shapiro prepared a study to provide an estimate of the economic benefits to New Hampshire – jobs, gross state product, and personal income – from the construction of the Scrubber. That study was included as Attachment LKS-2 to her testimony. Her study found that about 1,000 jobs per year would be created (or saved) in New Hampshire from the scrubber construction project.

49. The creation or saving of jobs during a period of deep recession is a significant matter of public interest. As Dr. Shapiro notes in her testimony, the Legislature itself discussed the importance of those Scrubber Jobs. When the House Science, Energy and Technology Committee determined not to change the Scrubber Law in 2009, the majority noted that it did not

want the Scrubber Project paused or cancelled because such actions "would lead to the loss of several hundred short term and long term jobs related to the construction and operation of the scrubber." (See the "Majority Committee Report" of the House Committee on Science, Technology and Energy, concerning H.B. 496 dated March 19, 2009 [included as Attachment WHS-R-12 to Mr. Smagula's rebuttal testimony]).

50. The Legislature's desire to preserve the jobs created by the Scrubber Project is indeed relevant to this proceeding, and is proper rebuttal. The Intervenors' Testimony voices arguments why the Intervenors feel the Scrubber should not have been installed. They all revolve around the economics of the Project as they see them, with no value ascribed to the public interest benefits of the Project. Dr. Shapiro's testimony rebuts this Intervenors' Testimony by demonstrating a materially significant public interest the Project produced – jobs during a recession – that all the Intervenors have ignored.

51. The Intervenors' Testimony also includes sizeable amounts of testimony suggesting the ability of PSNH to retire Merrimack Station in lieu of installing the Scrubber. See Hachey testimony at pages 23 and 28; Stanton testimony at 6, 7 10, 13, 14, 15, 16; Kahal testimony at 8, 17, 18 22, 26, 27, 30, 31, 33, 34, 51. Under RSA 369-B:3-a, for PSNH to retire Merrimack Station, the Company would have had to demonstrate and this Commission would have had find that such retirement was in the "public interest." The Intervenors' Testimony alleging that retirement of Merrimack Station was an available option omitted any discussion of this statutory requirement for a "public interest" determination. Dr. Shapiro's testimony provides facts necessary to rebut the Intervenors' contention that retirement of Merrimack Station would meet this statutory "public interest" hurdle.

52. OCA's contention that "factors of economic benefit are reviewed in a public interest determination, not a prudency determination" is misguided. The Intervenors' Testimony argues that retirement should have been pursued in lieu of Scrubber installation. Dr. Shapiro's testimony rebuts those contentions by demonstrating that there were significant public interest benefits beyond economics that needed to be taken into account to determine the prudence of moving forward with the Scrubber Project (again assuming that PSNH had discretion to make any contrary decision, an assumption PSNH rejects).

53. With respect to OCA's arguments relating to legislative history, PSNH incorporates paragraphs 36-38, *supra*. *See also* paragraph 66-68, *infra*, regarding the relevance of Dr. Shapiro's testimony as it relates to the quantification of any imprudence harm.

54. For these reasons, OCA's Motion to Strike pertaining to the testimony of Dr. Shapiro should be denied.

**MOTION TO STRIKE SECTIONS OF THE REBUTTAL TESTIMONY OF MR. SMAGULA**

55. Mr. Smagula presented testimony to rebut the myriad claims and arguments contained in the Intervenors' Testimony that PSNH's actions regarding the Scrubber Project were not prudent.

56. The OCA Motion regarding Mr. Smagula's testimony contains 18 separate paragraphs detailing why various portions of his testimony should be stricken. Once again, OCA is wrong.

57. In paragraph 4 of the OCA Smagula Motion, OCA argues "present day scrubber operation is outside the scope of this prudency investigation and not allowable." OCA argues that as part of his rebuttal to claims that PSNH was imprudent, Mr. Smagula should not be

allowed to set the "Contextual Factors" of the "facts known or knowable" at the relevant time. Why are these facts relevant to this proceeding? As Mr. Smagula states in his testimony (at page 6), "It is important because this is a prudence proceeding to determine what a reasonable person would have done under the circumstances faced by PSNH." The Intervenors' Testimony directly raised the issue of PSNH's imprudence – PSNH certainly has the right to rebut that testimony.[17] The "facts known and knowable" by PSNH go to the heart of the prudence obligation that PSNH must meet. In addition, as noted earlier in paragraph 14, *supra*, OCA's own witness Mr. Kahal testified that, "An appropriate remedy should take into account the circumstances ***and context*** of PSNH management's decision-making, including legal or regulatory mandates and market uncertainties." Kahal testimony at page 8, emphasis added. By seeking elimination of the context set forth by Mr. Smagula in pages 3 to 28 of his rebuttal testimony, OCA seeks to have the Commission decide the prudence issue in a vacuum, in a manner contrary to that espoused by its own witness.

58. In paragraph 5 of the OCA Smagula Motion, OCA argues that Mr. Smagula's testimony relating to the public interest is irrelevant. The Legislature's concerns regarding the public interest benefits of the Scrubber were "facts known or knowable" at the relevant time. In an unusual move, not only did the Scrubber Law mandate the installation of specific Scrubber technology, at a specific location, by a specific date with specific emissions reductions requirements, but it also made numerous statements of purpose and finding, which included public interest determinations, in that law itself at RSA 125-O:11. And, as discussed earlier[18], the Intervenors' Testimony raises the prospect of retiring Merrimack Station in lieu of

[17] *See* paragraphs 5 and 6, *supra*, regarding the rebuttable presumption that existed prior to the filing of the Intervenors' Testimony.

[18] *See* paragraphs 49 through 52, *supra*.

proceeding with the Scrubber Project – a process that by statute involves a consideration of public interest benefits. Mr. Smagula's testimony referring to public interest benefits of the Scrubber were "known or knowable" facts that PSNH considered as part of the project planning. Those public interest benefits clearly rebut the Intervenors' Testimony arguments that totally ignored those benefits.

59. In paragraphs 6, 7, and 8 of the OCA Smagula Motion, OCA argues that Mr. Smagula's testimony relating to legislative history and statutory interpretation is irrelevant.

60. PSNH incorporates the arguments set forth in paragraphs 12 to 19 and paragraph 40-42, *supra*, as to why OCA is wrong.

61. In paragraph 9 of the OCA Smagula Motion, OCA complains that the appendices and Attachment WHS-R-1 to Mr. Smagula's testimony should be stricken because it is legal argument and discusses legislative history. OCA is wrong.

62. In rebuttal to the Intervenors' Testimony, Mr. Smagula sets forth detailed facts and circumstances known to him and PSNH as the Scrubber Project progressed. The truth of the matters asserted in the litany of items included in Mr. Smagula's testimony is not necessarily in issue - - what is in issue is that every one of the matters set forth in his appendices and in Attachment WHS-R-1 to his testimony were "known or knowable" to him and PSNH and were considered as part of the project planning. Those statements, decisions, admissions, etc. rebut the Intervenors' Testimony arguments that totally ignored those statements, decisions, admissions, and the like. Indeed, those matters form the "context of PSNH management's decision-making" as discussed in Mr. Kahal's testimony.

63. In paragraph 10 of the OCA Smagula Motion, OCA asserts that the Brief of the State of New Hampshire submitted by the Attorney General's Office to the New Hampshire Supreme

Court in the *Stonyfield Farm* case is legal argument and must be stricken as irrelevant. The OCA is wrong.

64. The position of the State of New Hampshire regarding the Scrubber Law as set forth in the State's Brief was an item known to Mr. Smagula and PSNH as the Scrubber Project progressed. The Scrubber Law contains stringent enforcement provisions in RSA 125-O:7 that include the possibility of felony prosecution and assessment of significant monetary penalties. The view of the Attorney General's Office – the State's chief prosecutor – regarding the meaning and intent of the Scrubber Law is an extremely important data point that any reasonable person would consider when determining what that Law required in order to ensure compliance and avoidance of criminal sanctions.

65. In paragraph 11 of the OCA Smagula Motion, OCA argues that Attachment WHS-R-03 demonstrating that the "affected sources" defined in RSA 125-O:12, I produced well over $100 million in customer savings over market purchases last winter is irrelevant to this proceeding because those savings were produced in 2013-2014. OCA is wrong.

66. The Intervenors' Testimony arguing that PSNH was imprudent for moving forward with the Scrubber Project includes recommendations on how much, if any, of its investment PSNH should be allowed to recover.. As Mr. Reed notes in his testimony (at page 9), this Commission has previously held, "Prudence is 'essentially....an analogue of the common law negligence standard,'" citing to *Re PSNH,* 77 NHPUC 268, 270 (1992). In a common law negligence setting, when calculating "damages," items mitigating any such damage are relevant and must be considered. In rebuttal to the disallowance recommendations included in the Intervenors' Testimony, Mr. Smagula notes the significant savings that have already flowed to customers as part of the ratemaking process. Those savings are indeed relevant if the Commission determines

that PSNH should have ignored the statutory mandate that the Commission itself, and every other party, agency, and Court, have said existed.

67. OCA's own witness, Mr. Kahal, apparently agrees with this concept. In his testimony at page 9 Mr. Kahal testifies that "the appropriate imprudence remedy may depend upon decisions over the long-run treatment of Merrimack, e.g., potentially pursuing divestiture as suggested in a recent Staff report on default service." In response to PSNH data request 1-19 referring to this testimony, Mr. Kahal was asked "how a future divestiture of Merrimack Station would impact the prudent costs of complying with the requirements of the Scrubber Law." In his response, Mr. Kahal indicated that if future events involving Merrimack Station produced sufficient proceeds, there might be no quantified imprudence: "proceeds …might provide a partial (or full) offset to the actual book cost of the Merrimack scrubber. The larger that offset, the smaller the cost of potential imprudence. If divestiture proceeds (hypothetically) covered the full cost of the scrubber (or the unavoidable costs of the scrubber), then there would be no quantified imprudence."

68. Similarly, in response to PSNH data request 1-27 to OCA, its witness Mr. Kahal comments on "the present cost effect of a finding of imprudence," saying that "if … the scrubbed Merrimack plant is cost-effective today (relative to its book value and operating costs) as compared to the wholesale market, then the dollar impact of any imprudence may not be at issue in this docket. That is, while PSNH may have been imprudent in its conduct, in this scenario customers were not harmed."

69. As OCA's own witness referenced post-September 2011 documents in his testimony, and justified the relevance of those references based on their potential ability to mitigate any quantification of imprudence, it is rather unfair of OCA to argue that Mr. Smagula's referenced testimony is irrelevant and should be stricken.

70. In paragraph 12 of the OCA Smagula Motion, OCA argues that Attachment WHS-R-04 should be stricken.

71. The arguments against OCA's Motion for this item are substantially the same as those set forth in paragraphs 57 and 58, *supra.* The value of fuel diversity and system reliability produced by the "affected sources" are benefits that must be included if the Commission determines that PSNH should have ignored the statutory mandate that the Commission itself, and every other party, agency, and Court, have said existed.

72. In paragraph 13 of the OCA Motion, OCA claims that Attachment WHS-R-05 discussing the Scrubber's compliance with the Scrubber Law's emissions reduction requirements is irrelevant because the stack testing determining that compliance occurred "long after September 2011." OCA is wrong.

73. In Order No. 25,346, "Order Granting Temporary Rates," issued in this docket on April 10, 2012, the Commission summarized arguments made by Sierra Club alleging that PSNH was not entitled to establishment of temporary rates because "PSNH has not provided documentation of the mercury reduction and without such documentation, the Company's petition does not meet the burden to establish temporary rates." Order No. 25,356 at 23. In response to Sierra Club's argument, the Commission noted:

> The Legislature anticipated that the Scrubber would have to operate for a period of time before the actual degree of mercury reduction is known. See RSA 125-O:15 (requiring stack tests or other methodology twice per year to determine mercury emissions levels). … The Commission will consider any DES decision on mercury reduction in the permanent rate case portion of this proceeding

*Id*. at 24.

74. This docket is now "in the permanent rate case portion of this proceeding" referred to by the Commission in Order No. 25,356. Mr. Smagula's testimony and attachments demonstrating

the Scrubber's emissions reductions success are exactly what this Commission anticipated in that Order.

75. Paragraphs 14 and 15 of the OCA Smagula Motion again argue that portions of Mr. Smagula's testimony relating to legislative history are irrelevant and should be stricken.

76. For all the reasons set forth in paragraphs 12 to 19 and paragraph 40-42, *supra*. OCA is wrong.

77. The information included in the portions of testimony OCA seeks to strike includes matters "known or knowable" to Mr. Smagula and PSNH at the times that project planning was progressing. These are all pieces of information that qualified utility management and a reasonable person would consider when determining the proper course of action. Mr. Smagula is qualified and entitled to present such testimony.

78. OCA next argues on paragraph 16 of the OCA Smagula Motion that "Department of Environmental Services orders on the appeals of Sierra Club and CLF … are irrelevant to this prudence inquiry." OCA is wrong.

79. What OCA is referring to are decisions issued by the Air Resources Council, a sister adjudicative agency to this Commission,[19] regarding the Scrubber Project. Recall the New Hampshire Attorney General noted that RSA Chapter 125-O, which contains the Scrubber Law, is an environmental statute administered by NHDES. Hence, the views of that agency regarding the Scrubber Law are of particular significance.[20] The Air Resources Council documents addressed in Mr. Smagula's testimony and his Attachments WHS-R-18 and WHS-R-19 include significant findings from the Air Resources Council made as part of quasi-judicial adjudicative

[19] *See* RSA 21-O:11.

[20] *See Re PSNH*, 76 NH PUC 332, 333 (1991) citing to "*New Hampshire Retirement System v Sununu* 126 N.H. 104 (construction of a statute by those charged with its administration is entitled to substantial deference.)"

proceedings. The Air Resources Council's findings that, "As a matter of law, PSNH is required to install and operate the Scrubber system" and "PSNH is required to reduce mercury emissions from these sources by at least 80% on an annual basis…starting in July, 2013" were facts known to Mr. Smagula and PSNH when the Company proceeded with the Scrubber project.[21]

80. In paragraph 17 of the OCA Smagula Motion, OCA claims that Attachment WHS-R-20 to Mr. Smagula's testimony is irrelevant and must be stricken. That attachment is a Sierra Club webpage printout wherein the Sierra Club notes, "The NH Legislature has mandated (RSA 125-O et seq.) the installation of the wet flu [sic] gas desulphurization system ('scrubber') at the Merrimack Station generating facility in Bow, NH."

81. The Sierra Club website printout included as Attachment WHS-R-20 amounts to an admission by a party opponent (Sierra Club) that the Scrubber Law did indeed create, or could reasonably be interpreted to have created, a "mandate" requiring installation of the Scrubber. This testimony rebuts the Intervenors' Testimony, all of which is based on the absence of any such "mandate."

82. This statement from the Sierra Club (that Sierra Club viewed the Scurbber Law as creating a mandate) was a fact known to Mr. Smagula and PSNH when the Company proceeded with the Scrubber project.

83. Similarly, in paragraphs 18 and 19 of the OCA Smagula Motion, OCA argues that Attachments WHS-R- 21, 22, 23, and 24 to Mr. Smagula's testimony should be stricken. Those attachments are documents and pleadings produced by CLF, in which CLF repeatedly states

[21] The NHDES's understanding of the Scrubber Law was also set forth by the Director, Air Resources Division of DES (and now PUC Commissioner) Robert R. Scott in his Findings of Fact and Director's Decision, where he stated, "New Hampshire state law (RSA-125:O) ***requires PSNH to undertake this project***… " and "RSA 125-O:13 ***requires PSNH to install a FGD system*** to control mercury emissions from Merrimack Station Units MK1 and MK2 no later than July 1, 2013." (Emphases added.)

during the time periods relevant to this proceeding that the Scrubber Law requires PSNH to install the Scrubber.

84. Mr. Smagula's testimony and Attachments WHS-R-21, 22, 23, and 24 contain admissions by a party opponent (CLF) that the Scrubber Law did indeed create a "mandate" requiring installation of the Scrubber. This evidence rebuts the Intervenors' Testimony, all of which is based on the absence of any such "mandate."

85. These items from CLF were facts known to Mr. Smagula and PSNH when the Company proceeded with the Scrubber project.

86. Finally, in paragraph 21, of the OCA Smagula Motion, OCA provides general arguments why "'Contextual Factors' testimony, Supplemental testimony, Appendices and Attachments" to Mr. Smagula's testimony should be stricken.

87. OCA first argues in subparagraph 1 that these items are "in the form of direct testimony" that Mr. Smagula either previously testified to or could have testified to. As noted earlier in this Response, it was not until the Intervenors' Testimony was filed raising issues relating to the absence of a mandate in the Scrubber Law – contrary to the Intervenors' previous statements discussed above -- that the detailed information included in Mr. Smagula's rebuttal testimony was necessary. OCA apparently believes that utilities such as PSNH should be prescient and able to predict what myriad intervenors in a complex adjudicative proceeding such as this might present in their testimony, and include "rebuttal" to such testimony in initial testimony, even before the intervenors' testimony is filed. Such a position is incredible. Mr. Smagula's testimony fairly rebuts the Intervenors' Testimony filed in this proceeding, perhaps most importantly be clearly demonstrating that every one of them had previously taken the position that the Scrubber Law required PSNH to install the Scrubber. Recall also the testimony of

OCA's own witness, Mr. Kahal, in which he testified, "An appropriate remedy should take into account the circumstances and context of PSNH management's decision-making, including legal or regulatory mandates and market uncertainties." Kahal testimony at page 8. OCA asks that the very circumstances and context referred to by its own witness be stricken.

88. In subparagraph 2 and 3, OCA argues that Mr. Smagula's testimony should be stricken because it provides legal analysis, legislative history and legal conclusions or misconstrues other agencies' documents. PSNH's response to this claim has been set forth earlier in this Response. Everything contained in Mr. Smagula's testimony was a fact known or knowable to Mr. Smagula and PSNH at the time the Scrubber Project progressed which set the context for the Company's actions. Mr. Smagula is certainly entitled to rebut the claims made in the Intervenors' Testimony that PSNH was imprudent by setting forth the innumerable factors that all led to only one conclusion – that PSNH was required by law to install the Scrubber.

89. Finally, in subparagraph 4, OCA alleges that portions of Mr. Smagula's testimony should be stricken because he was not involved in certain internal presentations or reviews. Regardless of the scope of Mr. Smagula's involvement in internal company processes, he is capable of testifying to facts and other information that were known or knowable to PSNH at the time those processes took place. Due to the passage of time – over six years since Docket No. DE 08-103 was initiated, five years since contracts were executed, three years since the Scrubber Project was completed and placed into commercial operation, and over 2-1/2 years since this docket was initiated, many of the people that OCA would seemingly prefer PSNH call as witnesses are no longer available. The Commission can assess the credibility of Mr. Smagula and consider his testimony based on its observations. But, there is no reason why Mr. Smagula's testimony should be stricken for the reason set forth by OCA.

**CONCLUSION**

90. For the reasons set forth above, OCA's Motions raise the issue, and the Commission should first determine: ***What is the scope of this proceeding***? Only then can OCA's Motions be decided.

91. If the Commission finds that the Scrubber Law created a statutory mandate requiring PSNH to install the Scrubber exists – a position taken by not just PSNH, but the New Hampshire Supreme Court, the Air Resources Council, multiple Orders of this Commission, and the intervening parties themselves, then OCA's Motions should be granted, and, in addition, all of the Intervenors' Testimony should be similarly stricken from this proceeding. Similarly, if the Commission finds that based on what was known or knowable at the requisite time, a reasonable utility prudently could have come to the conclusion that such a statutory mandate existed, then OCA's Motions should be granted, and, in addition, all of the Intervenors' Testimony should be similarly stricken from this proceeding.

92. If the Commission concludes that no such statutory mandate requiring installation of the Scrubber existed -- contrary to decisions of the New Hampshire Supreme Court, the Air Resources Council, multiple Orders of this Commission, and admission of the intervening parties themselves – and also finds that it was unreasonable based upon the facts known or knowable at the time for PSNH and everyone else to conclude that such a mandate existed, then, for the reasons set forth herein, all of OCA's Motions should be denied in full.

93. A Commission decision regarding this matter would be extremely helpful to the orderly conduct of this proceeding. Indeed, many potential motions and discovery issues may be made moot by such a decision. A decision finding that the Scrubber Law did what everyone has said –

created a mandate requiring PSNH to install the Scrubber – or that a prudent utility could reasonably conclude that such a mandate existed -- would provide the best opportunity for this proceeding to be completed quickly and efficiently.

Respectfully submitted this 12th day of August, 2014.

**PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE**

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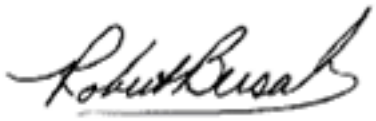
**CERTIFICATE OF SERVICE**

I hereby certify that on August 12, 2014, 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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