STATE OF NEW HAMPSHIRE

PUBLIC UTILITIES COMMISSION

DE 11-250

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Investigation of Merrimack Station Scrubber Costs and Cost Recovery

Order Granting Motion for Rehearing in Part

O R D E R N O. 25,506

May 9, 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 generator known as Merrimack Station. PSNH installed the Scrubber pursuant to RSA 125-O:11-18 (the Scrubber law) which was 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), Sierra Club (SC) and Conservation Law Foundation (CLF) are all parties to this docket.[1]

In addition to resolving discovery disputes between PSNH and TransCanada, *see*, *e.g.*, Order No. 25,334 (March 12, 2012) and Order No. 25,398 (August 7, 2012), the Commission gave the 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-

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[1] Detailed procedural history can be found in the 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.

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 at 10.

PSNH, TransCanada, CLF and SC (jointly) and the OCA filed briefs on August 28, 2012. In Order No. 25,445 (December 24, 2012), the Commission ruled on outstanding motions to compel and set forth its interpretation of the statutory provisions of RSA 125-O noted above. Order No. 25,445 at 24-26.

On January 23, 2013, PSNH timely filed a motion for rehearing of Order No. 25,445 (Motion), to which TransCanada and the OCA objected on January 28, 2013; CLF and SC jointly objected to PSNH's motion on January 30, 2013. On January 29, 2013, the Commission issued a secretarial letter suspending the docket's procedural schedule pending resolution of the Motion.

On January 15, 2013 PSNH filed a letter requesting an accounting statement clarification that would allow PSNH to recover the equity return portion of the cost of capital component of Scrubber costs, to which the OCA objected on February 22, 2013[2]. This issue will be addressed separately. PSNH also filed, on March 14, 2014, notice of a recent New Hampshire Supreme Court decision, *In the Matter of S. Rebecca Carmody and Craig T. Carmody*, Case No. 2012-135, 62 A.3d 862 (March 13, 2013) regarding the use of mandatory terms in a statute. TransCanada responded on March 19, 2013.

II. POSITIONS OF THE PARTIES AND STAFF

A. Public Service Company of New Hampshire

PSNH stated that conclusions in Order No. 25,445 (Order) concerning the legal mandates included in RSA 125-O:11-18, and interpretation of RSA 125-O:17 in particular, are incorrect,

[2] PSNH supplemented the filing on February 20, 2013 with further detail on its request.

unlawful or unreasonable.[3] Motion at 1. PSNH argued that the Commission has already rejected all of the assumptions on which the Order is based. *Id.* at 7. PSNH asserted that RSA 125-O:11-18 required it to construct a Scrubber at the Merrimack Station on or before July 1, 2013, but the Order concluded that PSNH had the ability to seek a variance from the obligation to build the Scrubber, if or when it became too expensive, or economically infeasible. *Id.* at 7.

PSNH asserted that the Order is based on three faulty assumptions: (1) that PSNH had discretion whether to construct the Scrubber; (2) that the Legislature based its public interest findings concerning the construction of the Scrubber on a fixed or presumed cost such that "significant increases" above such a cost might be considered "imprudent"; and (3) that the Legislature ceded the oversight authority it specifically reserved for itself in RSA 125-O:13, IX, and instead intended to allow the Department of Environmental Services (DES) to determine whether the statutory mandate to construct the Scrubber must be obeyed. PSNH said that each of these assumptions is false, and that each assumption has been explicitly rejected by the Commission in its prior orders relating to the Scrubber. *Id.* at 3-4.

PSNH maintained that in Order No. 24,979 (June 19, 2009) at 14-15, the Commission ruled that the legislative mandate to construct the Scrubber was unequivocal and that PSNH had no management discretion regarding the decision to build it.[4] Order No. 24,979 at 15. PSNH also asserted that the New Hampshire Supreme Court has twice described RSA 125-O:11-18 as mandating the installation of the Scrubber. PSNH argued that absent legislative intervention, it had no discretion whether to build the Scrubber; therefore, the finding of the Commission to the

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[3] PSNH incorporated by reference the arguments contained in its August 28, 2012 memorandum filed in response to Order No. 25,398.

[4] *See, also,* Order No. 25,050 (Dec. 8, 2009) on rehearing of Order No. 24,979, where the Commission stated: "Given the legislative finding that the scrubber project is in the public interest at RSA 125-O:11, we do not have the authority to transform the review of this financing request into a pre-approval proceeding relative to the scrubber project." Order No. 25,050 at 10.

contrary is inconsistent with New Hampshire law, Supreme Court opinions, and its own prior orders. *Id*. at 8-9.

PSNH asserted that the Commission's conclusion that the Company had the right to seek a variance based on a significant escalation in cost is directly contrary to its prior orders, among them Order No. 24,898 (Sept. 19, 2008) at 12-13, in which the Commission stated 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. Furthermore, RSA 125-O does not: (1) set any cap on costs or rates; (2) provide for Commission review under any particular set of circumstances; or (3) establish some other review mechanism. Therefore we must accede to its findings. Order No. 24,898 at 12-13. *See also* Order No. 24,914 (Nov. 12, 2008) at 12 ('The Legislature could have provided express cost limitations on the scrubber installation but did not do so.')."

Id. at 9.

PSNH stated that the Commission had previously rejected the claim that the Legislature intended any agency review of the overall cost of the Scrubber during construction.[5] PSNH argued that the Commission had previously recognized, but ignored in the Order, that "[t]he Legislature has….retained oversight of the scrubber installation including periodic reports on its cost. *See* RSA 125-O:13, IX." Order No. 24,979 at 15. PSNH maintained that in the words of the Commission, oversight by the Legislature prevented it from reviewing the costs of the Scrubber during construction.[6] *Id*. at 10.

PSNH claimed that despite a "clear and unequivocal statutory mandate," the Commission erroneously construed RSA 125-O:17, II to permit a variance from both the "80% reduction level and from any installation of mercury reducing technology." *Id*. at 2. PSNH asserted that, contrary to prior rulings, the Commission assumes the existence of authority to second-guess the

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[5] *See* footnote 7, *supra.*

[6] *See* Order No. 24,898 at 7-8.

Legislature's public interest finding through its reading of RSA 125-O:17, II. According to PSNH, this reading would give DES the authority to determine that construction of the Scrubber was economically infeasible above a certain cost. *Id*. at 10-11.

PSNH postulated that the fundamental problem with the Order is that the "economic feasibility" standard in RSA 125-O:17, II has nothing to do with undertaking the construction of the Scrubber but, instead, relates only to a comparison of achieved mercury reduction with the statutorily mandated mercury emissions reduction requirement of 80%. PSNH stated that in enacting RSA 125-O:11-18, the Legislature concluded that construction of the Scrubber was feasible and in the public interest, and construction should proceed on an expedited basis. PSNH stated that the Legislature also determined that construction could be accomplished "with reasonable costs to consumers," RSA 125-O;11, V, and kept for itself the power to determine whether the costs became unreasonable, RSA 125-O:13, IX. PSNH asserted that by reserving to itself the review of whether the mandate continued to be economic, the Legislature divested any agency from making that decision. *Id*. at 11.

PSNH stated that RSA 125-O:17 allows for variances in very limited circumstances: (1) to vary the schedule for meeting the mercury emissions reduction requirement by extending the date for compliance (Subpart I of Section 17), (2) to vary the level of reduction achieved by the scrubber technology where achieving that level is not possible because of energy crises, fuel disruptions, unavoidable disruptions in the operation of the plant or because achieving that level is economically infeasible. According to PSNH, neither of those subparts addresses the obligation to construct the Scrubber or its overall costs. *Id*. at 12. PSNH argued that by construing the statute to allow an alternative reduction requirement of zero mercury emissions, the Commission transformed a variance provision that deals solely with the mercury emissions

reduction requirements into a waiver and *de facto* repeal of the law's unequivocal mandate. According to PSNH, the Commission found that RSA 125-O:17, II permitted PSNH to seek a variance of its obligation to construct the Scrubber based on the potential economic infeasibility of construction; specifically, the significant escalation of cost. PSNH said that building on that logic, the Commission, as part of its review of prudent costs of installing the Scrubber, may consider whether PSNH should have determined that constructing the Scrubber was economically infeasible, and whether the Company should have sought a variance from the statutory requirement that the Scrubber be installed. *Id*. at 2.

PSNH said that such a reading is plain error because it would grant DES the power to repeal the express statutory mandates contained in RSA 125-O:13, I and II, and "unravel" the carefully constructed statutory scheme enacted by the Legislature which required construction of the Scrubber as part of an integrated multiple pollutant reduction strategy. *Id*. at 3. PSNH asserted that the Legislature granted no such power to the Commission or DES, explicitly or implicitly, and that the Commission misconstrued the statute and ignored the real-life, practical aspects of how the statute works and how a large-scale construction project such as the Scrubber must proceed. PSNH further contended that the Order is also inconsistent with the Commission's prior orders as well as the non-severability provision in RSA 125-O:10. *Id*. at 3.

PSNH claimed that the most logical reading of RSA 125-O:17, II is that once the Scrubber becomes operational and the level of reduction is known, PSNH could have requested a variance if it became economically infeasible to achieve the 80% level as opposed to some lesser level. PSNH stated that the "economic infeasibility" standard should only be used to determine whether, given the level or reduction actually achieved upon operation of the completed Scrubber, it is worth spending additional money that might be necessary to reach the mandated

80% standard. PSNH reasoned that given the specific mandates of the statute, it is inconceivable that the Legislature intended to allow another agency to review, and change or eliminate, its public interest determination that the Scrubber be built without clearly defining and delineating such a delegation of authority. *Id*. at 15.

In addition, PSNH argued that the Order ignores the plain language of RSA 125-O:17, which permits PSNH to request variances "only from the mercury emissions reduction requirements of the statute and only in two instances: (1) to vary the schedule for meeting those requirements; and (2) to vary the percentage of mercury reduced." *Id.* at 4. PSNH claimed that nothing in the law speaks to or permits a variance, or a waiver, from the statutory mandate found in RSA 125-O:11 and RSA 125-O:13, I, to construct the Scrubber, the technology which the Legislature and DES found to be the "best known commercially available technology," at RSA 125-O:11, II. *Id.* at 4. According to PSNH, the Company could not have sought a variance of its duty to construct the Scrubber and "the Commission has no authority to determine, as part of its prudence review, that the Scrubber should not have been constructed – for economic reasons, or any other reason. The Legislature itself determined the public interest and feasibility of the Scrubber when it passed the statute and required PSNH, as a matter of law, to have specific technology installed at a specific location by a specific date. Only the Legislature had the power to change that statutory determination and to repeal or amend the law requiring that the Scrubber be built, either because of a 'significant escalation of cost,' or for any other reason." *Id*. at 4.

PSNH claimed that the Order also ignored that a variance based on an "alternative reduction requirement" could never be requested during construction. Further, PSNH asserted that RSA 125-O:17, II could not serve as a basis for stopping construction, or as authority for the Commission to conclude that the failure to seek a variance during construction rendered some of

the costs of construction "imprudent." PSNH argued that the Order is contrary to the intent and language of the statute because the Commission found that PSNH could have sought a variance during construction under RSA 125-O:17, II. *Id.* at 5. PSNH maintained that when the Legislature wishes to give DES the authority to grant a waiver of a statutory requirement, it says so explicitly. PSNH posited that the fact that DES reviews the variance is compelling evidence that the variance was to focus on environmental implications of varying the mercury emissions reduction requirement. *Id.* at 17.

PSNH also said that the Commission misinterpreted the authority of DES to grant PSNH a variance from the mercury emissions reduction requirements of the Scrubber law in that the Commission's interpretation would grant DES the right to void the requirement to construct the Scrubber at all, thereby nullifying the public interest findings of the Legislature. *Id*. at 5.

PSNH reasoned that a finding that RSA 125-O:17 permitted PSNH to request a variance from any obligation to construct the Scrubber based on economic infeasibility reads the words "alternative reduction requirement" out of Subpart II and the words "mercury emissions reduction requirements" out of the first sentence of the Section. PSNH noted that statutes must be read to give meaning to all the words in the statute. PSNH argued that if the Legislature intended the statute to be read without the phrase "mercury emissions reduction requirements" in the first sentence of Section 17, and the phrase "alternative reduction requirement" from Subpart II, then it would have said so. *Id*. at 19.

PSNH claimed that by construing the words "alternative reduction requirement" to allow DES to approve anywhere from no mercury reduction to 100% reduction, the Commission has effectively converted the "variance" provision into a complete waiver of both the statutory mercury reduction requirement and the statutory mandate that the Scrubber must be installed and

operational by July 1, 2013. PSNH maintained that if the Legislature had intended this result, it would have been easy to say so, by adding the words “or waiver” to Section 17 so that the first sentence provided that “the owner may request a variance *or waiver* from the mercury reduction requirements of this subdivision.” *Id*. at 20.

PSNH stated the Commission read RSA 125-O:17 to be in direct conflict with RSA 125-O:11, I, III, V, VI, and VIII and RSA 125-O:13, I and II and IX by allowing PSNH to seek a variance to not install any mercury reduction equipment based on cost. PSNH asserted that the Legislature mandated that the Scrubber be built in a particular way, at a particular location, and by a particular date, and retained solely for itself the review of the cost of building the Scrubber during construction. PSNH noted that the Supreme Court has consistently held, whenever possible, the provisions of statutes should be read not to conflict with one another. *Id*. at 20-21.

PSNH reiterated that by ignoring the language of RSA 125-O:17 and the overall statutory context, the Commission’s construction of the statute places RSA 125-O:17 at odds with the rest of the statute and its mandate to construct the Scrubber. *Id*. at 6. PSNH said that the Commission’s interpretation “does violence to the statute and is contrary to principles of statutory construction.” This interpretation, according to PSNH, renders words in the statute meaningless, reads words into the statute that do not exist, causes two sections of the statute to conflict with one another, and would create uncertainty and confusion if actually implemented. *Id*. at 19.

According to PSNH, the Order also ignores the Commission’s prior findings that PSNH had no discretion to exercise in constructing the Scrubber, the legislative finding that construction of the Scrubber was in the public interest, and the Legislature’s specific reservation of authority to oversee the project, including the cost of construction. PSNH argued that the

Order confers authority to the Commission that exceeds its statutory authority and jurisdiction. *Id.* at 6. PSNH stated that the Order at p. 25 concludes that Section 17 permits DES to override the mandate to construct the Scrubber whenever the cost of construction, or of meeting any mercury reduction, becomes too expensive. PSNH charged that this reading "is unnecessary and creates an illogical, if not absurd, result." *Id.* at 21.

PSNH argued that Section 17 can easily be read in a way that does not create a conflict with the statutory mandate in RSA 125-O:13, I or II by reading the Section to allow for limited variances only where the schedule for meeting the reduction requirement cannot be met, or where a reduced level of reduction is sought after construction. Under that reading the mandate to construct remains intact. PSNH asserted that the Commission's interpretation reads Section 17 to allow DES to repeal the mandate and, by finding that Section 17 allows a variance not to build the Scrubber based on the cost of doing so, is in direct conflict with the Legislature's retention of the authority to review those costs in RSA 125-O:13, IX. The Commission's interpretation grants to DES the implied right to repeal the mandate and allows DES to usurp legislative functions, despite express legislative action to the contrary. *Id.* at 21.

PSNH argued that the Commission's decision that a variance must be allowed because any other interpretation would lessen the obligation of PSNH to engage in good utility management flies in the face of its own, earlier determination. PSNH charged that for the Commission to say PSNH had the ability to exercise discretion regarding construction of the Scrubber after the Scrubber has already been built is unfair and creates a serious due process issue. *Id.* at 22-23. PSNH asserted that it has never expected that the cost of compliance with the Scrubber mandate was unreviewable. PSNH said that it has always asserted that according to the statute, only the Legislature had the jurisdiction to review construction costs that resulted

from a legislative mandate to build a particular technology by a specific date. PSNH indicated that the Commission has also held this to be the case. PSNH agreed that there was nothing in the statute that provides PSNH with the ability to avoid "good management," and that the Commission always retains the right to review whether the costs incurred by PSNH to comply with the statutory construction mandate were "prudent." *Id*. at 23. PSNH asserted that this is not a hypothetical situation. PSNH said that it built the Scrubber at a cost disclosed to the Legislature; the Legislature monitored those costs as they were being incurred; the Legislature was well aware of the estimated $457 million cost of the Scrubber when it decided not to repeal, amend, or alter the statutory mandate to construct; and the Commission's own expert engineering consultant found that PSNH engaged in appropriate management of the project. PSNH contended that not only did the Legislature reserve to itself oversight of the Scrubber project, it exercised that authority by voting SB 152 and HB 496 inexpedient to legislate. *Id*. at 25.

According to PSNH, the Legislature enacted a mandate as part of an overall multi-pollutant strategy, RSA 125-O:11, VIII; made public interest findings concerning the value of the Scrubber, RSA 125-O:11, I and II; required that the Scrubber be constructed with specific technology by a date certain, RSA 125-O:13; found that its installation would be accomplished with "reasonable costs to consumers," RSA 125-O:11,V; retained review of those costs for itself, RSA 125-O:13, IX; and incentivized PSNH to expedite construction, RSA 125-O:16. Nonetheless, under the Commission's statutory interpretation, the Legislature then allowed DES to undo the entire statutory mandate, based on a determination of "economic infeasibility." PSNH advanced that the Commission also assumed that even though RSA 125-O:11-18 makes no mention of any specific "presumed cost" of construction, the Legislature must have based its public interest finding in the statute on a "presumed cost," and must have intended that DES

have the authority to decide whether accomplishing the mercury reduction standards in the statute was worth the cost, notwithstanding the Legislature's own decision not to alter its mandate knowing the new cost. Likewise, PSNH hypothesized, one would have to conclude that the Legislature vested DES, an environmental regulator, with primary jurisdiction to decide what constitutes a "significant escalation in cost" of a utility project. PSNH stressed that this simply makes no sense. *Id*. at 26.

PSNH stated that the Commission's interpretation of the statute creates an illogical and unworkable result. *Id.* at 22. Finally, PSNH contended that the real-world practical consequences of the Order demonstrate that the Commission's rejection of its own prior orders and its reading of RSA 125-O:17 is illogical, causes conflicting results, and sets bad public policy by essentially second-guessing the wisdom of the Legislature's actions and those of businesses striving to comply with laws. *Id*. at 6 and 28. PSNH concluded by asserting that the Commission should reconsider Order No. 25,445 and limit the scope of the proceeding to a determination of whether specific costs incurred by PSNH to install the Scrubber were prudently incurred. *Id*. at 29.

B. TransCanada

TransCanada claimed that PSNH's motion repeats the same arguments made in prior filings with the Commission and does not raise any new arguments or point to anything that was overlooked or mistakenly conceived by the Commission that would justify reconsideration of Order No. 25,445, including PSNH's argument that the Commission should ignore RSA 125-O:17, the variance provision, because of the non-severability provision (RSA 125-O:10). TransCanada also argued that, contrary to PSNH's assertion that the Commission placed the variance provision at odds with the rest of the statute, the Commission in fact gave meaning to

the provision consistent with the fundamental principles of statutory construction. TransCanada Objection at 1-3.

According to TransCanada, PSNH has argued through this docket that the installation of the Scrubber was mandated by the Legislature and that this mandate trumps all other provisions of the Scrubber law. TransCanada characterized this argument as over-simplifying the law because it ignores RSA 125-O:17, the variance provision, and RSA125-O:18, the provision authorizing the Commission to review the prudence of the expenses incurred in determining appropriate recovery for the Scrubber costs. TransCanada claimed that PSNH's arguments undermine one of the fundamental statutory construction principles, namely that statutes must be read as a whole, giving meaning to all of the provisions in the law, citing *Appeal of Public Service Co. of N.H.* 141 N.H. 13, 17 (1996). *Id.*

TransCanada said that it had previously pointed out that PSNH's construction of the variance provision would lead to the absurd result that PSNH could have spent an unlimited amount of money on the Scrubber and never had the duty to seek a variance from the law. PSNH's argument, if taken to its logical conclusion, would allow PSNH to install technology costing billions of dollars; TransCanada insisted that there is no legal basis for PSNH's claim to such unlimited discretion in spending on the Scrubber project, nor is it reasonable to believe that the Legislative would have mandated a project without consideration to the Scrubber's cost and the ultimate impact on ratepayers. *Id.* at 4. TransCanada attested that the Scrubber law does not restrict the Commission's traditional and fundamental authority to act as the arbiter between the interests of the customer and the interests of the regulated utility and to ensure that rates are just and reasonable; and this assertion is supported by RSA 125-O:18 which specifically recognizes

that the Commission must conduct a prudence review of the Scrubber's costs to determine the costs to be recovered by ratepayers. *Id*. at 5.

Contrary to PSNH's claims, TransCanada opined that nothing in Order No. 24,445 gives powers to the Commission that exceed its statutory authority and jurisdiction. Rather, TransCanada said that the Order reflects a reasonable exercise of the authority given to the Commission under the law and recognized in years of precedent, particularly where the Commission emphasized PSNH's duty to engage in good utility management at all times. TransCanada stated the Commission's Order does not constitute bad public policy, as PSNH suggests, but continues good public policy in its recognition of the obligation that regulated utilities have to act responsibly. *Id*. at 5-6.

According to TransCanada, PSNH argued that there is no authority or requirement that the Commission review whether the cost of the Scrubber was too expensive because there is no reference in the law to the Scrubber's cost. TransCanada disagreed, arguing that PSNH ignored the statutory requirement to conduct a prudence review, as well as the Legislature's finding that the Scrubber could be installed "with reasonable costs to consumers", citing RSA 125-O:11, V. *Id*. at 6. TransCanada opined that PSNH's argument, taken to its logical conclusion, would ignore RSA 125-O:17, II that allows the submission of evidence of "economic infeasibility" as a basis for seeking an alternate reduction requirement. TransCanada argued that PSNH's interpretation of the law would provide no protection for ratepayers and undermine PSNH's responsibility to exercise good utility management. *Id*. at 7.

TransCanada pointed out that PSNH had already responded to the data requests to which PSNH had originally objected, and on that basis, PSNH's motion should be considered moot.

TransCanada concluded by requesting that the Commission deny PSNH's motion for rehearing. *Id*. at 8-9.

C. Conservation Law Foundation/Sierra Club

CLF/SC argued that PSNH's motion for rehearing for the most part restated arguments that it had previously raised in its objections to TransCanada's motion to compel and did not identify a clear error of law made by the Commission, thus failing to meet its burden that the remedy of a rehearing is necessary, citing *Connecticut Valley Electric Co*., 88 NH PUC 355, 356 (2003). CLF/SC asserted that, given New Hampshire's liberal view of discovery, PSNH was unable to make a valid argument against the motion to compel, citing *Yancey v. Yancey*, 119 N.H. 197, 198 (N.H. 1979) (allowing liberal discovery absent privilege or harassment). CLF/SC Objection at 2.

According to CLF/SC, PSNH did not raise privilege or harassment as a basis for its motion for rehearing, but presented argument based on PSNH's perspective on the facts. CLF/SC cited PSNH's assertion that the Scrubber installation project could not be put on hold "while the economics of it are reassessed and a variance considered" (PSNH Motion at 27). CLF/SC argued that PSNH's assertion is precisely the type of claim that should be subject to examination through discovery. CLF/SC concluded that the Commission's rulings in Order No. 25,445 are consistent with the standard for discovery in proceedings before the Commission and because PSNH's Motion did not contradict the Commission's rulings in Order No. 25,445, it should be denied.

D. Office of Consumer Advocate

In its objection to PSNH's Motion, the OCA stated that Order No. 25,444 resolved a discovery dispute between PSNH and TransCanada relative to matters raised by TransCanada in

motions to compel filed on August 7, 2012, September 11, 2012 and October 9, 2012. The OCA asserted that New Hampshire law favors liberal discovery and that the Commission properly analyzed each data request to discern whether the information sought was relevant to the proceeding or likely to lead to the discovery of admissible evidence.

The OCA argued that the Commission did not commit legal error—it reviewed TransCanada's data requests, the motions to compel and PSNH's objections under the proper legal standard. The OCA concluded that PSNH offered no new evidence or other compelling reason for the Commission to grant rehearing and that PSNH's Motion should be denied.

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.

PSNH moves for rehearing arguing, again, that it was under an absolute mandate to install scrubber technology, and that the Commission's interpretation of the variance provision is inconsistent with the statute as a whole. PSNH repeats its argument that the variance provision can only be read to apply after full installation of the Scrubber and in very limited circumstances not present in this case.

The Commission set forth its interpretation of the variance and savings clauses of RSA 125-O in Order No. 25,445 at pages 23 through 26. We concluded that PSNH could have sought a variance in order to comply with RSA 125-O through means other than scrubber technology, including retirement of Merrimack Station. On rehearing, PSNH points out that we previously opined 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." Order No. 24,898 at 12. Only after PSNH raised this issue in its motion did we recognize the apparent contradiction, and we grant limited rehearing on this point. After reconsideration, we will not disturb the prior Commission ruling in Order No. 24,898. To the extent that Order No. 25,445 interpreted the variance provision, RSA 125-O:17, to allow retirement of Merrimack Station rather than installation of the scrubber technology as a method of meeting the emissions reduction requirements, that portion of Order No. 25,445 alone is reversed.

We do not go so far, however, as to conclude that PSNH had no management discretion in this matter. Even though it may not have been within PSNH's management discretion to propose retirement of Merrimack Station as an alternative reduction requirement under RSA 125-O:17, PSNH, like any other utility owner, maintained the obligation to engage in good utility management at all times. *See Public Service Company of New Hampshire*, Order No.

20,794, 78 NH PUC 149, 160 (1993); and *West Swanzey Water Company, Inc*., Order No. 25,203 (March 15, 2011) at 7. *See also* RSA 378:28 ("The commission shall not include in permanent rates any return on any plant, equipment, or capital improvement which has not first been found by the commission to be prudent, used, and useful….")

Although we concur with portions of PSNH's analysis regarding the variance provision of RSA 125-O:17, we will still compel PSNH to supplement its responses to TransCanada's discovery requests TC 1-1 through TC 1-5, and request TC 1-12 as may be necessary. The information sought is potentially relevant to whether PSNH exercised prudent utility management.

The request for certain accounting treatment filed by PSNH on January 15 and February 20, 2013, to which the OCA objected on February 22, 2013, will be addressed separately. Finally, because the Commission suspended the procedural schedule pending resolution of the Motion, we direct the Commission Staff to consult with the parties and propose in writing a new procedural schedule for conclusion of the docket.

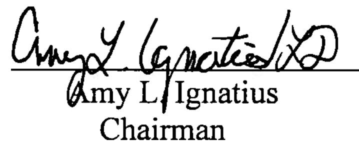
Based upon the foregoing, it is hereby

ORDERED, the Motion for Rehearing of Order No. 25,445 is GRANTED in part, as clarified herein; and it is

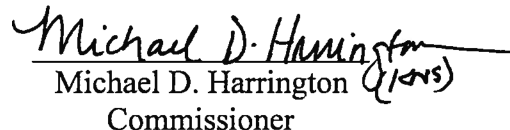
FURTHER ORDERED, that within 20 days the Staff shall submit a new procedural schedule after consultation with the parties.

By order of the Public Utilities Commission of New Hampshire this ninth day of May

2013.

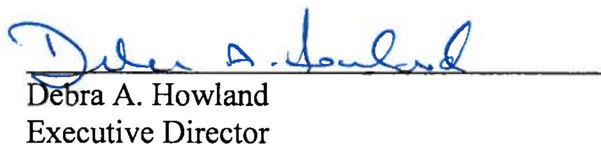


Amy L. Ignatius
Chairman



Michael D. Harrington
Commissioner

Attested by:



Debra A. Howland
Executive Director