STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DE 11-250

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Investigation of Scrubber Costs and Cost Recovery

Order Denying Second Motion for Rehearing and Clarifying Scope

O R D E R N O. 25,546

July 15, 2013

I. PROCEDURAL HISTORY

This docket considers the prudence of the costs and cost recovery for the wet flue gas desulfurization system (Scrubber) installed by Public Service Company of New Hampshire (PSNH) at its coal-fired generation plant known as Merrimack Station. PSNH installed the Scrubber pursuant to RSA 125-O:11-18 (the Scrubber law) which became effective June 8, 2006. The Office of Consumer Advocate (OCA), the New England Power Generators Association, Inc. (NEPGA), TransCanada Power Marketing Ltd and TransCanada Hydro Northeast, Inc. (collectively, TransCanada), and Sierra Club and Conservation Law Foundation (jointly, SC/CLF) are all parties to this docket.[1]

In connection with discovery disputes that arose in this docket, the Commission gave parties the opportunity to file legal briefs "regarding their views of the proper interpretation of RSA 125-O:10, RSA 125-O:17 and the cost recovery provisions of RSA 125-O:18, and how these statutes relate to one another, to the application of the standard for discovery of evidence, and to relevance." Order No. 25,398 (August 7, 2012) at 10.

[1] A detailed procedural history can be found in Order No. 25,332 (February 6, 2012) and Order No. 25,346 (April 10, 2012). All documents filed in DE 11-250 can be found on the Commission's website at http://www.puc.nh.gov/Regulatory/Docketbk/2011/11-250.html.

PSNH, TransCanada, SC/CLF, and the OCA filed briefs on August 28, 2012. On December 24, 2012, the Commission issued Order No. 25,445 (Discovery Order) in which the Commission ruled on the outstanding discovery motions and construed the above-referenced statutory provisions of RSA 125-O. *See* Order No. 25,445 at 24-26.

PSNH timely filed a motion for rehearing of Order No. 25,445 on January 23, 2013, to which TransCanada, SC/CLF, and the OCA objected. On May 9, 2013, the Commission issued Order No. 25,506 (Rehearing Order) granting in part PSNH's motion.

The OCA, TransCanada, and SC/CLF (together, Moving Parties) filed a Joint Motion for Rehearing, Clarification and/or Reconsideration (Motion) of Order No. 25,506 on May 28, 2013. The Motion argued that the Commission erred in the Rehearing Order when it determined that RSA 125-O:17, the variance provision in the Scrubber law, did not allow retirement of Merrimack Station as a method of meeting the mercury emissions reductions requirements of the Scrubber Law. PSNH filed an Objection to the Motion on May 31, 2013.

II. POSITIONS OF THE PARTIES

A. OCA, TransCanada, and SC/CLF

In the Rehearing Order, the Commission reversed its decision in Order No. 25,445 and concluded that the variance provision, RSA 125-O:17, could not be interpreted to allow retirement of Merrimack Station rather than installation of the scrubber technology as a method of meeting the emissions reduction requirements of the Scrubber Law, and that the only variances PSNH could request under RSA 125-O:17 were an alternative schedule for compliance, or an alternate emissions reduction goal. The Moving Parties argued that the Rehearing Order is unlawful and unreasonable because PSNH's motion for rehearing failed to demonstrate that the Discovery Order was unlawful, unreasonable, or the result of mistake.

Motion at 2-3. In addition, the Moving Parties asserted that because the Discovery Order pertained to discovery, the rehearing request should be considered in the context of the Commission's broad discretion in the area of discovery, and that the Commission should adopt a more expansive interpretation of the variance provision. *Id*. at 3.

The Moving Parties argued that, although the Commission stated that its interpretation of RSA 125-O:17 in the Discovery Order conflicted with a prior Commission determination in Order No. 24,898 (September 18, 2008), the Commission failed to provide any reasons, as required by RSA 541-A:35, for its decision that the interpretation of RSA 125-O:17 in Order No. 24,898 should control. *Id*. at 4-5. The Moving Parties argued that the Commission is not bound by its prior orders in that the Commission may modify an order pursuant to RSA 365:28. Further, they argue that the Commission's determination that an apparent conflict with an earlier order required rehearing is unreasonable and an error of law. *Id*. at 4. The Moving Parties also opined that Order No. 24,898 related to whether the installation of the Scrubber was in the public interest, while the Discovery Order related to a prudence proceeding and thus could be distinguished. The Moving Parties asserted that the conflict between the two orders is not a sufficient basis for the Commission's reversal in the Rehearing Order. *Id*. at 6.

According to the Moving Parties, the Commission decision in the Rehearing Order appears to find that PSNH could have used the variance provision (RSA 125-O:17) to seek an alternative schedule, or an alternative reduction requirement, but the variance provision did not give PSNH the option of retiring Merrimack Station to meet mandatory emission reduction goals. *Id*. at 7. They argued that the purpose of RSA 125-O is to reduce pollution, and that regardless of the alleged "mandate" requiring the owner of Merrimack Station to install a scrubber, there are no sanctions in the law if the owner fails to do so. The Moving Parties

asserted that the law cannot be construed to eliminate the most obvious method of compliance, retirement of the plant, unless expressly stated in the law. *Id*. at 8.

The Moving Parties said that the Rehearing Order appears to retreat from this common sense approach to understanding the Scrubber Law in the larger context. They claimed that interpreting the law to foreclose a review of retirement as one possible action "leads to a logical inconsistency if it means that PSNH had no choice but to construct the scrubber, even if economic conditions were such that the scrubber would be installed on a plant that a prudent utility would retire." *Id*. According to the Moving Parties, eliminating the consideration of retirement in the prudence review supports PSNH's view that construction of the Scrubber constituted prudent utility practice, limits the ability of the parties to present a full prudence case, and appears to ignore the Commission's ongoing obligation to ensure that PSNH ratepayers are protected from "exorbitant rates that derive from bad utility decisions." *Id*. The Moving Parties argued that removing retirement of the plant from the array of options PSNH could have considered, arbitrarily and unnecessarily limits consideration of the full spectrum of prudence as required. *Id*. at 9.

The Moving Parties concluded that, at a minimum, the Commission should clarify its decision. They requested an express finding independent of RSA 125-O:17 that the Commission can still consider whether a prudent utility would have "embraced a study of the advisability of constructing this project before proceeding given what was happening in the market" including the increase of customer migration, the decrease in natural gas prices, the significant increase in the cost of the Scrubber installation, and reasonably foreseeable environmental regulations that would increase the costs of operating a 40 year old coal-fired power plant. *Id*. at 10.

B. Public Service Company of New Hampshire

PSNH argued that the Commission was correct in interpreting RSA 125-O:17 as it did in the Rehearing Order. According to PSNH, the Commission reiterated that it has no jurisdiction to evaluate whether the Scrubber should have been built, or whether the cost of that technology was too high. PSNH asserted that the Commission defined the scope of its prudence review as being limited to an assessment whether the actions PSNH took to comply with its legal obligation to install the Scrubber were prudent. PSNH Objection at 2.

In response to the Moving Parties' claims, PSNH asserted that it had offered sufficient grounds for the Commission to reconsider the Discovery Order. *Id*. at 4. PSNH also argued that the Commission's interpretation of RSA 125-O:17 in the Rehearing Order is supported by decisions of the New Hampshire Supreme Court. *Id*. at 5. PSNH disagreed with the Moving Parties' assertion that the Discovery Order was limited to discovery issues, noting that the Discovery Order contains the Commission's initial interpretation of RSA 125-O:17, which pertains to the scope of the hearing. *Id*. at 7.

Finally, PSNH argued that the Commission's statement in the Rehearing Order that PSNH has an obligation to engage in good utility management is not inconsistent with the finding that PSNH had no discretion to decide whether to build the Scrubber. PSNH stated that the Commission retains the authority to determine whether PSNH was prudent in the construction and in incurring costs to install the Scrubber which, PSNH opined, is the proper scope of this proceeding. *Id*. at 8-9.

III. COMMISSION ANALYSIS

Pursuant to RSA 541:3, the Commission may grant rehearing or reconsideration when a party states good reason for such relief and demonstrates that a decision is unlawful or

unreasonable. *See Rural Telephone Companies*, Order No. 25,291 (Nov. 21, 2011) at 9. Good reason may be shown by identifying specific matters that were "overlooked or mistakenly conceived" by the deciding tribunal, *see Dumais v. State*, 118 N.H. 309, 311 (1978), or by identifying new evidence that could not have been presented in the underlying proceeding, *see O'Loughlin v. N.H. Personnel Comm'n*, 117 N.H. 999, 1004 (1977) and *Hollis Telephone, Inc., Kearsarge Telephone Co., Merrimack County Telephone Co., and Wilton Telephone Co.*, Order No. 25,088 (Apr. 2, 2010) at 14. A successful motion for rehearing does not merely reassert prior arguments and request a different outcome. *See Connecticut Valley Electric Co.*, Order No. 24,189, 88 NH PUC 355, 356 (2003), *Comcast Phone of New Hampshire*, Order No. 24,958 (April 21, 2009) at 6-7 and *Public Service Company of New Hampshire*, Order No. 25,168 (November 12, 2010) at 10.

The Moving Parties have not presented new evidence, nor have they identified specific matters that were overlooked or mistakenly conceived. In the Rehearing Order we considered whether our statement on page 25 of the Discovery Order that PSNH had a right to seek a variance based on "a significant escalation in cost" is directly contrary to prior Commission orders. Rehearing Order at 17. We determined that our statement in the Discovery Order was contrary to our prior statement in Order No. 24,898 that " [n]owhere in RSA 125-O does the Legislature suggest that an alternative to installing scrubber technology as a means of mercury compliance may be considered, whether in the form of some other technology *or retirement of the facility*." (emphasis added) *Id.* at 17. Accordingly, we granted PSNH's request for rehearing in part. Order No. 24,898, which was issued on September 18, 2009, confirmed for PSNH that retirement of Merrimack Station was not recognized as a method of compliance with the mercury reduction requirements of RSA 125-O. It is simply not possible, more than three

and a half years later, to revisit that issue. Therefore, we continue to find that our interpretation of RSA 125-O:17 and the inability of PSNH to use retirement as a means of obtaining a variance from the requirements of RSA 125-O in the Rehearing Order is the correct interpretation. As a result, we will deny the Motion for Rehearing. This does not mean, however, that the possibility of retirement of Merrimack Station is immaterial to our analysis.

With regard to the Moving Parties' request that we clarify our prior orders and the scope of this docket, we begin with the issue with which everyone agrees: the hearings will explore whether PSNH managed the construction of the Scrubber itself in a prudent manner. For example, did PSNH have adequate cost and quality controls in place? Did it oversee its contractors and employees in a prudent manner? We are not persuaded by PSNH's arguments, however, that our prudence review is limited to these questions alone. The scope of our prudence review is determined by the management discretion that PSNH had under existing law and, as a result, must be more comprehensive than a simple inquiry into whether PSNH did an adequate job of managing the funds expended to construct the Scrubber.

RSA 125-O:18 governs cost recovery by public utilities for compliance with the Scrubber Law. That section of the Scrubber Law provides:

> If the owner [of an affected source] is a regulated utility, the owner shall be allowed to recover all prudent costs of complying with the requirements of this subdivision in a manner approved by the public utilities commission. During ownership and operation by the regulated utility, such costs shall be recovered via the utility's default service charge. In the event of divestiture of affected sources by the regulated utility, such divestiture and recovery of costs shall be governed by the provisions of RSA 369-B:3-a.

RSA 125-O:18 (West Supp. 2012). The first sentence of this provision of the Scrubber Law is conditional. The phrase "[i]f the owner is a regulated utility" indicates that the Legislature specifically contemplated that an entity complying with the Scrubber Law *might not* be a public

utility. The second sentence provides that a public utility that complies with the Scrubber law and continues to own an affected source will collect its prudent costs of compliance through default energy service rates. The third sentence indicates three things of importance: First, a public utility that is required to comply with the Scrubber Law retains the management discretion to divest itself of an affected source, where appropriate. Second, a utility is not restricted to divesting an affected source only after a scrubber is constructed and compliance is completed. Instead, the lack of a time frame in the third sentence allows a utility to divest itself of an affected source prior to, during, or after installation of a scrubber. Third, while guaranteeing that a regulated utility will recover all prudent costs of compliance, even perhaps if the utility ultimately divests itself of the affected source, the third sentence places in the Commission's hands the mechanism for cost recovery for compliance where the affected source has been divested. (RSA 369-B:3-a requires the Commission to provide for cost recovery in the event PSNH opts to retire or divest its generation assets.)

While, under RSA 125-O, PSNH had no discretion, and continues to have no discretion, whether to install and operate the Scrubber if it remains the owner and operator of Merrimack Station, the Scrubber Law does not allow PSNH to act irrationally with ratepayer funds. RSA 125-O:18 makes clear that PSNH retained the management discretion to divest itself of Merrimack Station, if appropriate. Likewise, under RSA 369-B:3-a, PSNH retained the management discretion to retire Merrimack Station in advance of divestiture. Consequently, we have never construed RSA 125-O to mandate that PSNH continue with the Scrubber's installation if continuing would require PSNH to engage in poor or imprudent management of its generation fleet. As we stated in Order No. 24,914 at 13-14, "RSA 125-O:17 [sic.]. . . provide[s] a basis for the Commission to consider, in the context of a later prudence review, arguments as to

whether PSNH had been prudent in proceeding with installation of scrubber technology in light of increased cost estimates and additional costs from other reasonably foreseeable regulatory requirements such as those cited by the Commercial Ratepayers, which include the Clean Air Act, 42 U.S.C. § 7401 et seq., and the Clean Water Act, 33 U.S.C. §1251 et seq." It is the "later prudence review" referred to in Order No. 24,914 that we undertake in this docket. We do not by this Order express a view as to the prudence of PSNH's decision-making regarding Merrimack Station; that is precisely what is to be explored in the course of this docket.

We caution the parties that, although the prudence inquiry necessarily implicates PSNH's discretion and the Commission's decision making authority under RSA 369-B:3-a, this docket is not held pursuant to RSA 369-B:3-a and it will not determine whether PSNH must at this time divest itself of or retire Merrimack Station. PSNH has not petitioned for permission to divest or retire any of its assets, and we would not necessarily expect an inquiry under the factors that must be considered under RSA 369-B:3-a to yield the same result in 2013 as the inquiry might have yielded during the years in which PSNH was making critical decisions regarding the Scrubber investment. PSNH's prudent costs of complying with RSA 125-O must be judged in accordance with the management options available to it at the times it made its decisions to proceed with and to continue installation. The hearing on the merits will therefore not address current market or regulatory conditions but rather those conditions in place at the time of the decision-making under review; specifically the period of time after the Legislature's decision to require the Scrubber up to the point of the Scrubber's "substantial completion" in September 2011. *See* Order No. 25,445 at 26. At hearing, therefore, we will not admit evidence or allow cross examination on regulatory proposals or actions, market conditions or Company decisions that extend beyond September 2011.

At hearing the evidence may demonstrate that market and regulatory circumstances in place at times of critical decision-making justified continued operation of Merrimack Station, under the standards of RSA 369-B:3-a and justified the installation of the Scrubber technology. If the processes and decisions of complying with the Scrubber Law were prudently managed, then the resulting costs would be included in rates. Conversely, the evidence may demonstrate that market and regulatory circumstances at the time decisions were being made did not justify continued operation of the plant with the Scrubber installed, and thus did not justify the expenses of the Scrubber. In such a case, the costs of complying with the Scrubber Law would not be allowed into rates, even if prudently managed. Of course, the evidence may demonstrate that the balance shifted from continued operation being prudent to being imprudent, and therefore rate recovery of compliance expenses would be limited to those incurred prior to the point of management imprudence in pursuing the continued operation of the unit. If a finding were reached that resulted in some or all of the costs of installation being disallowed, PSNH would still be entitled to operate the unit, albeit at a reduced rate base. In any event, all the relevant facts and circumstances still need to be presented and reviewed at hearing. Finally, as previously stated, this is not a docket to determine if PSNH should divest or retire Merrimack Station pursuant to RSA 369-B:3-a.

In order to reach the hearing on the merits as expeditiously as possible, we adopt the following procedural schedule, building from the schedules proposed by PSNH, the OCA and Staff in a May 29, 2013 letter. The schedule below is subject to amendment if dates identified conflict with preexisting commitments:

Technical session	July 24, 2013 at 9 AM
PSNH Response and Objections to Technical Session Questions	August 7, 2013
Staff and Intervenor Testimony	August 23, 2013

Data Requests to Staff and Intervenors	September 6, 2013
Staff and Intervenor Responses and Objections to Data Requests	September 20, 2013
Rebuttal Testimony	October 4, 2013
Settlement Conference	October 18, 2013
File Settlement, if any	November 1, 2013
Hearing on the Merits	November 12-14, 2013 at 9 AM

Based upon the foregoing, it is hereby

ORDERED, rehearing and reconsideration of Order No. 25,506 is hereby DENIED; and it is

FURTHER ORDERED, that Order No. 25,445, Order No. 25,506, and the scope of this docket are clarified as discussed above.

By order of the Public Utilities Commission of New Hampshire this fifteenth day of July, 2013.

Amy L. Ignatius
Chairman

Michael D. Harrington
Commissioner

Attested by:

Debra A. Howland
Executive Director

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