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 Third Motion for Rehearing

O R D E R N O. 25,565

August 27, 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), Jim and Sandy Dannis, 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] Detailed procedural histories can be found in Order No. 25,332 (February 6, 2012), Order No. 25,346 (April 10, 2012), Order No. 25,298 (August 7, 2012), Order No. 25,506 (May 9, 2013) and Order No. 25,546 (July 15, 2013). 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. In particular, the Commission reasoned that PSNH "could have requested a variance from the 80% reduction requirement, and could have sought a lesser level of reduction, even down to no reduction at Merrimack Station, while pursuing a request to retire Merrimack Station. Retirement of Merrimack Station would effectively eliminate all emissions from the station and leave only continued emissions from PSNH's other generation units, reducing PSNH's overall mercury emissions significantly." Order No. 25,445 at 25.

PSNH timely filed a motion for rehearing of Order No. 25,445 (First Rehearing Motion) on January 23, 2013, to which TransCanada, SC/CLF, and the OCA objected. PSNH pointed out an apparent inconsistency between our reasoning in Order No. 25,445 and a prior order, in which we 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." *See* Order No. 24,898 at 12. On May 9, 2013, the Commission issued Order No. 25,506 (First Rehearing Order) granting in part PSNH's motion. We agreed with portions of PSNH's analysis regarding RSA 125-O:17 and concluded that: "we will not disturb the prior Commission ruling in Order No. 24, 898. To the extent that [the Discovery Order] 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." First Rehearing Order at 17.

The OCA, TransCanada, and SC/CLF filed a Joint Motion for Rehearing, Clarification and/or Reconsideration (Second Rehearing Motion) of the First Rehearing Order on May 28, 2013. The movants argued that the Commission erred regarding its interpretation of RSA 125-O:17. PSNH filed an Objection to the Second Rehearing Motion on May 31, 2013.

On July 15, 2013, the Commission issued Order No. 25,546 (Second Rehearing Order). The Commission denied the substantive relief requested in the Second Rehearing Motion but clarified the scope of this proceeding. With regard to the scope of its prudence review, the Commission construed RSA 125-O:18, the cost recovery section of the Scrubber Law, and RSA 369-B:3-a, which governs PSNH's divestiture and retirement of Merrimack Station Second Rehearing Order at 7-10. The Commission concluded that PSNH retained the management discretion to divest itself of Merrimack Station under RSA 125-O:18 or to retire Merrimack Station under RSA 369-B:3-a, if appropriate. *Id.* at 8. We further ruled that "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 [of the Scrubber]." PSNH timely filed a motion for rehearing of the Second Rehearing Order on August 9, 2013 (Third Rehearing Motion). The OCA, TransCanada, and SC/CLF jointly filed an objection to the Third Rehearing Motion on August 16, 2013.

We deny rehearing.

II. POSITIONS OF THE PARTIES

A. Public Service Company of New Hampshire

PSNH made three broad arguments in its Third Rehearing Motion. First, PSNH argued that the Second Rehearing Order is inconsistent with prior orders of the Commission and with the provisions of RSA 125-O:11-18. Third Rehearing Motion at 5-13. Second, PSNH argued

that the Commission's construction of RSA 125-O:18 conflicts with those portions of RSA 125-O that require installation of Scrubber technology, violates principles of statutory construction, creates illogical results and bad public policy, renders RSA 125-O:18 unconstitutional, and violates due process. *Id.* at 13-33. Third, PSNH argued that the Commission's construction of RSA 125-O:17 is erroneous, making the Second Rehearing Order inconsistent internally and with prior orders. *Id.* at 33-37. Where warranted, we address PSNH's more particularized arguments in our analysis below.

B. OCA, TransCanada, and SC/CLF

The OCA, TransCanada, and SC/CLF (Objecting Parties) argued that PSNH relied upon the same arguments it asserted in prior pleadings and therefore failed to meet the Commission's standard for granting rehearing. Objection to Third Rehearing Motion at 1-2 and 14. They argued that the Second Rehearing Order is consistent with statute, that the Third Rehearing Order is entirely consistent with Commission analyses in the instant and other dockets, and that PSNH ignored prior Commission orders in this docket and elsewhere regarding the Commission's authority to conduct prudence reviews. *Id*. at 5-7.

According to the Objecting Parties, accepting PSNH's analysis of RSA 125-O:18 would render the statute meaningless and contrary to principles of statutory construction, would make a mockery of the prudence review mandated by the statute and the Commission's authority to ensure that a utility's assets are used and useful, would 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 would restrict the Commission's authority to ensure that rates are just and reasonable; authority the Commission employs in order to protect ratepayers from the abuse of a monopoly. *Id*. at 3-4. The Objecting Parties stated that PSNH's argument ultimately fails

because it does not recognize the scope and implications of a prudence review, which the Legislature expected the Commission to perform as evidenced by the enactment of RSA 125-O:18. *Id*. at 8.

Further, the Objecting Parties argued that PSNH's claim that it was denied due process by the "arbitrary decision-making" of the Commission strains credibility because PSNH was familiar with the law long before Scrubber costs were incurred, and PSNH knew of the Commission's plenary authority to review and oversee all activities of regulated utilities. According to the Objecting Parties, the Scrubber Law contains no provisions limiting Commission authority. *Id*. at 11.

III. COMMISSION ANALYSIS

A. Standard for Rehearing

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 at 9, 96 NH PUC 646 (2011). 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), *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 at 7,

94 NH PUC 166 (2009), and *Public Service Company of New Hampshire*, Order No. 25,168 (November 12, 2010) at 10.

PSNH has not presented new evidence, nor has PSNH identified specific matters that were overlooked or mistakenly conceived by the Commission. On the contrary, PSNH's arguments demonstrate a misunderstanding of RSA 125-O:11-18 and our prior orders, including the Second Rehearing Order. PSNH's misunderstanding stems from a number of faulty underlying assumptions.

B. Consistency with Prior Commission Orders and With Statute

In the Second Rehearing Order, our clarification of the scope of this proceeding included a determination that PSNH retained the management discretion and duty of prudence to consider divestiture of Merrimack Station under RSA 125-O:18 and RSA 369-B:3-a. Consequently, the Second Rehearing Order made clear that discovery and testimony on this issue would be permitted.

This recent clarification of the scope of this proceeding is consistent with our prior orders on the scope of the prudence review that PSNH would eventually be subject to under the Scrubber Law. We have emphasized PSNH's decision-making responsibilities from the outset of proceedings in Docket DE 08-103, *Investigation of PSNH's Installation of Scrubber Technology at Merrimack Station*. In that docket we decided that, pursuant to RSA 369-B:3-a, we could not pre-approve *PSNH's decision* to modify Merrimack Station by constructing the Scrubber. Order No. 24,914 (November 12, 2008) ("[In Order No. 24,898], we concluded that the Commission lacked the authority to conduct a public interest review, in the form of pre-approval, of *PSNH's decision to install scrubber technology.*"). *Emphasis supplied.* Further, we stated:

> RSA 125-O:17 constitutes a mechanism for PSNH to seek relief from the Department of Environmental Service (DES) in certain circumstances; it does not constitute authority for the Public Utilities Commission to determine in advance whether it is in the public interest for PSNH to install scrubber technology. RSA 125-O:17 [sic.], however, is pertinent to prudence. We found previously that we retained our authority to determine prudence, including "determining at a later time the costs of complying with the requirements of RSA 125-O:11-18 and the manner of recovery for prudent costs." We note here that although RSA 125-O:17 provides PSNH the option to request from DES a variance from the statutory mercury emissions reductions requirement for reasons of "technological or economic infeasibility," it does not provide the Commission authority to determine at this juncture whether PSNH may proceed with installing scrubber technology. RSA 125-O:17 [sic] does, however, provide 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.

Investigation of PSNH's Installation of Scrubber Technology, Order No. 24,914 at 13, 93 NH PUC 564 (2008). Although we note in reviewing Order No. 24,914 that prudence is more properly referred to in RSA 125-O:18 and not in RSA 125-O:17, the import of Docket DE 08-103 remains the same: No utility may proceed blindly with the management of its assets or act irrationally with ratepayer funds; PSNH had a duty to its ratepayers to consider the appropriate response, possibly even including a decision to no longer own and operate Merrimack Station, when facing changing circumstances.[2] As Order No. 24,914 made clear, the scope of our eventual prudence review would encompass those issues.

Despite the guideposts set in Docket DE 08-103, PSNH has confused our inability to address the public interest in reducing mercury emissions from operating coal plants, with Commission approval of PSNH's continued ownership and operation of Merrimack Station

[2] We were conscious that we had incorrectly referenced RSA 125-O:17 as the section relevant to prudence in Order 24,914 when we quoted that order on pages 8-9 of the Second Rehearing Order. This was the reason for our use of the Latin "Sic." in our quotations of Order 24,914. Consequently, PSNH's third argument is unfounded and does not merit discussion. *See* Third Rehearing Motion at 33-37.

regardless of any contingency or economic effects of PSNH's decision-making. Additionally, PSNH has confused and conflated the statutory mandates upon owners of affected sources in RSA 125-O with its independent choice to continue to own and operate Merrimack Station.

Our previous statements regarding RSA 125-O:11-18, however specific to PSNH, were occasioned by and framed in the context of *PSNH's decision to continue its ownership and operation of Merrimack Station.* Our statements were not a directive that PSNH continue to own and operate Merrimack Station; were not a legal determination that the Legislature required PSNH to continue to own and operate Merrimack Station between 2006 and July 2013; and were not a legal determination that PSNH was the only entity that could install Scrubber technology. From the outset of proceedings before this Commission, we have characterized PSNH as having made a decision to proceed with the Scrubber project. This is because RSA 125-O mandated that the owner of Merrimack Station and not PSNH in particular, install Scrubber technology. Although PSNH has chosen to continue to own and operate Merrimack Station, RSA 125-O:11-18 did not compel PSNH to do so from 2006 through July 2013. Indeed, as a matter of law, RSA 369-B:3-a explicitly permitted PSNH to divest its remaining generation assets, including Merrimack Station, beginning May 1, 2006, and no section of the Scrubber Law, RSA 125-O:11-18, altered PSNH's ability to do so.

Within the more than 100 pages of argument that PSNH has filed regarding the interpretation of RSA 125-O:11-18, PSNH has not identified any statutory basis for its argument that PSNH was required to continue its ownership of Merrimack Station. PSNH's argument in this regard is that, while plausible, a reading of RSA 125-O:18 that would have allowed PSNH to sell Merrimack Station prior to completion of a Scrubber installation is "impractical" and "illogical" and would lead to "absurd" results. PSNH argues that it was the only party with any

reasonable and practical chance of complying with the seven-year timetable set by the Legislature for construction of a Scrubber. Third Rehearing Motion at 18-19. According to PSNH, a divestiture proceeding would have taken so long and the penalties for failing to install Scrubber technology at Merrimack Station by July 2013 were so severe that no new owner would have ever stepped forward. *Id.* at 19.

We considered whether such "practical" concerns made our interpretation of RSA 125-O:18 and RSA 369-B:3-a "illogical," but because we did not believe that the practical concerns led to an illogical or absurd result, we rejected them in favor of the plain wording of the statute. Fundamentally, the practical concerns now raised by PSNH are matters of fact that must be weighed and tested as part of the adjudicative process. These practical concerns are more relevant to whether PSNH acted prudently when it chose to continue to own and operate Merrimack Station and thus be obligated to meet the mercury reduction requirements, than to a statutory interpretation of the Scrubber Law.

Moreover, PSNH's practical concerns appear to be overstated. First, we note that it did not require seven years to complete the Scrubber project. As we found in the Discovery Order, the Scrubber was substantially completed and entered into service in September 2011, at least 19 months in advance of the July 2013 compliance deadline set by the Legislature. Order No. 25,445 at 24. Second, PSNH and the Commission have had recent experience with divestiture. *See* Docket No. DE 00-272 *Divestiture of NAEC/PSNH Electric Generation Facilities* and Docket No. DE 02-075 *PSNH, Sale of Seabrook Station Interests,* in which PSNH and a number of other parties accomplished the divestiture of Seabrook Station in less than two years from the signing of the Restructuring Settlement Agreement to Commission approval of the sale. In fact, in Docket No. DE 00-272, PSNH represented that the sale of fossil-fueled plants such as

Merrimack Station would only take 12 months from start to finish with some additional time for preparation and contingencies: "Experience in power plant divestitures through the Northeast indicates that such divestitures require approximately 12 months to conduct from launch to closing. There are many variables that make it difficult to accurately predict the actual process duration." PSNH bolstered this statement with three examples of sales taking 10, 12, and 13 months and represented "[t]hese experiences are typical of other asset divestitures in the Northeast." Public Service Company of New Hampshire: Nuclear, Fossil and Hydroelectric Asset Divestiture Plans, at 6, Docket No. DE 00-272, December 15, 2000 (on file with the NHPUC). Moreover, while we do not consider it determinative, PSNH and a new owner could have made the sale of Merrimack Station contingent upon receiving a variance from the July 2013 deadline from DES pursuant to RSA 125-O:17, II.[3]

Another of PSNH's concerns is that recovery of its prudently incurred costs could only be determined after the Scrubber was completed and the costs of compliance were known, effectively prohibiting PSNH from divesting Merrimack Station either prior to or during the construction of the Scrubber. *See, e.g.*, Third Rehearing Motion at 14-15, 17, and 25. We find no support for this argument in statute. Both RSA 125-O:18 and RSA 369-B:3-a require this Commission to allow recovery of prudently incurred costs of even partial compliance in the event of divestiture as neither statute requires that PSNH have owned Merrimack Station from the inception to the completion of the Scrubber project.

Notwithstanding PSNH's practical concerns, the plain wording of RSA 125-O:11-18 applies to the owner of Merrimack Station, not to PSNH specifically. Additionally, the plain

[3] Although the Commission rejects PSNH's concern regarding the duration of a sale as a basis for interpreting RSA 125-O:18 and RSA 369-B:3-a, the Commission does not here make a specific finding as to how long a sale of Merrimack Station may have taken, which may be relevant to the prudence of PSNH's decision making. The parties remain free to introduce evidence on this issue at hearing.

wording of RSA 125-O:18 and 369-B:3-a contemplate that PSNH might divest itself of the station prior to completing the Scrubber installation while requiring that this Commission still approve utility recovery of prudent costs of compliance with RSA 125-O:11-18. PSNH admitted nearly as much in its pleading, when it stated: "Each of the provisions (of RSA 125-O:7, 13, and 16) would apply regardless of the owner," Third Motion for Rehearing at 18, and "The statutory mandate to install and have operational Scrubber technology by July 2013 is unequivocal, regardless of who the 'owner' was." *Id.* at 19. We will not deviate from the plain wording of the statute and adopt PSNH's version of a "practical" reading, especially not here, where divestiture and recovery of costs of divestiture were contemplated by the statutory framework, the time that it would have taken to divest Merrimack Station was accommodated by a seven-year statutory compliance period, construction of the Scrubber did not take a full seven years, and there was the possibility of extending the seven-year compliance schedule by variance.[4]

Similarly, we considered and rejected failed legislation during the 2009 legislative session as helpful in interpreting RSA 125-O:18 and 369-B:3-a. The failure of Senate Bill 152 and House Bill 496 to pass their respective houses in 2009 tells us nothing of the meaning of RSA 125-O:11-18, enacted in 2006, or RSA 369-B:3-a, last amended in 2003. The demise of the 2009 bills may signal that the Legislature believed that the Commission already had the authority to review PSNH's decision-making in a prudence review, in which case the legislation would have been unnecessary, just as much as it may signal that, as argued by PSNH, the Legislature did not wish to provide the Commission with such authority. *See* Joint Objection to Third Motion for Rehearing at ¶5, fn.6 and Attachment B, which demonstrates that PSNH President

[4] Although the Commission rejects PSNH's practical concerns as bases for interpreting RSA 125-O:18 and RSA 369-B:3-a, we recognize that these concerns may be relevant to PSNH's prudence, an issue that will not be decided prior to hearing.

Gary Long assured the Senate that SB 152 was unnecessary because the Commission would conduct a normal, standard, after-the-fact prudence review to determine whether PSNH was "reckless" or "made bad decisions."[5]

C. RSA 125-O:18 and Divestiture

Our clarification that PSNH retained the management discretion and duty of prudence to consider divestiture of Merrimack Station under RSA 125-O:18 is not inconsistent with our prior construction of RSA 125-O and RSA 369-B:3-a. In Docket DE 08-103, we addressed the relationship between the Scrubber Law and RSA 369-B:3-a. In particular, we addressed whether, given the legislative mandate to install Scrubber technology, RSA 369-B:3-a nonetheless required us to pre-approve PSNH's decision to modify Merrimack Station. Our focus in that docket was not on prudence, divestiture or retirement, none of which were before us for consideration. *See* Order No. 24,898 at 12 (divestiture not before the Commission). We decided only that:

> . . . as a result of the Legislature's mandate *that the owner of Merrimack Station* install scrubber technology by a date certain, and its finding pursuant to RSA 125-O:11 that such installation of scrubber technology at PSNH's Merrimack Station is in the public interest of the citizens of New Hampshire and the customers of the station, the Commission lacks the authority to make a determination pursuant to RSA 369-B:3-a as to whether this particular modification is in the public interest.

Investigation of PSNH's Installation of Scrubber Technology, Order No. 24,898 at 13, 93 NH PUC 456 (2008) (*emphasis supplied).*

In coming to that construction of RSA 125-O and RSA 369-B:3-a, we determined in part that: "installation" of Scrubber technology at Merrimack Station and "modification" of

[5]See, e.g., Third Motion For Rehearing, Attachment B at 30-31 ("We have very detailed documents on [costs of ten elements of the project, the impact on rates, and the competitiveness of Merrimack Station to the market based on variations in fuel costs]. . . . We have very detailed documents on this. I mean the Public Utilities Commission can and will see all this stuff. They look at all these project things and they do a prudence review and they do a very thorough job. So we're not concerned with that, because we think we're doing a great job and we know they will do a very thorough job in reviewing what we did. But we don't have a problem with that. That's done in the normal course of business. That's already provided for under current law.")

Merrimack Station were equivalent concepts, *id.* at 7-8; and that the target population in RSA 369-B:3-a was a subset of the target population in RSA 125-O:11, V. Therefore, for the purposes of this particular type of modification, the "public interest of retail customers of PSNH" and the "public interest of the citizens of New Hampshire and the customers of affected sources" were equivalent, *id.* at 8. As a result of our two findings above, the Legislature's public interest finding under RSA 125-O:11, VI subsumed any public interest finding the Commission might make to pre-approve a modification of Merrimack Station under RSA 369-B:3-a, *id.* at 7-8. Consequently, the Legislature intended the more recent, more specific statute, RSA 125-O:11, to prevail over the modification provisions of RSA 369-B:3-a, *id.* at 8-9; and the Legislature's public interest finding in RSA 125-O:11 precluded a proceeding under RSA 369-B:3-a to examine the public interest of this particular modification, *id.* at 10. We applied a similar rationale in Order No. 24,979 (June 19, 2009), in which we construed the public good determination under RSA 369:1 for approval of a utility financing, part of which might fund the Scrubber installation, to be subsumed by the public interest finding made by the Legislature in RSA 125-O:11. *Id.* at 17.

In our prior orders we did not construe RSA 125-O:11-18 and RSA 369-B:3-a with regard to whether PSNH's continued ownership and operation of Merrimack Station was in the public interest; however, we did not overlook this issue when we issued the clarification in the Second Order on Rehearing. We make our reasoning in the Second Order on Rehearing explicit here. Applying the same analysis to the public interest in divestiture as we applied in Order Nos. 24,898 and 24,979 to the public interest in a modification of Merrimack Station, we concluded that the public interest findings in RSA 125-O:11 do not preclude an inquiry under RSA 369-

B:3-a into the public interest of a decision by PSNH to divest itself of Merrimack Station or to retire that Station prior to divesture.

In coming to this conclusion, we made the following findings which we articulate here. First, installation of Scrubber technology by the owner and operator of Merrimack Station, and PSNH's divestiture of Merrimack Station are not equivalent concepts. Second, the target population in RSA 369-B:3-a is a subset of the target population in RSA 125-O:11, V; however, for the purposes of divestiture, the "public interest of retail customers of PSNH" and the "public interest of the citizens of New Hampshire and the customers of affected sources" are not equivalent. This concept requires explanation. Divestiture is specifically referred to in RSA 125-O:18. That section of the Scrubber Law directs that divestiture and recovery of costs shall be governed by the provisions of RSA 369-B:3-a. RSA 369-B:3-a permits PSNH to divest Merrimack Station if doing so is found to be "in the economic interest of retail customers of PSNH." RSA 369-B:3-a. In the case of Scrubber installation by PSNH without divestiture, the citizens of New Hampshire would enjoy all of the benefits of mercury reduction while all the attendant costs would fall solely on retail default service customers of PSNH. *See* RSA 125-O:18 (prudent costs are recovered in default service rate where utility owns and operates the affected source). In the event of divestiture prior to PSNH's completion of Scrubber installation, both the citizens of New Hampshire and the retail customers of PSNH would have enjoyed all of the benefits of mercury reduction, still with no cost to the citizens of New Hampshire, but potentially with less resulting cost to PSNH's customers. In the event of divestiture following completion of Scrubber installation by PSNH, the citizens of New Hampshire would still enjoy the benefits of mercury reduction, but direct economic impacts would again fall solely upon PSNH customers. In the case of divestiture following completion of Scrubber installation,

however, the cost might be borne differently depending upon what services a customer takes from PSNH. Under current law, a utility's prudent costs of the Scrubber installation are recovered in default energy service rates during the utility's ownership and operation of Merrimack Station, RSA 125-O:18, whereas RSA 125-O:18 and RSA 369-B:3-a do not specify the rate components of the mechanism for recovering such costs following retirement or divestiture. *See* RSA 369-B:3-a (PSNH cannot retire or divest its generation assets unless the Commission makes provision for cost recovery).

As a result of these findings, the Legislature's public interest finding under RSA 125-O:11, VI regarding installation of Scrubber technology does not subsume a public interest finding by the Commission under RSA 369-B:3-a regarding PSNH's divestiture of Merrimack Station. Because RSA 125-O:18 calls for a prudence review in a manner determined by the Commission and specifically directs that questions of cost recovery in the event of divestiture be addressed pursuant to RSA 369-B:3-a, the Legislature intended for RSA 369-B:3-a to apply to questions of the public interest in the case of divestiture. Further, the statutory language expressly acknowledges that divestiture was a permissible decision for PSNH to make, subject to a proceeding under RSA 369-B:3-a and an independent economic interest determination[6] by this Commission.[7]

Retirement of Merrimack Station presents slightly different considerations, but the result is the same for this analysis: modification and retirement are not equivalent concepts and a public interest determination regarding one does not subsume a public interest determination regarding the other. Certainly, no one would claim the reverse: that a determination that

[6] *Cf. Appeal of Pinetree Power, Inc.*, 152 N.H. 92, 97 (2005) ("By the plain language of the statute, the public interest standard for modification is broader than just economic interests.").

[7] We emphasize here that we are making no prudence determination at this juncture regarding PSNH's decision to continue ownership of Merrimack Station, only that the issue may be explored at hearing.

retirement of Merrimack Station is in the public interest would be the equivalent of a determination that PSNH should undertake a significant capital investment to comply with mercury reduction laws to thereby keep the facility operational.

The Legislature's public interest findings in the Scrubber Law are not rendered meaningless by our ruling that PSNH had management discretion to divest itself of or to retire Merrimack Station; nor are the Legislature's findings rendered meaningless by our ruling that we have the authority to independently make public interest findings with regard to divestiture or retirement. Instead, these rulings would have, at most, rendered the Legislature's findings either applicable to a different owner in the event of divestiture or moot in the event Merrimack Station ceased operation permanently. Consequently, we reject PSNH's argument that we would have been precluded from making the findings necessary to permit PSNH to divest or retire Merrimack Station, prior to PSNH's completion of its Scrubber project.

D. Constitutional Claims

We reject PSNH's constitutional complaints of denial of due process and non-compensable takings. PSNH argues that our alleged "flip flopping" on the interpretation of RSA 125-O:17 creates a due process violation or has violated PSNH's vested right to construct the Scrubber. In both the First and Second Rehearing Orders in this docket, we acknowledged an apparent inconsistency between our prior construction of RSA 125-O:17 and our construction of that provision in the Discovery Order. We then construed RSA 125-O:17 in the manner championed by PSNH.

More particularly, in the Discovery Order, we reasoned that retirement of Merrimack Station would have provided a basis for PSNH to seek a variance from the Scrubber Law's 80% mercury reduction requirement. Order No. 25,445 at 25. PSNH sought rehearing, pointing out

an apparent inconsistency with our previous statement 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." *See* Order No. 24,898 at 12. Subsequently, in the First Rehearing Order, we agreed with portions of PSNH's analysis regarding RSA 125-O:17 and concluded that:

> we will not disturb the prior Commission ruling in Order No. 24, 898. To the extent that [the Discovery Order] 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.

First Rehearing Order at 17. We reaffirmed this holding in the Second Rehearing Order:

> Order No. 24,898 . . . confirmed . . . that retirement of Merrimack Station was not recognized as a method of compliance with the mercury reduction requirements of RSA 125-O. . . .[W]e continue to find that our interpretation of RSA 125-O:17 [in Order No. 24,898 and the First Rehearing Order] and the inability of PSNH to use retirement as a means of obtaining a variance from the requirements of RSA 125-O . . . is the correct interpretation.

Second Rehearing Order at 6-7.

PSNH prevailed on its interpretation of whether retirement of Merrimack Station was a recognized method of compliance with the mercury reduction requirements of RSA 125-O, and whether retirement would have formed a legitimate basis for a variance under RSA 125-O:17. It cannot then argue that by accepting its position we have not provided it due process.

PSNH's real complaint is not that we made and corrected an erroneous statement regarding compliance with mercury reduction requirements by retirement pursuant to RSA 125-O:17. PSNH's true disagreement is with our conclusion that, despite our repeated statements that PSNH was under a legislative mandate to construct Scrubber technology, Section 18 of the Scrubber Law retained PSNH's basic duty of prudence not to act irrationally with ratepayer funds, and authorized PSNH to consider its options under RSA 369-B:3-a in the event of

changed circumstances. Our prior statements were made in the context of PSNH's decision to continue its ownership and operation of Merrimack Station.

This is a statutory question, and PSNH's argument that it had a vested right to construct the Scrubber does not make the question a constitutional one. The common-law rule of vested rights applies when "an owner, who, relying in good faith on the absence of regulation which would prohibit his proposed project, has made substantial construction on the property or has incurred substantial liabilities relating directly thereto, or both, acquires a vested right to complete his project in spite of the subsequent adoption of an ordinance prohibiting the same." *Appeal of Public Service Co. of N.H.,* 122 N.H. 1062, 1069 (1982). PSNH analogizes its reliance upon the legislative mandate to install Scrubber technology to reliance upon a lack of regulation and the Commission's "newly minted" clarification of the scope of its prudence review to be the subsequent adoption of a prohibitive ordinance. Third Rehearing Motion at 28. Neither analogy holds.

First, PSNH's reliance upon Commission statements that PSNH was under a mandate to construct Scrubber technology is unreasonable. As discussed more fully above, our prior statements in this regard were framed by and made in the context of PSNH's decision to continue its ownership and operation of Merrimack Station. Second, the section governing cost recovery came into effect with the remainder of the Scrubber Law in 2006, well before PSNH incurred liabilities. Further, as discussed above, we stated in 2008 that our eventual prudence review would consider 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." Order No. 24,914 at 13. Our interpretation of RSA 125-O:18 and RSA 369-B:3-a is not a sudden, new, or "current creation" of a basis for the

Commission to deny costs as PSNH alleges. Instead, our interpretation of RSA 125-O:18 and RSA 369-B:3-a is an elaboration and refinement of our reading of the statutes that has been a theme of our orders from the outset. We do not believe that elaborating on our interpretation of RSA 125-O:18 in this docket is in any way inappropriate or forms the basis for a due process or a non-compensable taking claim. This is the first proceeding in which the Commission will consider cost recovery in rates pursuant to RSA 125-O:18.

Finally, PSNH's constitutional claims are premature. PSNH has not been denied recovery, and the factual record is incomplete.

E. Prudence Review

We reject PSNH's argument that the Legislature determined in 2006 when it passed the Scrubber Law that PSNH was prudent in installing Scrubber technology at Merrimack Station and that the Commission is precluded from making that determination in this docket. In Section 11 of the Scrubber Law, the Legislature made number of findings, including that "[i]t is in the public interest to achieve significant reduction in mercury emissions at the coal burning electric power plants in the state . . ." RSA 125-O:11, I, "[t]he installation of scrubber technology will . . . reduce mercury emissions . . . with reasonable costs to consumers," RSA 125-O:11, V, and "[t]he installation of such technology is in the public interests of the citizens of New Hampshire and the customers of affected sources." RSA 125-O, VI. While these findings are relevant to whether PSNH acted prudently in its decision to complete the installation of Scrubber technology at Merrimack Station, a prudence review is more encompassing and fundamentally different than a determination that Scrubber technology is best at reducing mercury emissions at a reasonable cost. As we have said in the past, prudence is commonly associated with diligence and contrasted with negligence. *Utility Property Tax Abatements and Limitation of Expenses*,

Order No. 21,712, 80 NH PUC 390, 392-93 (1995). When reviewing whether a utility has been prudent in its decision making, we "may reject management decisions when inefficiency, improvidence, economic waste, abuse of discretion or action inimical to the public interest are shown." *Appeal of Easton*, 125 N.H. 205, 215 (1984) *citations and quotations omitted.* Other commissions have taken a similarly broad view of the prudence inquiry:

> [Prudence] is the degree of care required by the circumstances under which the action or conduct is to be exercised and judged by what is known, or could have reasonably been known, at the time of the conduct. In other words, whether an action will be considered prudent depends on whether the action would be considered reasonable by a person with similar skills and knowledge under similar circumstances. It is a term often used interchangeably with what is considered "reasonable" under the circumstances. The Commission must determine whether decisions were made in a reasonable manner in light of the conditions or circumstances that were known or reasonably should have been known when the decision was made.

Duke Energy Indiana, Inc., Cause No. 43114 IGCC 4S1, PUR slip copy at 108, 2012 WL 6759528 at *108 (IURC December 27, 2012). The Legislature did not address PSNH's degree of care in deciding to proceed with the Scrubber project through to its completion. The Legislature appropriately left that review to the Commission, in a manner to be approved by this Commission, once PSNH's decision making process was completed. *Cf.* RSA 125-O:18 and RSA 369-B:3-a.

Based upon the foregoing, it is hereby

ORDERED, rehearing of Order No. 25,546 is hereby DENIED; and it is

FURTHER ORDERED, that Order No. 25,445, Order No. 25,506, Order No. 25,546 and the scope of this docket are clarified as discussed above; and it is

FURTHER ORDERED, that the procedural schedule specified in the Commission's Secretarial Letter dated August 6, 2013, shall be resumed without change.

By order of the Public Utilities Commission of New Hampshire this twenty-seventh day of August, 2013.

Amy L. Ignatius
Chairman

Michael D. Harrington
Commissioner

Attested by:

Debra A. Howland
Executive Director