

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 11-250

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Investigation of Merrimack Station Scrubber Project and Cost Recovery

Order Granting Temporary Rates

ORDER NO. 25,346

April 10, 2012

APPEARANCES: Sarah B. Knowlton, Esq. and Robert A. Bersak, Esq., on behalf of Public Service Company of New Hampshire; Orr & Reno, P.A. by Douglas L. Patch, Esq., of on behalf of TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast, Inc.; Zachary M. Fabish, Esq., on behalf of the Sierra Club; N. Jonathan Peress, Esq., on behalf of Conservation Law Foundation; Jim and Sandy Dannis, *pro se*; the Office of Consumer Advocate by Rorie E.P. Hollenberg, Esq., on behalf of residential ratepayers; and Suzanne G. Amidon, Esq. and Matthew J. Fossum, Esq., on behalf of Commission Staff.

I. PROCEDURAL HISTORY

On November 18, 2011, Public Service Company of New Hampshire (PSNH or Company) filed a petition for temporary rates to recover costs associated with the installation of a wet flue gas desulphurization (Scrubber) system at the Merrimack Station located in Bow, New Hampshire. PSNH made the filing pursuant to a Secretarial Letter issued on November 15, 2011 in Docket No. DE 11-215, PSNH's petition to establish a default service rate for effect January 1, 2012.¹

In its motion, PSNH requested that the Commission establish temporary rates pursuant to RSA 378:27 and RSA 125-O:18, for effect January 1, 2012, to allow the Company to begin

¹ PSNH offers default service under the name Energy Service (ES). On October 14, 2011, PSNH amended its filing in Docket No. DE 11-215 to seek recovery of Scrubber costs through the 2012 ES rate. The October 14 filing also sought to amend the petition in DE 11-216, PSNH's proposed default energy (ADE) service rate, to recover a portion of Scrubber costs through rate ADE. In a Secretarial Letter dated November 11, 2011 in Docket Nos. DE 11-215 and DE 11-216, the Commission stated that the Scrubber costs would not be considered in those dockets, and that the Commission would open a separate proceeding for consideration of the Scrubber costs and PSNH's recovery of those costs. Further background on this matter can be found in Docket Nos. DE 11-215 and 216.

recovery of costs associated with the Scrubber. PSNH asked that the Commission either establish a temporary rate for the recovery of Scrubber costs at 1.18 cents per kilowatt-hour (kWh) or allow the existing ES rate, then 8.89 cents per kWh to remain in effect beyond December 31, 2011 on a “temporary rate” basis until the Commission determined the appropriate recovery of Scrubber costs. The petition included the joint testimony of Robert A. Baumann, Director, Revenue Regulation & Load Resources for Northeast Utilities Service Company (NUSCO), and William H. Smagula, Director of Generation for PSNH and reports that provided updates on the status of the installation of the Scrubber Project.²

On December 7, 2011, TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast Inc. (collectively, TransCanada) filed a petition to intervene in the proceeding. On December 8, 2011, the following parties moved to intervene: the Sierra Club, New England Power Generators Association, Inc. (NEPGA), and Conservation Law Foundation (CLF). On December 12, 2011, the OCA submitted a letter stating that it would participate in the docket on behalf of residential ratepayers consistent with RSA 363:28.³

A prehearing conference was held as scheduled on December 13, 2011 followed by a technical session. On December 15, 2011, Staff filed a report of the technical session that included a proposed procedural schedule for the temporary rate portion of the proceeding. The Commission issued a Secretarial Letter on December 15, 2011 approving the proposed procedural schedule and addressing the motions to intervene. The Commission determined that although NEPGA, TransCanada, Sierra Club and CLF did not demonstrate affected rights,

² The joint testimony of Messrs. Baumann and Smagula was originally filed on October 14, 2011 in Docket No. DE 11-215, the proceeding to establish PSNH’s ES rate for effect beginning January 1, 2012. The attachments to the testimony included reports filed in Docket No. DE 08-103, a proceeding to monitor PSNH’s actions in constructing the Scrubber project. The Commission kept Docket No. DE 08-103 open for purposes of receiving progress reports from PSNH regarding the Scrubber installation. *See* Order No. 24,898 (September 19, 2008) at 13 in Docket No. DE 08-103.

³ For additional procedural history in this proceeding, *see* Order No. 25,342 (April 3, 2012) in the instant docket.

duties, or privileges that mandate their intervention, given the particular circumstances of this docket their intervention requests would be granted pursuant to RSA 541:32, II. Further, to promote the prompt and orderly conduct of the proceeding, the Commission directed NEPGA and TransCanada to combine their discovery and cross-examination and directed Sierra Club and CLF to combine their discovery and cross-examination. The Commission did not require the OCA to combine its efforts with any other parties.

On January 20, 2012, Staff filed certain reports provided to Staff by Jacobs Consultancy, Inc. (Jacobs) in Docket No. DE 08-103, the docket which the Commission had kept open for purposes of receiving progress reports on the Scrubber Project.⁴ Also on January 20, PSNH filed a motion for confidential treatment of certain information in the Jacobs reports. On January 30, 2012, the OCA filed an objection to PSNH's motion for protective order on behalf of itself, CLF, Sierra Club, TransCanada, and NEPGA. On February 6, 2012, the Commission issued Order No. 25,332 in Docket Nos. DE 08-103 and DE 11-250 granting in part and denying in part PSNH's request for confidential treatment.⁵

Staff filed the direct testimony of Steven E. Mullen, assistant director of the Commission's electric division, on February 24, 2012. On March 9, 2012, Commissioner Robert R. Scott filed a letter recusing himself from participation in this docket.

On March 9, 2012, residential ratepayers Jim Dannis and Sandy Dannis (Dannis) filed a motion to intervene out of time, stating that this proceeding will directly affect their costs for electric energy supplied by PSNH. The hearing on temporary rates was held as scheduled on March 12, 2012. At the hearing, the Commission granted the Dannis's late-filed motion to

⁴ See Order No. 24,898 (September 19, 2008) at 13 in Docket No. DE 08-103.

⁵ See Order No. 25,332 (February 6, 2012) in Docket Nos. DE 08-103 and DE 11-250 for the parties' arguments and the Commission's ruling on the motion for confidential treatment. On February 7, 2012, PSNH filed a request pursuant to Puc 203.08 (i) that information for which confidential treatment was denied not be disclosed until all of its rights to request rehearing and/or appeal have been exhausted or waived.

intervene. Also on March 9, 2012, Dannis filed a motion to disqualify Commissioner Michael Harrington from hearing or otherwise participating in the docket. On April 3, 2012, the Commission issued Order No. 25,342 denying the motion for disqualification.

At the March 12, 2012 hearing on temporary rates, the Commission ruled that parties would have until March 19, 2011 to file legal memoranda addressing whether PSNH had all necessary permits to operate the scrubber. Hearing Transcript of March 12, 2012 at 166-167. PSNH filed a legal memorandum on March 19, 2012. CLF filed a legal memorandum on March 20, 2012. On March 22, 2012, PSNH filed an updated progress report for the Scrubber installation at Merrimack Station. The progress report included, among other information, correspondence from The Air Compliance Group, LLC and a related attachment which depicted the mercury test results for mercury measurement tests conducted in January and March 2012.

II. POSITIONS OF THE PARTIES AND STAFF

A. Public Service Company of New Hampshire

PSNH said the Legislature required PSNH to install Scrubber technology pursuant to the passage of 2006 N.H. Laws, Chapter 105, and Act Relative to the Reduction of Mercury Emissions.⁶ Exh. 1 at 3. PSNH explained that it conducted the tie-in of the Scrubber with Merrimack Unit 1 in September and that the Scrubber became operational for Unit 1 on September 28, 2011. The tie-in outage for Merrimack Unit 2 began October 12, 2011.

According to PSNH, the Scrubber became used and useful as of September 28, 2011 when it began functioning in connection with the operation of Merrimack Unit 1. PSNH testified that the various Scrubber functions were all successfully operating and the Project was fulfilling its statutory purpose of reducing mercury, and also significantly reducing sulfur dioxide

⁶ See RSA 125-O:11-18.

emissions, rendering the equipment used and useful in the provision of service to customers. Exh. 1 at 4-6. In addition, PSNH claimed that continuous emissions monitors (CEMs) at Merrimack Station, which has been certified in accordance with federal regulations and monitored by the New Hampshire Department of Environmental Services (DES), shows the scrubber is achieving sulfur dioxide (SO₂) reductions of 90 percent or greater. Exh. 3.

PSNH testified that RSA 125-O:18 authorizes the Company to recover all prudent costs of complying with the requirements of the Scrubber law through ES rates. Exh. 1 at 2. PSNH said that the primary costs associated with the Scrubber to be included in rates are (1) the depreciation costs, which are the recovery of the Company's capital investment expenditures associated with the project; (2) a return on the capital investment or ratebase; and (3) additional operating costs associated with the Scrubber. Exh. 1 at 3.

PSNH attested that as of November 18, 2011 \$359.1 million in capital investments associated with the Scrubber had been placed in service. PSNH Motion for Temporary Rates at 2. PSNH requested that, similar to past capital investments in its generation assets, the Commission immediately allow cost recovery of the investment and associated operations and maintenance (O&M) expense related to the Scrubber Project in its ES rates under RSA 378:27, the statute authorizing temporary rates, and RSA 125-O:18. PSNH said that the temporary rate statute authorizes the Commission to "immediately fix, determine and prescribe" "reasonable temporary rates" and that RSA 125-O:18 provides the Company "shall be allowed to recover all prudent costs of complying with this subdivision in a manner approved by the Public Utilities Commission." *Id.* at 6

PSNH originally requested the inclusion of Scrubber costs in its October 14, 2011 filing in Docket No. DE 11-215, PSNH's petition to set an ES rate effective January 1, 2012. In that

filing, PSNH estimated that the recovery costs associated with the Scrubber would add 1.18 cents per kWh to the Company's ES rate. Exh. 1 Attachment RAB-5. PSNH calculated the 1.18 cents per kWh value based on the assumption that it would begin recovery of Scrubber costs with rates effective January 1, 2012. *Id.* at 2.

The Company later recalculated the rate assuming recovery of Scrubber costs would begin on April 1, 2012 following the hearing on temporary rates. Hearing Transcript of March 12, 2012 (3/12/2012 Tr.) at 54. At the temporary rate hearing, Mr. Baumann testified that the recalculated temporary rate for recovery of Scrubber costs would be 1.58 cents per kWh, assuming recovery began on April 1. Mr. Bauman testified that the 1.58 cents per kWh attempts to collect the Scrubber costs for calendar year 2012 in the months April through December. PSNH also proposed to amortize approximately \$13.1 million associated with the operation of the Scrubber in 2011 over a three-year period and that the rate included recovery of these amortized costs attributable to 2012. *Id.* at 54-55. Mr. Baumann said that the Company intended to add the Scrubber costs to the updated ES rate of 7.77 cents per kWh. *Id.* at 107.

Mr. Baumann said that he had reviewed Mr. Mullen's testimony and noted that Mr. Mullen had proposed a rate of 0.98 cents per kWh to begin recovery of a portion of Scrubber costs on April 1, 2012. Mr. Baumann posited that the spectrum of options for the Commission to consider in setting temporary rates for recovery of Scrubber-associated costs are as follows: no recovery, a rate of 0.98 cents per kWh, or the Company's updated request of 1.58 cents per kWh. Mr. Baumann said that the positive aspect of Mr. Mullen's proposal from a customer perspective is that Mr. Mullen's recommended revenue requirement provides for a more graduated increase to rates. *Id.* at 56. Mr. Baumann testified that the Company believes Mr. Mullen's proposed rate falls reasonably within the band of recovery options, between no recovery and the Company's

proposed rate of 1.58 cents per kWh. According to Mr. Baumann, the Company felt that Mr. Mullen's proposal to begin partial recovery on a temporary basis pending final review is positive. *Id.*

Mr. Baumann asserted that the Company was concerned that the lower rate proposed by Mr. Mullen would leave about \$31 million unrecovered as of December 31, 2012. The Company's proposal would leave about \$9.8 million unrecovered as of December 31, 2012, all attributable to costs associated with the operation of the Scrubber in 2011. PSNH said that while Mr. Mullen's proposal provided rate smoothing in proposed temporary rates, Mr. Mullen's recommendation would create rate strain in the future. *Id.* at 57. In summary, the Company said that it did not object to Mr. Mullen's recommended revenue requirement. *Id.* at 119.

At hearing, CLF directed questions to Mr. Smagula to explore whether PSNH had all necessary permits to operate the Scrubber as required by RSA 125-O:13, I. *Id.* at 60. Mr. Smagula stated that the Company had supplied the information in a response to data request OCA Set 1 No. 2 (Exh.4). *Id.* at 62. Mr. Smagula affirmed that the response provided listed all of the necessary permits and approvals. *Id.* at 63. In addition, Mr. Smagula said that agreements between the Company and certain municipalities that allowed PSNH to dispose of wastewater at publicly owned treatment works (POTWs) were included in Exhibit 4; however, he maintained that those agreements were not permits necessary to the operation of the Scrubber. *Id.* at 70.

CLF also questioned whether PSNH was familiar with the Environmental Protection Agency's (EPA) Industrial Pretreatment/Indirect Discharge Program. *Id.* at 73. According to CLF, the program is implemented by the DES and requires certain industrial applications and permits as a prerequisite for allowing industrial waste to be disposed of by POTWs. *Id.* at 75. Mr. Smagula replied that it was his understanding that DES had provided the authorization to the

municipal POTWs to receive wastewater from the Scrubber and that, to the best of his knowledge, PSNH did not receive any approval other than the approval to allow the POTWs to receive the waste. *Id.* at 76.

CLF also inquired whether PSNH had obtained a National Pollution Discharge Elimination System (NPDES) permit under the Clean Water Act to allow it to discharge Scrubber wastewater. *Id.* at 82-83. Mr. Smagula stated that the Company had applied for such a permit and had worked with the DES in its review of the Company's design for Scrubber wastewater treatment and disposal. *Id.* at 85. He said that the EPA, as part of the NPDES process, did not provide PSNH with any permit modifications to allow discharge of the Scrubber wastewater and, as a result, PSNH does not discharge any wastewater from the Scrubber installation. *Id.* at 85. Mr. Smagula said that the Company developed an alternate means to manage the Scrubber effluent. *Id.* at 86.

Sierra Club asked PSNH to describe the functional mercury removal rate of the Scrubber Project. *Id.* at 92. Mr. Smagula responded by stating that the purposes of requiring the installation of the Scrubber was to reduce mercury emissions by 80 percent across its fleet of generation assets, and to achieve that reduction, the Scrubber has to "over-comply" to compensate for two small mercury-emitting units located in Portsmouth. *Id.* at 93.

Sierra Club inquired how Mr. Smagula knew the mercury reduction rate of the Scrubber. Mr. Smagula said that initial tests were conducted by DES and that PSNH had received verbal information on the results of the tests indicating that the reduction of mercury by the Scrubber is "well over" 80 percent. Mr. Smagula said that the Company was waiting for final documentation to substantiate the verbal information. *Id.* at 95. Mr. Smagula further testified that, while there are CEMs at Merrimack that measure SO₂ reduction, there are no CEMs for

monitoring mercury. As a result, mercury reductions are measured and monitored through stack tests. *Id.* at 96. Mr. Smagula said that he would be able to provide the documentation of mercury reduction in the near future but insisted that the Scrubber was functioning consistent with its intended purposes to reduce mercury emissions. *Id.* at 97-98. Mr. Smagula said he would be able to provide the documentation next month. *Id.* at 99.

Sierra Club inquired what additional costs would result from delaying temporary rates for one month. *Id.* at 99. PSNH said that if temporary rates are delayed, the Company would continue to incur costs associated with the Scrubber that are not in rates and those costs would be deferred for recovery in future rates, along with a carrying charge. *Id.* at 100. PSNH said that the deferral amount would accumulate at a rate of about \$5 million per month with an associated annual carrying charge of about \$500,000 which would increase over time as long as recovery was deferred. *Id.* at 101-102. PSNH said that the carrying charge would be calculated as either the allowed cost of capital from its last distribution rate case, or the stipulated costs of capital used in the ES rate, between 9% and 10%. *Id.* at 102.

Mr. Dannis asked how the Company funded the Scrubber project as between debt and equity. Mr. Baumann replied that the Scrubber project was funded through the entire cost of capital on the Company's books based on a weighted capital structure that is approximately 50% debt and 50% equity. *Id.* at 110-111. Mr. Baumann explained that the Company did not have any specific funding, equity or debt, associated with the Scrubber project and did not issue debt for the specific purposes of funding the Scrubber. *Id.* at 115-117.

In its memorandum filed March 19, 2012, PSNH reaffirmed that it had all permits and approvals necessary to operate the Scrubber and that the Scrubber is used and useful in the provision of service to the Company's customers. PSNH Memorandum at 1. PSNH observed

that the General Court had mandated the installation of the Scrubber when it enacted RSA 125-O:11 *et seq.* and found that it was in the public interest to significantly reduce mercury emissions. RSA 125-O:11, I required the installation of a Scrubber at Merrimack Station no later than July 1, 2013. *Id.* at 2–4. To incent the expeditious installation of the Scrubber technology, RSA 125-O:16 provides economic performance incentives for mercury reductions which are achieved prior to July 1, 2013. Because the Scrubber was placed in service in September 2011, PSNH said that Company will earn the incentives, all of which will inure to the benefit of customers based on the in-service date. *Id.* at 4.

PSNH acknowledged that the Company would have to obtain all necessary permits and approvals to install and operate the Scrubber according to RSA 125-O:13, I. PSNH noted that the legislature included language in the law urging regulatory agencies and bodies that would be issuing permits to give due consideration to the finding that the installation of the Scrubber is in the public interest. *Id.*

According to PSNH, the statutory references to July 1, 2013 relate to the mandatory operational date of the Scrubber system and not to the Commission's determination whether the Scrubber is in operation and used and useful in the provision of service to PSNH's customers, citing *In re Stonyfield Farm, Inc. et al.*, 159 N.H. 227, 229 (2009). *Id.* at 4-5. PSNH said that the Scrubber was declared in service on September 28, 2011 and continues successful operation in accordance with all permitting and approval requirements. PSNH argued that all of the traditional requirements for an asset to be placed in service have been met, that the Scrubber is used and useful and providing customer benefits, and cost recovery should commence. *Id.* at 5.

PSNH pointed out that Exhibit 4 lists at least 97 permits that the Company obtained from federal, state and local entities to construct and operate the Scrubber. *Id.* at 5-6. PSNH claimed

that the record contained substantial evidence demonstrating that the Company has all permits and approvals necessary to dispose of scrubber wastewater. *Id.* at 6.

PSNH said that the Company initially planned to discharge wastewater from the Scrubber into the Merrimack River, a plan approved by the DES and which also required the approval of the EPA. According to PSNH, the EPA decided that it would deal with the necessary approval as part of the overall NPDES permit process. The Company claimed that the NPDES permit process has been delayed by the EPA for over 14 years and still will not be resolved for years following any EPA action. *Id.*

Based on the inability to obtain a timely approval from the EPA, PSNH said it developed an alternative solution to dispose of the wastewater to allow the Scrubber to come online as soon as possible. The agreements with POTWs allow PSNH to operate the Scrubber and use established industrial wastewater treatment facilities to dispose of Scrubber wastewater. PSNH said this information is contained in Exhibit 2 and, therefore, is contained in records on file with the Commission. *Id.* at 7.

PSNH referred to CLF's examination of Mr. Smagula regarding the Company's receipt of permits or approvals from NHDES to dispose of Scrubber wastewater. PSNH said that Mr. Smagula repeatedly testified that the Company had filed documents with DES to support the Company's intent to take Scrubber wastewater to New Hampshire POTWs. *Id.* at 7. PSNH referred to Exhibit 10, the Company's response to a record request to provide information regarding the Company's application for an Industrial Wastewater Indirect Discharge Permit. In Exhibit 10, PSNH explained that on May 11, 2011 it had submitted an Industrial Wastewater Indirect Permit Application to allow the municipalities of Allentown, Concord, Hooksett and Manchester to accept Scrubber wastewater. Also attached to Exhibit 10 were recently approved

agreements to dispose Scrubber wastewater with the DES facility in Franklin and the POTW in the City of Lowell, Massachusetts. *Id.* at 8. PSNH said that the Company also had agreements with two privately operated wastewater treatment facilities located outside of New Hampshire for the disposal of Scrubber wastewater.

The Company said that there was confusion at the hearing about the terminology associated with the documents, whether they were “agreements”, “approvals” or permits; but regardless of what the documents are called, the fact remains that the Company has obtained appropriate permission to dispose of wastewater and has so informed the Commission in books and records on file. *Id.* at 9. PSNH stated that the Company is not obligated to bring wastewater to any of these facilities and, in fact, has not brought any wastewater to some of them. PSNH further asserted that no permits or approvals are required for disposal at the privately operated water treatment facilities. *Id.*

PSNH averred that CLF was aware that the Company had received the necessary approvals from DES. *Id.* at 10. PSNH said that in the course of discovery, the Company had provided CLF and the other parties copies of DES’ approval for the Hooksett discharge, the Hooksett Hauled Waste Disposal Agreement, and the City of Concord’s Permit to Discharge Industrial Wastewater Transported Waste (Response to Tech Q-008). PSNH said it provided the documents from Hooksett and Concord but insisted that those documents regarding wastewater disposal are not relevant to temporary rates. *Id.*

PSNH argued that RSA 378:27 permits the Commission to prescribe temporary rates and that the standard for temporary rates is less stringent than the standard for permanent rates, citing *Appeal of Office of Consumer Advocate*, 134 N.H. 651,661 (1991). PSNH said it has presented unrebutted testimony on the start-up of the Scrubber operation, how it was placed into service

and how it was tied to Merrimack Units 1 and 2. *Id.* at 11. PSNH said it also provided information regarding the Company's work with DES on the specification, installation, operation and maintenance, and new reporting of CEMs and the SO₂ reductions achieved by the Scrubber. *Id.* at 12. PSNH pointed out that Mr. Smagula offered testimony about the mercury emissions stack testing. PSNH emphasized that Mr. Smagula had testified that all indications pointed to the Scrubber performing as it was designed in the reduction of mercury emissions. *Id.* at 13.

PSNH further claimed that regardless of the timing of mercury results, there is no statutory requirement that mercury reductions be demonstrated prior to placing the Scrubber in service. According to PSNH, RSA 125-O13, II merely provides that beginning on July 1, 2013, total mercury emissions from affected sources should be at least 80 percent on an annual basis from the baseline mercury measurement. PSNH asserted that there is no statutory requirement that those reductions occur sooner or that the commencement of cost recovery (RSA 125-O:18) is contingent on those results. *Id.*

PSNH concluded that cost recovery should begin now because the Company constructed the Scrubber as it was required to do so. PSNH said that the legislature granted the Commission some discretion regarding the manner in which cost recovery would occur underscores the Commission's authority to approve a temporary rate in an amount and at a time it deems appropriate. *Id.* at 14.

PSNH concluded that because all of the traditional requirements for an asset to be placed in service have been met here, cost recovery should begin. The Company repeated its assertion that its books and records on file with the Commission demonstrate that the Scrubber is in service, is used and useful and provides benefits to customers. *Id.* at 14.

B. 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.

C. Conservation Law Foundation

At hearing, CLF did not offer any comment on temporary rates, but, as noted, questioned the Company extensively about compliance with permitting requirements, particularly for wastewater treatment. On March 20, 2012 CLF filed a memorandum addressing whether PSNH had all necessary permits and approvals to install and operate the Scrubber. In its memorandum, CLF argued that PSNH was unable to demonstrate that the Scrubber wastewater treatment system is used and useful and ripe for cost recovery. CLF Memorandum at 1.

According to CLF, the Commission has considerable discretion in deciding whether a rate base change qualifies as used and useful, and the used and useful determination is fact-based, citing *Appeal of Conservation Law Foundation of New England, Inc.*, 127 N.H. 696, 637 (1986). *Id.* at 4. CLF said that the wastewater treatment system constructed by PSNH is designed to treat Scrubber wastewater prior to it being discharged into the Merrimack River. According to CLF, PSNH was unable to obtain authorization from EPA for its initial wastewater treatment plan. Consequently, the Company began to install additional equipment at its wastewater treatment facility site reduce to the waste stream volume. CLF said that the new equipment will not only reduce the discharge but will eliminate it, and that PSNH is in the midst of modifying the wastewater treatment system into a zero liquid discharge (ZLD) system.

CLF claimed that PSNH is experiencing difficulty in tying the ZLD system into the already-constructed Scrubber wastewater treatment installation. *Id.* at 5. CLF argued that this development suggests that PSNH is in the midst of reengineering and reconstructing the Scrubber wastewater disposal system. CLF conceded that issues related to the prudence of PSNH's actions regarding wastewater disposal will be addressed during the permanent rate portion of this proceeding, but expressed concern that PSNH is seeking to recover through temporary rates for the cost of the new existing wastewater treatment system even though it is now being modified. CLF also said that PSNH is seeking the cost of disposing of wastewater at private out-of-state facilities during times that the Scrubber wastewater treatment facility is not operational due to the ongoing reconstruction and re-engineering of the facility. *Id.* at 6.

CLF said that it appears that PSNH has obtained permits necessary to dispose of the Scrubber wastewater at nearby POTWs. CLF argued that the Company must nonetheless conform with federal pretreatment standards and the water pollutant constituents and concentrations set forth in PSNH's Industrial Discharge Request Application. CLF also asserted that PSNH should explain why it is necessary to ship wastewater for treatment and disposal at private, out-of-state facilities, the amount of wastewater being disposed at such facilities, and the cost. *Id.*

In conclusion, CLF claimed that PSNH concealed the arrangements that it had to make to dispose of Scrubber wastewater including the details of its trucking wastewater to out-of-state private disposal facilities; and that PSNH continues to withhold information regarding the quantity of the wastewater being disposed of at various facilities and the cost. *Id.* at 7. CLF argued that these circumstances raise questions regarding the extent to which the Scrubber wastewater treatment facility is being used and whether the public interest is served by providing

recovery in temporary rates for such costs. CLF said that its allegations provide reasonable grounds for questioning the figures in the reports filed by PSNH with the Commission under RSA 378:27. *Id.*

D. TransCanada

TransCanada took no position on temporary rates. Tr. 3/12/2012 at 170.

E. Jim and Sandy Dannis

Mr. Dannis said that he had no closing statement. *Id.*

F. Office of Consumer Advocate

The OCA said that it had no position on temporary rates. *Id.*

G. Commission Staff

Mr. Mullen testified regarding Staff's recommendation for an appropriate level of temporary rates during the pendency of this proceeding. Staff defined temporary rates, which are specifically allowed pursuant to RSA 378:27, as a means for a utility to begin recovery of certain costs pending the outcome of a full proceeding to investigate those costs. Exh. 9 at 5. Mr. Mullen said that the issue of the prudence of the Scrubber project and its related costs would not be addressed in its position for purposes of this order, and that those issues will be more fully explored during the "permanent rates" portion of this proceeding. *Id.* at 4.

Mr. Mullen presented four options for the Commission to consider in determining whether to implement temporary rates: (1) denying the request to implement temporary rates; (2) establishing temporary rates at the current non-scrubber ES rate level, excluding PSNH's 2011 under-collection; (3) establishing temporary rates at the current non-scrubber ES rate level of 8.31 cents per kWh, including PSNH's 2011 under-collection; or (4) establishing temporary

rates at a level in excess of the current ES rate. Mr. Mullen then explained the potential impacts of each option on the Company and its customers. *Id.* at 5-6.

Mr. Mullen stated that PSNH is seeking recovery for operation and maintenance costs, fuel costs, avoided SO₂ costs, property taxes, depreciation and return on rate base. The total annual revenue requirements for 2012, as reported in PSNH's November 18, 2011 filing, are \$57.2 million. *Id.* at 10. Staff indicated that, consistent with PSNH's position that the Scrubber was placed in service in 2011 and that 2011 Scrubber costs have to date not been recovered, PSNH proposed amortizing the 2011 Scrubber-related costs over three years and including one-third of those costs with its 2012 costs. This would bring the total proposed 2012 recovery to \$61.8 million. *Id.* Mr. Mullen noted that not all of the capital costs for the Scrubber were included in PSNH's request for temporary rates and that certain plant items either had not been placed into service at the time of PSNH's filing, or would not be placed in service until later in 2012 or early 2013. *Id.* at 11.

Taking into account various temporary rate options, the rate and cost implications of each option, and a balancing of customer and shareholder interests, Mr. Mullen recommended that the Commission establish temporary rates effective April 1, 2012, at a level of 0.98 cents per kWh for the Scrubber-related costs. That rate level assumes a twelve-month temporary rate period and was calculated using the projected 2012 annual ES kWh sales. In addition, Staff recommended that the Commission adjust the non-Scrubber ES rate to 7.77 cents per kWh as proposed by PSNH, then add the temporary Scrubber cost recovery rate 0.98 cents per kWh, resulting in a total ES rate of 8.75 cents per kWh effective April 1, 2012. Staff explained that the result is a net increase to the ES rate of 0.44 cents per kWh above the current 8.31 cents per kWh rate. *Id.* at 12. Staff stated that this ES rate would remain at 8.75 cents until at least July 1,

2012, at which time the non-Scrubber portion of the rate would be subject to change through the normal mid-year review of the ES rate. *Id.* at 12-13. The 0.98 cents per kWh portion of the ES rate related to Scrubber costs, however, would continue through the conclusion of this proceeding. *Id.* at 13.

Mr. Mullen said that he calculated the rate using the updated “Total Forecasted Merrimack Scrubber Cost” of \$55,500,000 per year provided in response to technical session data request identified as TECH Q-001, a copy of which was attached to Exhibit 9 as SEM-1. He took into account earlier publicly-stated cost estimates for the Scrubber project as well as potential questions to be raised about the actual cost, and calculated a percentage, which he called the “Temporary Rate Cost Percentage” of 66%. To calculate the Temporary Rate Cost Percentage, Mr. Mullen used \$250,000,000 (the original estimated cost of the Scrubber installation) as the numerator, and \$378,773,000 (a figure derived by taking the average of the 13 monthly gross plant balances for 2012, including December 31, 2011) as the denominator. Mr. Mullen said that the percentage was calculated solely for the purpose of developing a temporary rate recommendation and that it has no other significance. He explained that the percentage represents what he views as a reasonable balancing of the various interests and concerns.

Mr. Mullen then applied 66% to \$55,500,000, resulting in a product of \$36,631,000. To that sum, he added the total 2011 under-collection of \$13,101,000, deriving a total of \$49,732,000 to be collected through temporary rates. Mr. Mullen testified that any decisions regarding prudence and potential cost allowances and disallowances should be made in the permanent rate portion of the proceeding after all evidence has been examined. *Id.* at 14.

Based on his recommendation of a temporary rate of 0.98 cents per kWh, Mr. Mullen calculated that the monthly bill impact to a residential customer using 500 kWh per month would

be an increase of \$2.20, or 2.5 percent, over the \$86.86 total bill using rates in effect today. Because ES is charged to all customer classes on a cents per kWh basis, for every 1,000 kWh used on a monthly basis, customers taking ES from PSNH would see an increase to their bill of \$4.40. *Id.* at 15.

In conclusion, Staff stated that in its assessment the Company had records at the Commission sufficient to show that the project is used and useful. Staff said that temporary rates should be set not as requested by the Company, but in line with the Staff proposal to reduce the ES rate to 7.77 cents per kWh and then add 0.98 cents per kWh to that rate to recover Scrubber costs. Staff said that the rates should take effect April 1, if possible, to allow the Company to begin recovery and to smooth the rate change for customers. Tr. 3/12/2012 at 170-171.

III. COMMISSION ANALYSIS

Pursuant to RSA 369-B:3, IV (b)(1)(A), the price of PSNH's ES shall be "PSNH's actual, prudent and reasonable costs of providing such power, as approved by the commission." To comply with the statute, the Commission has authorized a two-step process to set PSNH's ES rate. In the first step, PSNH makes a filing where it proposes an ES rate for the following calendar year based on projections of costs and revenues. Following review of the filing, and after notice and hearing, the Commission establishes an ES rate to take effect January 1 of the following year.⁷ In May of each year, PSNH files a reconciliation of its actual default service costs and revenues. Any adjustments arising from review of that reconciliation are incorporated into the following period's ES rate setting process. *See, e.g.*, Order No. 25,060 (December 31, 2009) in Docket No. DE 09-091, PSNH's 2008 Reconciliation Proceeding.

⁷ The rates are subject to a midyear adjustment to minimize the effect of any over or under-collection on customers' rates. *See* Order No 24,579 (January 20, 2006) in Docket No. DE 05-126, *Public Service Company of New Hampshire, Transition and Default Energy Service Rate*.

In addition to PSNH's annual ES ratemaking process, the Scrubber statute provides that "[i]f the owner is a regulated utility, the owner shall be allowed to recover all prudent costs of complying with the requirement of this subdivision in a manner approved by the public utilities commission...such costs [to] be recovered via the utility's default service charge." RSA 125-O:18.

PSNH initially filed its request to include the revenue requirements associated with the capital and operating costs of the Scrubber in its proposed 2012 ES rates. Given the fact that this capital project is unique, in that it is the most costly single capital addition to an existing generation plant in recent Commission history, and that it is made pursuant to a specific legislative mandate, the Commission stated that it would consider the costs associated with the Scrubber project in a separate docket to allow for a more extensive review of the issues presented. *See* DE 11-215, Secretarial Letter, Nov. 15, 2011. PSNH filed its request for temporary rates in this docket in order to begin recovering the costs of the Scrubber installation, pending the Commission's review of the Scrubber project and final order on PSNH's rate request.

RSA 378:27 requires the Commission to set temporary rates that are:

sufficient to yield not less than a reasonable return on the cost of the property of the utility used and useful in the public service less accrued depreciation, as shown by the reports of the utility filed with the commission, unless there appears to be reasonable ground for questioning the figures in such reports.

See also Appeal of the Office of Consumer Advocate, 134 N.H. 651, 661 (1991). The analysis "is 'less stringent' than the standard for permanent rates, in that temporary rates shall be determined expeditiously, without such investigation as might be deemed necessary to a determination of permanent rates." *Id.* at 660 (citation omitted). Moreover, the effective date of temporary rates

“fixes and determines the period during which the rates allowed in the underlying permanent rate proceeding may apply.” *Appeal of Pennichuck Water Works*, 120 N.H. 562, 564 (1980). Any collection under temporary rates is reconciled against the rate ultimately approved for permanent rate recovery.

Because of the unique nature of the Scrubber project and the related rate request, the Commission must consider both PSNH’s books and records and evidence proffered at the temporary rate hearing, as well as the terms of the statute mandating the Scrubber installation, to ascertain PSNH’s need for temporary rates. We first address the issue raised by CLF with respect to PSNH’s permits to operate the Scrubber. Pursuant to the express language in RSA 125-O:11, the Legislature required that PSNH install the Scrubber by July 1, 2013 because, according to DES, it was the best known commercially available technology for the reduction of mercury. RSA 125-O:11, I and II. The achievement of the directive to install the Scrubber, however, is made contingent upon the obtaining of “all necessary permits and approvals from federal, state, and local regulatory agencies and bodies.” RSA 125-O:13, I. CLF alleged at the March 12, 2012 hearing on temporary rates, both through direct argument and cross examination, that PSNH did not have the required permits for the disposal of wastewater produced by the Scrubber and, therefore, did not have “all necessary permits” as required by the statute.

At the March 12, 2012 hearing, PSNH acknowledged that it attempted to secure an NPDES permit that would allow it to discharge the Scrubber wastewater directly to the adjacent Merrimack River. Tr. 3/12/2012 at 84-85. When it was not able to obtain an NPDES permit that would allow such discharges, PSNH sought alternative means to dispose of the Scrubber-generated wastewater. *Id.* at 85-86. On March 15, 2012, in response to the Commission’s request that PSNH provide evidence that it had sought and obtained any needed industrial

wastewater indirect discharge authorization, PSNH stated that it had initially sought approval from DES for indirect discharges in May 2011. *See* Exhibit 10. Accompanying its response, and included in the record as Exhibit 10, are copies of documentation showing that PSNH obtained authority to bring partially treated wastewater to municipal treatment facilities in Concord, Allenstown, Hooksett, and Manchester, New Hampshire and Lowell, Massachusetts, as well as to a DES operated facility in Franklin, New Hampshire. Mr. Smagula testified that the Company had brought shipments of wastewater to some but not all of those facilities following primary treatment on site. Tr. 3/12/2012 at 69. In its memorandum, CLF conceded that “[b]ased on recently provided Exhibit 10, it appears PSNH has obtained permits necessary to dispose of” the Scrubber wastewater. CLF nonetheless contends that “PSNH should explain why it is necessary to ship wastewater for treatment and disposal at private, out-of-state facilities, the amount of wastewater being disposed of at such facilities and the cost.” Memorandum of Conservation Law Foundation at 6.

PSNH has already provided an explanation for its decision to manage Scrubber wastewater by obtaining authorization to ship partially-treated wastewater to the facilities identified by the Company in Exhibit 10. We do not agree that, for purposes of temporary rates, PSNH must also explain its selections of disposal locations or provide bills of lading of wastewater shipments to determine whether the Company held all permits needed to place the Scrubber into service.⁸ Certainly the prudence of costs incurred for such shipments will be an element of the permanent phase of this proceeding. For purposes of temporary rates, however, we conclude that the evidence produced by PSNH and on file with the Commission, including the documents contained in Exhibit 10, is sufficient to demonstrate that PSNH obtained the

⁸ We recently reached the same conclusion in response to CLF’s motion to compel certain responses from PSNH in this docket. *See Public Service of New Hampshire*, Investigation of Merrimack Station Scrubber Project and Cost Recovery, Order No. 25,334 (Mar. 12, 2012) at 10.

required wastewater permits for operation of the Scrubber facility as required by RSA 125-O:13. Whether the Company is in compliance with those permits may be determined by DES, the agency with jurisdiction over the wastewater permitting issues.

In its argument against temporary rates, Sierra Club contended that the Company is not entitled to establish temporary rates to recover Scrubber costs because, in Sierra Club's estimation, PSNH has not shown that the Scrubber is used and useful. According to Sierra Club, the purpose of the Scrubber was to comply with RSA Ch. 125-O, which requires that the Scrubber reduce mercury emissions by at least 80 percent. RSA 125-O:11, III. Sierra Club argued that 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. We disagree.

RSA 125-O:11 requires PSNH to build the Scrubber to reduce mercury and states that it is in the public interest to "achieve significant reductions in mercury emissions at the coal-burning electric power plants in the state." RSA 125-O:11, I. The statute directed the construction of the specific technology PSNH installed at Merrimack Station, stating, "[t]he department of environmental services has determined that the best known commercially available technology is a wet flue gas desulphurization system, hereafter 'scrubber technology,' as it best balances the procurement, installation, operation, and plant efficiency costs with projected reductions in mercury and other pollutants from the flue gas streams of Merrimack Units 1 and 2." RSA 125-O:11, II. According to RSA 125-O: 13, I, the Scrubber at Merrimack Station is to be installed no later than July 1, 2013 and the mercury emitted from the plant is to be "at least 80 percent less on an annual basis than the baseline mercury input, as defined in RSA 125-O:12, III, beginning on July 1, 2013." RSA 125-O:13, II.

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). At hearing, Mr. Smagula testified that the initial tests show the Scrubber is reducing mercury as designed, at a level “well over” 80%. Tr. 3/12/2012 at 95. No evidence was introduced that contravened Mr. Smagula’s statement.⁹The extent to which mercury emissions are being reduced must be determined by DES to ascertain PSNH’s compliance with specific statutory reduction requirements. 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.

Having found no impediment to the establishment of temporary rates, we will now determine an appropriate level for temporary rates. RSA 378:27 allows the Commission to set rates based on reports of the utility on file with the Commission unless there are grounds to question the reasonableness of the data in the reports. We find no reason to question PSNH’s records on file with the Commission, and will set temporary Scrubber cost recovery rates accordingly.

The Company initially sought to establish the ES rate at 9.57 cents per kWh. Exh. 1 at 2. PSNH calculated the rate by adding a proposed temporary Scrubber cost recovery rate of 1.18

⁹ PSNH filed an updated Progress Report in the instant docket on March 22, 2012 which included correspondence and related material indicating that preliminary test results submitted by The Air Compliance Group, LLC, not yet subjected to discovery and cross examination, indicate that the Scrubber was reducing mercury emissions between 97.38% and 97.99%, for an average of 97.63% in January and 97.51% in March, 2012.

cents per kWh to the existing “base” ES rate. *See* Exhibit 1 RAB-5 at 1. The Scrubber-related “adder” was later revised to 1.58 cents per kWh. Tr. 3/12/2012 at 54.

In setting temporary rates we are cognizant that the recovery should provide for not less than a reasonable return on the property being used. We find that Staff has used a logical and reasonable methodology to develop temporary rates in a manner that balances all interests and concerns. Mr. Mullen based his recommendation, in part, on a comparison of the costs originally estimated for the Scrubber (\$250,000,000) and the average of the actual gross plant balances relating to the Scrubber of (\$378,773,000). He used these two sums to calculate a “Temporary Rate Cost Percentage” to derive a total revenue requirement amount to be recovered through temporary rates.

Using this methodology, Mr. Mullen calculated a temporary Scrubber cost recovery rate of 0.98 cents per kWh to be added to an adjusted ES rate of 7.77¹⁰ cents per kWh for an overall rate of 8.75 cents per kWh. Mr. Mullen calculated that his recommendation, if adopted, would result in a net increase to the overall ES rate of 0.44 cents per kWh over the current rate for a total adjusted ES rate of 8.75 cents per kWh. Exh 9. at 12. PSNH testified that the amount proposed by Mr. Mullen “falls reasonably within the band of recovery options . . .” Tr. 3/12/12 at 56.

The Staff proposal as a reasonably calculated revenue requirement associated with the Scrubber project for recovery through temporary rates. It is well considered, balances the interests of the Company and the ratepayers, and has the added benefit of smoothing rates for PSNH’s ES customers, thus minimizing rate volatility. In addition, Mr. Mullen’s analysis compares his proposal and that of PSNH, revealing that the Company will achieve a reasonable

¹⁰In this proceeding, PSNH provided updated information to support a reduction in its ES rate to 7.77 cents per kWh from the current rate of 8.31 cents per kWh.

return on the property, based on its current cost of capital. We therefore approve a temporary Scrubber cost recovery rate of 0.98 cents per kWh and an adjustment to PSNH's ES rate to 7.77 cents per kWh which yields a total adjusted ES rate of 8.75 cents per kWh. The adjusted ES rate will be effective for service rendered on or after April 16, 2012.

For clarity, we reiterate that upon the determination of the permanent rates attributable to the Scrubber addition, any under- or over-recovery will be reconciled back to the establishment of temporary rates. Thus, while we establish temporary rates for the Scrubber addition on the basis of the information we have available, we anticipate that the parties will engage in a searching inquiry to investigate PSNH's permanent Scrubber rates. The actual costs allowed to be recovered, as well as the time period during which those costs accrued for future recovery, will depend upon findings made at the conclusion of the permanent rate portion of this proceeding. In order to expedite the full examination of the permanent Scrubber-related rates, we instruct Staff to convene the parties to develop a procedural schedule for completion of this docket. Discovery on issues relevant to permanent rates should continue even as a schedule is being developed.

Based upon the foregoing, it is hereby

ORDERED, that Public Service Company of New Hampshire is hereby authorized to establish an Energy Service rate at 7.77 cents per kWh and establish a temporary Scrubber cost recovery rate at 0.98 cents per kWh for a combined Energy Service rate of 8.75 cents per kWh, effective April 16, 2012; and it is

FURTHER ORDERED, that after consultation with the parties, Staff shall report to the Commission a proposed procedural schedule; and it is

FURTHER ORDERED, that Public Service Company of New Hampshire shall file tariffs consistent with this Order within 30 days hereof pursuant to New Hampshire Code Admin. Rules Puc 1603.02.

By order of the Public Utilities Commission of New Hampshire this tenth day of April, 2012.



Amy D. Ignatius
Chairman



Michael D. Harrington
Commissioner

Attested by:



Lori A. Davis
Assistant Secretary

SERVICE LIST - EMAIL ADDRESSES - DOCKET RELATED

Pursuant to N.H. Admin Rule Puc 203.11 (a) (1): Serve an electronic copy on each person identified on the service list.

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Docket #: 11-250-1 Printed: April 10, 2012

FILING INSTRUCTIONS:

- a) Pursuant to N.H. Admin Rule Puc 203.02 (a), with the exception of Discovery, file 7 copies, as well as an electronic copy, of all documents including cover letter with:
- DEBRA A HOWLAND
EXECUTIVE DIRECTOR
NHPUC
21 S. FRUIT ST, SUITE 10
CONCORD NH 03301-2429
- b) Serve an electronic copy with each person identified on the Commission's service list and with the Office of Consumer Advocate.
- c) Serve a written copy on each person on the service list not able to receive electronic mail.