

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
FOR REHEARING OF ORDER NO. 25,714

September 10, 2014

Pursuant to RSA 541:3 and Rule Puc 203.33, Public Service Company of New Hampshire (“PSNH” or the “Company”) respectfully moves the New Hampshire Public Utilities Commission (“Commission”) to rehear and reconsider Order No. 25,714 issued in this proceeding on September 8, 2014 (the “Order”). As discussed below, the Order conflicts with PSNH’s legal obligations and burden of proof established both by statute and by the Commission in a prior order. PSNH requests that the Commission reconsider those conflicting rulings and/or provide a clarification or waiver of PSNH’s otherwise applicable obligations.

In support of this Motion, PSNH states:

1. On September 8, 2014, the Commission issued Order No. 25,714, “Order on the Office of Consumer Advocate’s Motions to Strike Rebuttal Testimony.”
2. In that Order, the Commission ordered, *inter alia*, that certain portions of the rebuttal testimony of Mr. William H. Smagula, P.E., be stricken. Included in the testimony to be stricken were the following pieces of Mr. Smagula’s testimony:

- a. Page 26 (Bates 26), line 4 through line 10. In this portion of testimony, Mr. Smagula discusses the extent of mercury emissions reduction being accomplished by operation of the Scrubber. Attachment WHS-R-05, a report dated March 21, 2014, reflecting the emissions reductions achieved by the scrubber, was also stricken. (The “emissions reduction testimony.”)
- b. Page 26 (Bates 26), line 11 through line 18. In this portion of testimony, Mr. Smagula testifies that installation of the scrubber was in conformity with the least cost integrated resource plan most recently filed by PSNH pursuant to RSA 378:38 and found adequate by the commission. (The “RSA 378:41 Compliance Testimony.”)
- c. Page 22 (Bates 22), line 3 through page 24, line 5; and page 25 (Bates 25), line 7 through page 26, line 3. In these portions of testimony, Mr. Smagula provides evidence that the scrubber is “used and useful” in the provision of utility service and is actually providing service to consumers. (The “used and useful testimony”).

3. Good reason for granting rehearing exists as a result of the specific matters identified herein that were “overlooked or mistakenly conceived” in the Order. *See Dumais v. State*, 118 N.H. 309, 311 (1978).

The Emissions Reduction Testimony

4. In Order No. 25,346, “Order Granting Temporary Rates,” the Commission summarized the positions of the parties. At page 14 of Order No. 25,346, the Commission noted the position of intervenor Sierra Club:

Sierra Club said that absent some sort of documentation regarding the performance of the Scrubber in the reduction of mercury emissions, the goal

of the Scrubber law, the PSNH petition does not carry the burden of establishing that the Scrubber project is both in use and useful sufficient to warrant temporary rates. Tr. 3/12/2012 at 108-09.

5. The Commission responded to this issue of the Sierra Club at page 24 by stating, “The Legislature anticipated that the Scrubber would have to operate for a period of time before the actual degree of mercury reduction is known.” The Order continued:

The Commission will consider any DES decision on mercury reduction in the permanent rate case portion of this proceeding. Because the statute requires an annual reduction in mercury (RSA 125-O:13, II) and contemplates a period of time to reach threshold removal levels (RSA 125-O:15--), we do not conclude that establishing temporary rates is contingent upon a determination that the Scrubber’s performance on the first day of operation had to have met the 80 percent requirement.

Id.

6. The “emissions reduction testimony” provided by Mr. Smagula was the most up-to-date information available regarding the performance of the Scrubber concerning the reduction of mercury emissions [which the Sierra Club noted, is “the goal of the Scrubber law”] when rebuttal testimony was due. This testimony and the information in Attachment WHS-R-05 was provided to meet the Commission’s decision in Order No. 25,346 that determination of the performance of the Scrubber regarding mercury emissions reduction would be considered in the permanent rate case portion of this proceeding.

7. This information is relevant and timely, since, as the Commission notes, the Scrubber law “contemplates a period of time to reach threshold removal levels.” Hence, it could not be provided earlier.

8. By striking this testimony, the Commission has prevented PSNH from providing the information which the Commission itself indicated would be considered in the permanent rate portion of this proceeding.

9. PSNH requests that the Commission rescind the portions of Order No. 25,714 striking the “emissions reduction testimony” to allow PSNH to comply with the provisions of the earlier

Order No. 25,346. In addition, or in the alternative, PSNH requests the following:

- a. That the Commission waive the requirement found in Order No. 25,346 that determination of the performance of the Scrubber regarding mercury emissions reduction would be considered in the permanent rate case portion of this proceeding; and/or,
- b. That the Commission grant PSNH leave to supplement Mr. Smagula’s testimony by providing a new Attachment WHS-R-05 to replace the original attachment stricken by the Order. Attached hereto as Attachment 1 is what PSNH proposes to be the new Attachment WHS-R-05 - - it is the first annual “Mercury Compliance Report” dated July 30, 2014, filed by PSNH with DES demonstrating compliance with the mercury emissions reduction requirements of the Scrubber Law.¹ Mr. Smagula’s rebuttal testimony was due prior to this Mercury Compliance Report being prepared and filed, and the Report therefore was not available when rebuttal testimony was required. Acceptance of this revised Attachment WHS-R-05 in lieu of the existing (but now stricken Attachment WHS-R-05) would give PSNH the opportunity to provide the specific evidence sought in Order No. 25,346.

¹ As required by RSA 125-O:13, II, DES determined that the first reporting period for Scrubber emissions reporting would be July 1, 2013 through June 30, 2014, with the compliance report due 30 days following the end of the reporting period.

The RSA 378:41 Compliance Testimony

10. The purpose of this proceeding is to establish rates pursuant to RSA 125-O:18 and RSA Ch. 378 to allow recovery of all prudent costs of complying with the requirements of the Scrubber Law.

11. At the time that PSNH filed its request for recovery of costs of the Scrubber through rates, RSA 378:40, "Plans Required" read:

No rate change shall be approved or ordered with respect to any utility that does not have on file with the commission a plan that has been filed and reviewed in accordance with the provisions of RSA 378:38 and RSA 378:39. However, nothing contained in this subdivision shall prevent the commission from approving a change, otherwise permitted by statute or agreement, where the utility has made the required plan filing in compliance with RSA 378:38 and the process of review is proceeding in the ordinary course but has not been completed.

12. Similarly, at the time of PSNH's application, RSA 378:41, "Conformity of Plans" required that, "Any proceeding before the commission initiated by a utility shall include, within the context of the hearing and decision, reference to conformity of the decision with the least cost integrated resource plan most recently filed and found adequate by the commission."

13. As the Commission is aware, the application of the least cost integrated resource plan statutes, RSA 378:37, *et seq.*, is the subject of an appeal pending before the New Hampshire Supreme Court in *Appeal of PSNH Ratepayers*, Docket No. 2013-0307.²

² That appeal of Order No. 25,485 issued in Docket No. DE 12-292, "PSNH Proposed Default Energy Service Rate for 2013," was lodged on May 6, 2013, subsequent to the filing of initial testimony in this proceeding. The Appellants in that pending Supreme Court appeal include Alexandra and James Dannis, who are also intervenors in the instant proceeding, and Amy Matheson, on whose behalf Attorney James T. Rodier filed a public comment in the instant proceeding on September 11, 2012.

14. Mr. Smagula's "RSA 378:41 Compliance Testimony" was provided to ensure compliance with the statutory requirement of RSA 378:41 that was in effect at the time of the filing of PSNH's application.

15. 2014 N.H. Laws, Chapter 129 (HB 1540) amending the Least Cost Integrated Resource Plan laws at RSA 378:37, *et seq.*, became effective on August 15, 2014. Chapter 129:3, I repealed RSA 378:41. However, the new law does not indicate whether applications filed prior to the effective date of the law must comply with RSA 378:41 that was in effect on the date of application, or whether the date of the Commission's order deciding that application will determine the applicability of RSA 378:41.

16. Although PSNH believes that the repeal of RSA 378:41 effective August 15, 2014, makes that statute inapplicable to the instant case, in an abundance of caution PSNH included the requisite representations in Mr. Smagula's testimony to make academic the issue of whether or not the requirements of RSA 378:41 apply.

17. PSNH requests that the Commission rescind the portions of Order No. 25,714 striking the "RSA 378:41 Compliance Testimony" to moot this legal issue and ensure that both the Commission and PSNH comply with RSA 378:41, whether or not it is applicable. In the alternative, PSNH requests that pursuant to RSA 378:38-a the Commission waive any least cost integrated resource plan requirement pertaining to the installation and operation of the Scrubber, as such installation and operation was mandated by the Scrubber Law, and there is good cause for such a waiver; and/or, to take administrative notice pursuant to RSA 541-A:33, V and Rule Puc 203.27 of PSNH's 2010 Least Cost Integrated Resource plan, which the Commission reviewed in Docket No. DE 10-261 and approved by Order No. 25,459 issued on January 29, 2013.

The “Used and Useful” Testimony

18. RSA 378:30-a, “Public Utility Rate Base; Exclusions” reads:

Public utility rates or charges shall not in any manner be based on the cost of construction work in progress. At no time shall any rates or charges be based upon any costs associated with construction work if said construction work is not completed. All costs of construction work in progress, including, but not limited to, any costs associated with constructing, owning, maintaining or financing construction work in progress, shall not be included in a utility's rate base nor be allowed as an expense for rate making purposes until, and not before, said construction project is actually providing service to consumers.

19. As noted earlier, during the temporary rates portion of this proceeding, the Sierra Club took the position that PSNH had not adequately demonstrated “that the Scrubber project is both in use and useful.” The “used and useful” issue was also raised as a significant portion of the testimony of Mr. Stephen R. Eckberg filed on behalf of the Office of Consumer Advocate. *See, e.g.*, page 1, line 24 through page 2, line 4 of Mr. Eckberg’s testimony, where he responds to the question, “Would you please summarize the expenses you will address in your testimony?” by responding in relevant part, “Certainly. My testimony will address: ... 3. The degree to which any prudent investments are used and useful in provision of service to customers.”³

20. In the Order at 11, the Commission ordered stricken testimony describing “the current operation of the Scrubber and other events that occurred after the Scrubber became operational in September 2011.” The rationale for this decision was, “This testimony is not relevant to PSNH’s decisions concerning whether and how to build the scrubber and, therefore, we order it stricken.”

Id. This “used and useful testimony” stricken by the Order was provided to demonstrate compliance with the requirement of the “anti-CWIP” provision of RSA 378:30-a that the

³ *See also* page 2, lines 3-4; page 4, line 25 through page 5, line 3; page 7, line 14 through page 10, line 1; and Attachments SRE-9, -10, and -11 to Mr. Eckberg’s testimony, as discussed in more detail in PSNH’s “Motion in Limine to Strike Portions of the Prefiled Testimony of Stephen R. Eckberg” filed concurrently with this Motion.

Scrubber “is actually providing service to consumers,” as well as to rebut the contentions and testimony of other parties to this proceeding.

21. It would be impossible for PSNH to rebut those intervenors’ contentions and demonstrate that the Scrubber was “actually providing service to customers” and was “used and useful in the provision of service to customers” without describing the actual operation and success of the Scrubber – matters that by definition had to occur after the Scrubber became operational.

22. PSNH had earlier moved that the Commission strike portions of intervening parties’ testimony related to the “used and useful” issue. In Order No. 25,640 the Commission denied that motion, without prejudice.⁴

23. PSNH requests that the Commission rescind the portions of Order No. 25,714 striking the “used and useful testimony” to allow PSNH to demonstrate compliance with RSA 378:30-a as well as to rebut and respond to the contentions raised by other parties.

WHEREFORE, PSNH respectfully requests that the Commission rescind the portions of Order No. 25,714 striking the “emissions reduction testimony,” the “RSA 378:41 Compliance Testimony,” and the “used and useful testimony,” or, to grant the alternative remedies set forth by PSNH above.

⁴ As noted in fn. 3, *supra*, PSNH filed a renewed motion to strike concurrently with this Motion.

Respectfully submitted this 10th day of September, 2014.

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

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CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2014, I served an electronic copy of this filing with each person identified on the Commission's service list for this docket pursuant to Rules Puc 203.02(a) and 203.11(c).



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