

**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

**SIERRA CLUB'S OBJECTION TO PUBLIC SERVICE COMPANY OF NEW
HAMPSHIRE'S MOTION IN LIMINE TO STRIKE PORTIONS OF THE PREFILED
TESTIMONY OF DR. RANAJIT SAHU**

NOW COMES the Sierra Club ("SC"), pursuant to Puc 203.07(e), and hereby objects to the above-referenced Motion filed by PSNH with the Commission on September 10, 2014. In support of this objection, SC asserts the following:

I. INTRODUCTION

1. PSNH's Motion in Limine to Strike Portions of the Prefiled Testimony of Dr. Ranajit Sahu (PSNH's "Motion") proceeds from mistaken premises and flawed reasoning, and thus PSNH fails to carry its burden in establishing that any of Dr. Sahu's prefiled testimony must be struck. PSNH's entire argument rests on two flawed pieces of logic. First, PSNH claims that, if any of its rebuttal testimony is stricken for (apparently) any reason, whatever testimony PSNH was attempting to rebut must also be struck, whether or not that original testimony shares any of the infirmities or failures of PSNH's rebuttal. Second, PSNH misconstrues this Commission's Order requiring that testimony must only discuss evidence temporally related to the prudence of the scrubber project into a shield against submission of evidence showing that environmental liabilities PSNH could and should have anticipated have in fact come to pass. As such, PSNH's Motion must be denied.

II. BACKGROUND

2. On December 23, 2013, SC submitted the prefiled testimony of Dr. Ranajit Sahu in this Docket. This testimony provided evidence to this Commission as to what forthcoming significant environmental compliance obligations and costs—such as water permitting and cooling tower requirements—a prudent utility would have considered in 2008, but which PSNH did not appear to consider while it was deciding to move forward and commit enormous sums of money to the expensive scrubber project. On December 31, 2013, PSNH filed multiple motions to strike portions of Dr. Sahu’s testimony, among sections of other prefiled testimony submitted by the Office of the Consumer Advocate (“OCA”), TransCanada, and the Conservation Law Foundation. On March 26, 2014, the Commission issued Order No. 25,640, denying much of PSNH’s motions to strike, including those portions seeking to strike Dr. Sahu’s testimony.

3. On July 11, 2014, PSNH submitted a package of prefiled rebuttal testimony, including over 200 pages of testimony, appendixes, and attachments from William H. Smagula, which in part purported to rebut Dr. Sahu’s testimony.

4. On August 8, 2014, OCA filed a motion seeking to strike certain portions of Mr. Smagula’s prefiled rebuttal testimony. *See* OCA’s Motion to Strike Sections of Rebuttal Testimony of PSNH Witness William H. Smagula.¹ In it, OCA pointed out that, among other things, Mr. Smagula’s testimony concerning the “present day scrubber operation,” the “public interest standard,” and “legislative history and statutory interpretation,” were outside the scope of these proceedings. *Id.* at 2-3.

5. On September 8, 2014, this Commission issued Order No. 25,714, granting in part and denying in part OCA’s motion. There, among other determinations, the Commission decided that, on the subject of testimony concerning alleged “public interest benefits” from the

¹ Sierra Club took no position on OCA’s motion. *See id.* at 6.

scrubber project, it would “not allow hindsight testimony as to whether those benefits were realized because such testimony is not relevant to PSNH’s decision” to move forward with the scrubber project. Order No. 25,714, at 11. Further, the Commission reiterated that the purpose of testimony was to help the Commission to “judge what a reasonable utility manager would do under circumstances existing at the time of the challenged decisions.” *Id.* at 10. Accordingly, testimony as to such topics as “the current operation of the Scrubber” and other events described in Mr. Smagula’s testimony (including the polar vortex, operation of a railroad line, and discussion of various awards) concerning the purported public interest in the scrubber were “not relevant.” *Id.* at 11. Consistent with its determinations, the Commission struck page 31, line 8 through page 32, line 22 of Mr. Smagula’s prefiled testimony, among other sections.

6. PSNH now moves in its present Motion to strike portions of Dr. Sahu’s testimony on three theories: one, that since some of Mr. Smagula’s rebuttal testimony was ruled outside the scope of these proceedings, whatever testimony Mr. Smagula was attempting to rebut must also somehow outside the scope of these proceedings; two, that since Mr. Smagula attempted to testify as to irrelevant events that occurred after PSNH made its decision to move forward with the scrubber project, Dr. Sahu may not testify as to issues that continued on after PSNH made its decision to move forward with the scrubber project, regardless of relevancy; and three, that undefined portions or aspects of Dr. Sahu’s testimony “make[] legal conclusions” concerning “a law.” For the following reasons, all three arguments fail, and PSNH’s Motion must accordingly be denied.

A. Nothing Supports Striking Dr. Sahu’s Testimony Simply Because Mr. Smagula’s Testimony Was Partially Struck.

7. Contrary to PSNH’s claim, the fact that portions of Mr. Smagula’s testimony were struck by this Commission does not mean that whatever portions of Dr. Sahu’s testimony Mr.

Smagula was attempting to respond to must also be struck. PSNH complains that its own testimony was deemed outside the scope of these proceedings, but does not offer any explanation as to why many of the portions of Dr. Sahu's testimony it finds disagreeable should therefore likewise be struck.

8. PSNH seeks to strike Dr. Sahu's testimony discussing PSNH's failure to consider, when it made the decision to move forward with the scrubber project, the following:

- a. Forthcoming greenhouse gas compliance costs (*see* Sahu page 6, second full paragraph through page 7, first full paragraph);
- b. Forthcoming plant-specific mercury and MATS compliance costs (*see* Sahu page 7, second full paragraph; Sahu page 8, "PSNH will need to comply with MATS Proper planning could have obviated this mess"); and,
- c. PSNH's failure to consider a whole suite of forthcoming environmental compliance costs at the time it made the decision to proceed with the scrubber project was imprudent (*see* Sahu page 10, "properly accounting for these and other upcoming environmental rules and the attendant significant compliance costs . . . could well have led PSNH to conclude that its aging coal plants might simply not be viable . . . [a] prudent utility would have recognized this reality in the summer of 2008").

PSNH does so through no further reasoning than that "the Commission struck as irrelevant Mr. Smagula's testimony rebutting Dr. Sahu's testimony." *See* Motion at 3, ¶2(a); *id.* at ¶2(d) (same); *id.* at ¶2(e) (same); *id.* at ¶2(h) ("the Commission struck as irrelevant sections of Mr. Smagula's testimony rebutting this portion of Dr. Sahu's testimony"). It is difficult to tell, but PSNH may be arguing that testimony concerning greenhouse gas, mercury, and other

environmental compliance costs are per se outside the scope of this proceeding, although it does not make any attempt to explain why this may be.

9. Instead, PSNH complains that, because its testimony seeking to rebut portions of Dr. Sahu's testimony was struck, Dr. Sahu's direct testimony would "proceed with no opportunity for rebuttal." Motion at 3.² But this is farcical, and amounts to an attempt by PSNH to pretend that its election to submit testimony the Commission deemed irrelevant is somehow prejudicial to PSNH. Mr. Smagula's prefiled rebuttal, coming nearly 7 months after Mr. Sahu's testimony was filed, consisted of 46 pages of testimony, plus two appendixes totaling another 19 pages, plus another 152 pages of attachments, as part of an overall package of rebuttal testimony from multiple witnesses exceeding over 700 pages. *See generally* Smagula Testimony. It is plain that PSNH has had extremely ample opportunity to rebut any and all intervenor testimony; a failure by PSNH to include *relevant* evidence and information as part of that rebuttal testimony is in no way a "denial" of that opportunity. PSNH's failure to articulate a reason why the portions of testimony it finds objectionable should be excluded is thus fatal, and its Motion should be denied.³

B. PSNH Misconstrues this Commission's Order as to the Relevant Time Period.

10. PSNH mistakenly reads this Commission's Order No. 25,714 as precluding discussion of any information post-dating September 2011, and as a result, seeks exclusion of Dr. Sahu's testimony in which he points out that many of the environmental obligations and

² Confusingly, and presumably purely for rhetorical purposes, PSNH describes this issue as "Sahu irrelevance." *Id.* Yet, PSNH never attempts to explain how the irrelevance this Commission found in Order 25,714 in *Mr. Smagula's* testimony is somehow attributable to Dr. Sahu.

³ Indeed, PSNH's argument here appears to be more about dissatisfaction with the Commission's Order No. 25,714 than an attempt to carry its burden in arguing how Dr. Sahu's testimony is beyond the scope of these proceedings. It is noteworthy, then, that while PSNH has contemporaneously with this Motion sought reconsideration of certain parts of Order No. 25,714, it has not asked this Commission to reconsider its decision to strike pages 32-32 of Mr. Smagula's testimony.

compliance costs PSNH should have considered when deciding to move forward with the scrubber project in 2008 have actually come to pass. This is improper.

11. First, PSNH is incorrect in viewing this Commission's Order as an iron curtain that curtails any introduction of information as of the date the scrubber was powered up, particularly as regards the information contained in Dr. Sahu's testimony. PSNH seeks exclusion of Dr. Sahu's observation that "regulations of greenhouse gases for power plants, is, in fact, coming to pass" and citation to public announcements by the President concerning EPA's Climate Action Plan moving forward (*see* Motion at 3, ¶ 2(c); Sahu at 7), his testimony noting that EPA "ultimately did issue a draft NPDES permit for Merrimack Station that would require closed-cycle cooling" (*see* Motion at 4, ¶ 2(f); Sahu at 9),⁴ and his testimony concerning the "tens of millions of dollars in compliance costs" likely needed to meet the requirements in the forthcoming Merrimack NPDES permit, the costs associated with MATS compliance at Schiller, and future costs associated with complying with air quality standards and carbon regulation (*see* Motion at 4, ¶ 2(g); Sahu at 10). But each of these segments of testimony discusses events arising out of considerations PSNH could have and should have had when it decided to move forward with the scrubber project. Essentially, PSNH seeks to bar testimony demonstrating that the sorts of costs PSNH should have anticipated while it was deciding to construct the scrubber are now upon it, despite the fact that the reality of the draft NPDES permit, MATS regulation, carbon regulation, and other environmental compliance costs are, of course, powerful demonstrations that PSNH should have considered the possibility that such things may happen. Such testimony is thus entirely appropriate to this proceeding.

⁴ PSNH's objection here is all the more puzzling given that the draft permit in question was released in September of 2011. *See* U.S. EPA, Merrimack Station Draft NPDES Permit, *available* at <http://www.epa.gov/region1/npdes/merrimackstation/>. This is of course within the window of time that PSNH itself agrees is relevant to this docket. *See, e.g.*, Motion at 1, ¶ 1(b) (claiming that the relevant period for testimony is "June 2006 through September 2011").

12. Second, excluding such information would not make much sense in any situation. The MATS rule, EPA’s Clean Power Plan and other carbon regulation, and the draft NPDES permit for Merrimack Station are all background legal facts of which this Commission can readily take notice. *See, e.g.*, Order No. 25,714 at 8 (“We may take official notice of ‘any fact which could be judicially noticed in the courts of New Hampshire’”) (citing RSA 541-A:33, V; N.H. Code Admin. Rules Puc 203.27). PSNH appears to seek exclusion of testimony not because it is irrelevant or because it is not something that this Commission can officially notice anyway, but because it is inconvenient to PSNH. This is illegitimate, and as such, PSNH’s Motion should be denied.⁵

C. PSNH Fails to Identify any Objectionable “Legal Analysis” in Dr. Sahu’s Testimony.

13. Finally, PSNH’s complaint that Dr. Sahu’s testimony contains “significant portions” of “legal analysis” is both wholly unsupported and completely unexplained. Motion at 4. In the single sentence PSNH devotes to describing its purported concerns, PSNH fails to at all identify or even allude to what if any “significant portions” of Dr. Sahu’s testimony it finds objectionable—PSNH simply claims that Dr. Sahu somewhere and somehow “makes legal conclusions” concerning “a law.” *Id.* Such cryptic and perfunctory statements simply do not carry PSNH’s burden in a motion in limine: it is neither opposing parties’ nor certainly this

⁵ PSNH also seeks to strike a footnote from Dr. Sahu’s testimony in which Dr. Sahu points out that scrubbers are more commonly installed to control for sulfur dioxide, with some mercury reduction as a potential co-benefit, and that installing a scrubber to control for mercury reduction is highly unusual. *See Sahu* at 4 n.1. But, rather than being a statement as to “choice of technology,” this footnote helps explain how, by electing to proceed with the scrubber project, PSNH incurred greater costs than had it instead decided to retire Merrimack and comply with forthcoming MATS regulations at Schiller through a less resource intensive mercury-specific control system. As such, PSNH’s Motion seeking to strike this footnote is off-point, and should be denied.

