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

CONSERVATION LAW FOUNDATION'S AND SIERRA CLUB'S OBJECTION TO PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE'S MOTION IN LIMINE FOR LIMITATION OF THE PARTICIPATION OF THE SIERRA CLUB AND THE CONSERVATION LAW FOUNDATION IN THIS PROCEEDING DUE TO THE ISSUE PRECLUSION DOCTRINES OF COLLATERAL ESTOPPEL AND RES JUDICATA

NOW COMES the Conservation Law Foundation ("CLF") and the Sierra Club ("SC"), pursuant to Puc 203.07(e), and hereby object to the above-referenced Motion filed by PSNH with the Commission on August 21, 2014. In support of this objection, CLF and SC assert the following:

I. INTRODUCTION

1. PSNH's Motion to limit the participation of CLF and SC in this docket relies on material misrepresentations to this Commission concerning a permit appeal before the Air Resources Council ("ARC"), in Dockets No. 09-10 and 09-11. PSNH erroneously asserts that, in those two dockets, the question of whether or not the Scrubber Law, RSA 125-O:11 *et seq.*, contains a "mandate" to construct and operate a scrubber at Merrimack Station was fully adjudicated, that ARC found PSNH had a mandate to construct the scrubber regardless of prudence, and that CLF and SC are bound by that determination.

2. Contrary to PSNH's assertion, the issue *was not litigated* in those dockets, as the relevant ARC order and PSNH's own filings specifically state. PSNH cobbles together its

argument by misquoting the ARC order, mischaracterizing to this Commission the substance of the ARC permit appeal, and by misrepresenting the law of res judicata and collateral estoppel. For these reasons, PSNH's motion is without merit, and must be denied. Moreover, PSNH's Motion once again ignores the clear rulings by this Commission that it will not blindly accept that PSNH had to construct the scrubber regardless of cost and other economic considerations, and seeks relief far beyond the scope of what it argues in its Motion. For these additional reasons, PSNH's Motion must also be denied.

II. ARGUMENT

A. The Status of any "Mandate" in the Scrubber Law Was Never a Part of the ARC Permit Appeal, and Thus Issue Preclusion Cannot Apply.

3. PSNH attempts to claim that ARC Dockets Nos. 09-10 and 09-11, seeking review of the issuance of a Temporary Air Quality Permit allowing construction of the scrubber, "actually litigated to final judgment" the issue of whether or not the Scrubber Law consists of a "mandate" that PSNH construct and operate a scrubber at Merrimack Station; however, that issue was neither litigated in nor the subject of those dockets. Accordingly, neither res judicata nor collateral estoppel exists.

4. As this Commission has previously determined, collateral estoppel or issue preclusion only applies to prevent "relitigation by a party in a later action" matters that were "actually litigated in a prior action" by that party. *Connecticut Valley Electric Company*, Order No. 23,939, at 63 (DE 00-110, March 29, 2002). Quoting the New Hampshire Supreme Court, this Commission observed that, for collateral estoppel to apply,

> [T]he issue subject to estoppel must be identical in each action, the first action must have resolved the issue finally on the merits, and the party to be estopped must have appeared in the first action . . . . Further, the party to be estopped must have had a full and fair opportunity to litigate the issue, and the finding must have been essential to the first judgment.

Id. (quoting *Warren v. Town of East Kingston*, 145 N.H 249, 252 (2000). Similarly, for res judicata to attach, there must be a "final judgment by a court that is conclusive upon the parties in a subsequent litigation involving the same cause of action. *Id.* at 62 (quoting *Canty v. Hopkins*, 146 N.H. 151, 155 (2001)). As this Commission notes, "cause of action" for these purposes is "defined as the right to recover, regardless of the theory of recovery . . . . Thus, a crucial question in determining whether to apply res judicata . . . is always whether the action brought in the second suit constitutes a different cause of action than that alleged in the first suit." *Id.* at 62-63 (quoting *Blevens v. Town of Bow*, 146 N.H. 67, 73 (2001) and *West Gate Village Association v. Dubois*, 145 N.H. 293, 296 (2000)).[1] Accordingly, at a bare minimum, for either of the doctrines to apply, the issue in question must have been actually litigated in a prior proceeding such that it was intrinsic to the determination of the cause of action, and thus essential to the asserted prior judgment.

5. In *Connecticut Valley*, this Commission rendered a decision based primarily on defining certain terms in a power purchase agreement. *Id.* at 64. In so doing, it rejected arguments that either res judicata or collateral estoppel applied because of a prior Federal Electric Regulatory Commission ("FERC") proceeding in which parties sought recision or reformation of the power purchase agreement. *Id.* at 29, 64. In so doing, the Commission observed that, while the agreement had been challenged in a prior proceeding, the definition of its terms did "not form the basis of any prior decision," and thus the prior determination "involved neither the same 'cause of action' . . . nor a 'matter actually litigated in a prior action.'" *Id.* at 64. Accordingly, no preclusive doctrine applied.

[1] It is unclear from PSNH's motion whether PSNH's arguments are grounded in res judicata or collateral estoppel; PSNH appears to make little if any distinction between the two doctrines. Nonetheless, as this Objection explains, neither applies here.

6. The situation here is on all fours with that of *Connecticut Valley*. Specifically, the issue of whether or not the Scrubber Law contains a "mandate" (let alone issues of the scope, contours, and legitimacy of any such mandate) was simply never a matter "actually litigated" before the ARC in the permit proceedings nor "essential" to the decision in those dockets, which were limited to the question of whether or not a temporary permit for the construction of the Scrubber Project was properly issued.

7. In March of 2009, CLF and SC separately filed notices of appeals of a Temporary Permit (Permit No. TP-0008) granted by New Hampshire DES to PSNH for construction and operation of a scrubber at Merrimack Station. These appeals, docketed as ARC 09-10 and 09-11, challenged the issuance of the Temporary Permit, seeking vacature of the permit, and/or staying its effect, owing to asserted defects in the permitting process and a failure by DES to consider New Source Review under the Federal Clean Air Act. *See* Sierra Club Petition, ARC Docket No. 09-10 (March 18, 2009); Conservation Law Foundation Petition, ARC Docket No. 09-11 (March 19, 2009). Subsequently, the dockets were consolidated, and the ARC issued an order confirming the scope of the appeals as limited to the following questions:

a. Whether the MK2 turbine modifications should have been included with and/or aggregated to the scrubber permit application.
b. Whether DES made the proper "completeness" determination regarding the scrubber permit application before issuing the permit in question.
c. Whether DES considered the proper baseline years in issuing the permit in question.
d. Whether the MK2 turbine modifications should have undergone new source review.

ARC Order *Decision & Order Regarding Scope of Issues on Appeal*, Docket Nos. 09-10 ARC and 09-11 ARC, at 2 (Sept. 11, 2009). As such, the issue of whether or not the Scrubber Law contains a "mandate" was not within the scope of the appeals.

8. The ARC further limited the scope of the appeals in the same final order denying CLF and SC's appeals cited by PSNH in its Motion. There, the ARC stated that "the issues on appeal are:"

a. Whether the MK2 turbine modifications should have been included with and/or aggregated to the scrubber permit application.
b. Whether DES made the proper "completeness" determination regarding the scrubber permit application before issuing the permit in question.
c. Whether DES considered the proper baseline years in issuing the permit in question.

ARC Order *Decision & Order on Pending Motions*, Docket Nos. 09-10 ARC and 09-11 ARC, at 1-2 (September 20, 2010) (hereinafter, the "September 2010 ARC Order"). Again, no question as to the existence of a "mandate" in the Scrubber Law was ever part of the appeals.[2]

9. Nor need this Commission take the ARC's word for it. While PSNH has only recently begun claiming that the issue of the "mandate" was actually litigated in the ARC proceedings, at the time, PSNH itself repeatedly and vociferously argued in ARC dockets 09-10 and 09-11 that the only issue on appeal was the issuance of a temporary air permit.

10. For example, on July 22, 2009, PSNH filed a Memorandum of Law in which it argued:

> [T]he statutes and rules unequivocally define the scope of the appeal as being limited to the Director's Decision as to whether to issue or deny the permit for the Scrubber Project. **All other issues not specifically related to the FGD System permit application itself are beyond the scope of this proceeding**.

[2] PSNH ignores these aspects of the ARC's orders, and instead points to Attachment WHS-R-18 to the rebuttal testimony of PSNH witness Smagula, claiming that the September 20, 2010 ARC order made such findings. Setting aside the facts that Attachment WHS-R-18 is a *request* for findings of fact and conclusions of law PSNH made of the ARC in proceedings that did not involve CLF or SC, in a completely different docket (ARC Docket No. 11-10, document filed in July of 2012) *nearly two years after* the September 20, 2010 ARC order, and that, contrary to PSNH's claim, the September 20, 2010 order *denied* making many of the "Findings of Fact" PSNH attributes to it (see the September 2010 ARC Order at 7, noting that "Requests 1-8 . . . are neither requests for findings of fact or rulings of law, therefore, the Council makes no ruling on them"), it is absolutely plain that the question of a "mandate" was no part whatsoever of the ARC proceedings, and was never litigated (nor even on the table for litigation), according to no less an authority than the ARC itself.

PSNH Memorandum of Law Regarding Appropriate Scope of Issues for the September 14, 2009 Hearing, ARC Dockets Nos. 09-10 and 09-11 (July 220, 2009) at 5 (emphasis added).[3]

11. Weeks later, PSNH again made the same argument: in a Motion for Clarification, PSNH claimed that "under the statute, **any issues beyond the Scrubber permit application** and [DES's] 'final action on the application' (**such as** . . . the costs related to the Scrubber project, and **alternatives to the legislatively mandated Scrubber technology**) will not be addressed in this appeal." PSNH Motion for Clarification, ARC Dockets Nos. 09-10 and 09-11 (August 13, 2009) at 6 (emphasis added; parenthetical in original).[4]

12. Unsurprisingly, PSNH's Motion is completely bereft of discussion as to whether or how the question of the "mandate" was raised in the ARC proceedings. Indeed, PSNH repeatedly and bewilderingly argues that "the parties involved had full opportunity to litigate the ARC Order." Motion at 10-11. Setting aside the fact that CLF and SC never litigated "the ARC Order," but instead litigated issuance of the Temporary Permit, the critical question for issue preclusion is not that the *case* was litigated, but that the *issue* for which the moving party claims preclusion was actually litigated. *Connecticut Valley* at 62-63.

13. Despite this, PSNH cites incorrectly to the ARC's response to PSNH's Requests for Findings of Fact and Conclusions of Law. See footnote 2. As a preliminary matter, contrary to PSNH's claims in its Motion, Requests 2, 6, and 7—including the statement "'Scrubber Project' means the [FGD] mandated by the New Hampshire Legislature to be installed by PSNH"—were never granted by the ARC, which instead ignored them on the grounds that they were "neither findings of fact or conclusions of law." September 2010 ARC Order at 7. More

[3] Indeed, PSNH titles an entire subsection of its brief this way: "As A Matter of Law, This Appeal Is Limited To the Director's Decision to Issue the Temporary Permit For The Scrubber." *Id.* The question of a "mandate" was never on the table.

[4] An underlying irony of PSNH's motion in limine is that PSNH sought, successfully, to narrow the issues on appeal in the ARC dockets. *Id.* PSNH, having succeeded in its efforts to constrict the issues litigated in those dockets now seeks to retroactively and dramatically expand the scope of those dockets beyond anything contemplated by the parties to include new matters PSNH would prefer not to litigate now.

importantly, although the ARC granted a series of some 80 of PSNH's Requests, this was done without discussion, without litigation by the parties, and without impact to any of the reasoning upon which the ARC based its denial of CLF and SC's permit appeals.[5] Yet, PSNH now claims that, since the ARC made one of those grants, Request No. 107 ("As a matter of law, PSNH is required to install and operate the Scrubber system,") this Commission may not hear evidence concerning prudency, in contravention of the statute and this Commission's prior rulings (including those in which the Commission specifically stated it would hear evidence concerning the prudency of proceeding with the scrubber project, as discussed below).[6] In fact there is nothing in the ARC order indicating that Request No. 107 was ever intended to be a binding determination of the meaning of the Scrubber Law or this Commission's authority to accept evidence from CLF and SC on the issue of prudency and to consider the prudency of PSNH under RSA 125-O:0-18. For these reasons, PSNH's argument must fail, as this Commission's own rulings on res judicata and collateral estoppels dictate: only issues actually litigated and essential to a tribunal's decision may be precluded. *Connecticut Valley* at 62-63. No preclusion is warranted here.

[5] The sum total discussion by the ARC of its grants of PSNH's Requests for Findings of Fact and Conclusions of Law is as follows: "Granted: 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 (with the exception of the "1" after April), 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 59, 61, 62, 63, 64, 66, 67, 68 (first sentence), 69, 70, 71, 72, 75, 76, 77, 78, 79, 80, 81, 82, 83 (second sentence), 84 (second, third, and fourth sentences), 85, 86, 87, 88, 89, 90, 91 (first sentence), 92, 93, 94,95, 96, 101, 103, 104, 105, **107**, 108, 109, 110, 111, 112, 113, 114, 115, 116 (to the extent Env-A requires NHDES to, within 60 days of receipt of an application, notify the applicant that said application is deemed complete or request that the applicant submit information in accordance with Env-A 607.03(b)), 117 (third and fourth sentences), 118, 120, 121 (first sentence)." September 2010 ARC Order at 7-8 (emphasis added).

[6] Notably, PSNH did not until the present Motion appear to place much stock in such "findings," either, as PSNH largely repeated these same requests for findings of fact and conclusions of law in July 2012, in ARC Docket No. 11-10, including Request No. 107. *See* Smagula Rebuttal Testimony, WHS-R-18, No. 107. This similarity perhaps accounts for PSNH's confusion in citing to the ARC Docket No. 11-10 set of requests in its instant motion, instead of the nearly identical set of requests in Dockets Nos. 09-10 and 09-11, but certainly underscores the fact that nobody—not even PSNH—felt that any preclusive effect attached on the issue of a "mandate" in ARC Dockets Nos. 09-10 and 09-11.

14. As the ARC itself makes plain, the issue of the existence of a "mandate" was never actually litigated in the ARC dockets, nor essential to the decision there to deny CLF and SC's appeals. As such, issue preclusion cannot apply, and PSNH's Motion must be denied.

B. The Issue PSNH Claims Is Precluded Has Already Been Litigated in *This* Forum, and PSNH Lost.

15. PSNH's Motion suffers from the further fatal defect that, while the issue of whether or not the Scrubber Law contains a "mandate" was not litigated in the ARC dockets, it has been litigated—multiple times—in the current proceeding, with the Commission deciding against PSNH. Issue preclusion based on the ARC dockets would accordingly be not just unlawful, but illogical here.

16. For example, in Order No. 25,506 at 17, the Commission determined that, under the Scrubber Law, PSNH maintained management discretion to retire Merrimack prior to installing a scrubber, specifically noting that "PSNH, like any other utility owner, maintained the obligation to engage in good utility management at all times."

17. Similarly, in Order No. 25,546 at 8, the Commission held that, even with the Scrubber Law, "PSNH retained the management discretion to retire Merrimack Station" under RSA 369-B:3-a. Indeed, the Commission made clear that the prudency determination in this docket would "be more comprehensive than a simple inquiry into whether PSNH did an adequate job of managing funds expended to construct the scrubber." *Id.* at 7. Additionally, the Commission in that Order clarified that the Scrubber Law did not mandate that PSNH to continue to install a scrubber if doing so would be poor or imprudent management of its generation fleet. *Id.* at 10 (noting that if the evidence did not justify continued ownership and operation of Merrimack at the time PSNH decided to move forward with the scrubber project, "the costs of complying with the Scrubber Law would not be allowed into rates").

18. Likewise, in Order No. 25,565 at 15-19, the Commission affirmed its prior rulings that PSNH retained the management discretion to retire or divest Merrimack Station prior to completing installation of a scrubber.

19. Finally, in Order No. 25,640 at 13, the Commission denied PSNH's motions seeking to strike testimony on the issue of the possibility of retiring Merrimack, again affirming that the Scrubber Law did not remove from PSNH the management discretion to divest or retire Merrimack. There, the Commission again made clear that its former orders in this docket had consistently maintained that "PSNH retained the management discretion to divest itself of Merrimack Station . . . [and] to retire Merrimack Station . . . ." *Id.* at 13.

20. Given this Commission's repeated stance *in this docket* on the issue of whether or not PSNH could have retired Merrimack in lieu of constructing and operating a scrubber, PSNH's insistence that an question never litigated in an ARC permit appeal nonetheless precludes CLF and SC from offering evidence and argument concerning a "mandate" in the Scrubber Law is as wrong as it is baffling. CLF and SC have, of course, already litigated this question before this Commission in this proceeding, and so PSNH's argument that they must now stop litigating the question is completely unfounded. As such, PSNH's Motion must be denied.

C. The Relief PSNH Requests Does Not Flow From Its Arguments.

21. Even if PSNH were right (which it is not), and somehow CLF and SC were precluded from arguing whether the Scrubber Law "mandated" installation and operation of a scrubber at Merrimack Station, PSNH's requested relief—barring CLF and SC from arguing that deciding to construct and operate a scrubber at a price that wildly exceeded PSNH's original cost estimates—does not follow from such a preclusion. It in fact is in direct contravention to the

clear language of RSA 125-O: 0-18. RSA 125-O: 0-18 mandates that this Commission conduct a prudency review, and this Commission has already determined that the prudency review will include evidence concerning whether a prudent utility manager would have contemplated actions—like retirement or divestiture—other than completing installation of the scrubber as costs escalated and market and social conditions changed.

III. CONCLUSION

22. As explained above, PSNH has failed to establish that any doctrine, whether res judicata or collateral estoppel, precludes CLF and SC from offering evidence and argument on the issue of a "mandate" in the Scrubber Law. WHEREFORE, CLF and SC respectfully request that that Commission:

a. Deny the Motion in Limine; and

b. Grant such further relief, including an award of costs as this Commission deems just and proper.[7]

Respectfully submitted,

Dated: September 2, 2014

CONSERVATION LAW FOUNDATION

By: 

Ivy L. Frignoca

[7] CLF and SC seek recovery of costs pursuant to RSA 365:38-a, which permits the Commission to award just and reasonable costs deemed to be in the public interest to other parties that participate in utility proceedings. "Other parties" are defined as retail customers that are subject to the rates of the utility and who demonstrate financial hardship. CLF's and SC's respective memberships include retail customers of PSNH. CLF's and SC's participation in this docket is representative of those members' interests.

Maine Advocacy Center
Conservation Law Foundation
47 Portland Street
Portland, ME 04101
Tel.: (207) 210-643
ifrignoca@clf.org

SIERRA CLUB
Zachary M. Fabish
The Sierra Club
50 F Street, NW - 8th Floor
Washington, DC 20001
Tel.: (202) 675-7917
zachary.fabish@sierraclub.org

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of September 2014, a copy of the foregoing Objection was sent electronically to the service list.

By:

Ivy L. Frignoca

Maine Advocacy Center
Conservation Law Foundation
47 Portland Street
Portland, ME 04101
Tel.: (207) 210-643
ifrignoca@clf.org