

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 11-250

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Investigation of Scrubber Costs and Cost Recovery

Order on Motion to Reconsider Order No. 25,714

ORDER NO. 25,723

October 14, 2014

In this order we grant in part PSNH's motion to reconsider Order No. 25,714 (Sept. 8, 2014) relating to OCA's motions to strike PSNH rebuttal testimony. We will allow some testimony from Mr. Smagula on the current operations of Merrimack Station and testimony that installation of the Scrubber is consistent with PSNH's least cost integrated resource plan.

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.

In Order No. 25,714 (Sept. 8, 2014), we decided the Office of the Consumer Advocate's (OCA) five motions to strike rebuttal testimony, each of which was directed at a different PSNH witness. We struck Mr. Smagula's testimony from page 22 through page 28 where "Mr. Smagula described the current operation of the Scrubber and other events that occurred after the Scrubber became operational in September 2011." *Id.* at 11. We also struck Mr. Smagula's Attachment 5, a March 2014 report of Merrimack Station emissions testing. *Id.* at 13. We struck that section of Mr. Smagula's testimony and Attachment 5 because the time period relevant to the prudence of PSNH's actions runs from the June 2006 passage of the

Scrubber law through September 2011, when the Scrubber was substantially completed. *Id.* at 10. “This time frame follows from the prudence standard that governs this case. We are to judge what a reasonable utility manager would do under circumstances existing at the time of the challenged decisions.” *Id.* We ruled that the struck testimony and Attachment 5 fell outside that time frame.

PSNH filed a *Motion for Rehearing of Order No. 25,714* on September 10, 2014, in which PSNH asked us to reconsider our rulings striking certain passages of Mr. Smagula’s testimony and Attachment 5. The OCA objected on September 16, 2014.

II. POSITIONS OF THE PARTIES

A. PSNH

PSNH argued that particular sections of Mr. Smagula’s stricken testimony are relevant to three topics, which PSNH labeled “emissions reduction testimony,” the “RSA 378:41 compliance testimony,” and the “‘used and useful’ testimony.” Motion at 2-7. According to PSNH, the “emissions reduction testimony,” which appears at page 26, lines 4-10, describes how the Scrubber is successfully removing mercury from Merrimack Station’s air emissions. Attachment 5 is a document also offered to prove mercury reductions. PSNH argued this testimony is relevant to its burden under RSA 125-O:13, II to prove the Scrubber is reducing mercury. Motion at 2-3. PSNH noted that our order on temporary rates deferred a ruling on whether the Scrubber was adequately removing mercury. *Id.* at 3; *see* Order No. 25,346 at 14, 24 (Apr. 10, 2012) (“The Commission will consider any DES decision on mercury reduction in the permanent rate case portion of this proceeding”).

The “RSA 378:41 compliance testimony” refers to the requirement that PSNH prove the relief it seeks in this docket complies with its least cost integrated resource plan (LCIRP). The

testimony in question appears at page 26, lines 11-18, where Mr. Smagula stated the “installation and operation of the scrubber pursuant to the Scrubber Law conforms to that law and PSNH’s 2010 LCIRP.” PSNH argued that the testimony is necessary to satisfy the LCIRP requirement and was thus incorrectly stricken.

Mr. Smagula’s “used and useful testimony” consists of operational details of the Scrubber and Merrimack Station since 2011. PSNH asked that we reconsider our order striking two excerpts of that testimony. The first, page 22, line 3, through page 24, line 5, contains testimony that Merrimack Station saved customers millions of dollars in recent winters and, through burning coal, advances the public interest benefits of fuel diversity. In the second excerpt, page 25, line 7, through page 26, line 3, Mr. Smagula testified that “[t]he Scrubber is working exceptionally well.” PSNH argued that this testimony is relevant to satisfy its burden under RSA 378:30-a to prove the Scrubber is “used and useful.” Motion at 7. PSNH noted that the OCA’s witness challenged whether the Scrubber is fully used and useful, December 23, 2013, Direct Testimony of Stephen R. Eckberg, at 7-9 (Tab 136), and that we did not resolve the issue in the temporary rate order. Order No. 25,346 at 24.

B. The OCA

The OCA argued that PSNH waived its arguments because PSNH raised them for the first time in its motion for reconsideration and not when it objected to the OCA’s motion to strike Mr. Smagula’s testimony. “PSNH had the opportunity to raise these concerns and failed to do so.” Objection at 1. The OCA concluded that PSNH’s motion does not meet the legal standard for reconsideration, which requires new evidence or a showing of matters that we overlooked or misunderstood. *Id.* at 3.

III. COMMISSION ANALYSIS

The standards governing motions for reconsideration are well-known. “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. Good reason may be shown by identifying specific matters that were ‘overlooked or mistakenly conceived’ by the deciding tribunal, or by identifying new evidence that could not have been presented in the underlying proceeding.” Order No. 25,506 at 16 (May 9, 2013) (citations omitted).

The OCA is correct in the narrow sense that PSNH’s motion does not meet this standard. In objecting to the OCA’s motion to strike Mr. Smagula’s testimony, PSNH did not raise the three issues discussed here, and PSNH did not present new evidence. In a broader sense, however, PSNH’s arguments concern issues that have been part of this docket from the outset. At the temporary rate hearing, intervenors challenged whether the Scrubber was used and useful and whether it was meeting the mercury reduction standards. We deferred a ruling on those issues in recognition that the Scrubber had just been put into service. Order No. 25,346 at 24. The appropriate place to introduce that evidence was through rebuttal testimony, which Mr. Smagula provided. Similarly, PSNH’s obligation to prove that the rate it requests related to the Scrubber complies with its LCIRP is a requirement not central to this litigation, but important nonetheless.

PSNH’s failure to articulate these arguments in objection to the OCA’s motion to strike was an error on its part. In the context of this litigation, however, that error does not warrant the potentially significant effects that may follow if we excluded the testimony based solely on counsel’s oversight. We thus address the merits of PSNH’s reconsideration request.

We find that the emissions reduction testimony is relevant. We acknowledged in the temporary rate order that PSNH must prove the Scrubber is working, and we recognized that PSNH could not have the proof available at the time of the temporary rate hearing. We thus stated that we “will consider any DES decision on mercury reduction in the permanent rate case portion of this proceeding.” Order No. 25,346 at 24. The “emissions reduction testimony” Mr. Smagula presented in rebuttal is relevant to this issue. We reconsider our order striking page 26, lines 4-10, and attachment 5 referenced therein.

The LCIRP compliance testimony is also relevant. PSNH must demonstrate compliance with its LCIRP.¹ Mr. Smagula’s “RSA 378:41 compliance testimony,” if accepted, may satisfy that obligation. We thus reconsider our order striking page 26, lines 11-18.

Regarding the used and useful testimony, we find the first excerpt to be irrelevant and the second excerpt to be relevant. RSA 378:30-a requires PSNH to prove the Scrubber is used and useful in order to be placed into rates. The first excerpt, testimony that Merrimack Station saved customers millions of dollars in recent winters and, through burning coal, advances the public interest benefits of fuel diversity, is not relevant in the context of this hearing. Therefore, page 22, line 3, through page 24, line 5, shall remain stricken. The second excerpt, which includes the statement that “[t]he Scrubber is working exceptionally well,” is relevant to whether the Scrubber is used and useful. We reconsider our order striking this excerpt, page 25, line 7, through page 26, line 3.


Based upon the foregoing, it is hereby

ORDERED, that PSNH’s motion to reconsider Order 25,714 is GRANTED in part and DENIED in part; and it is

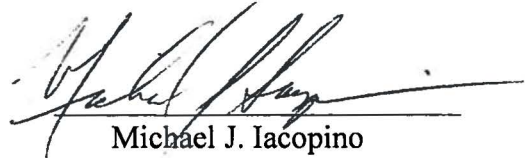
¹ We take no position in this order whether PSNH must comply with former RSA 378:41 or recently amended RSA 378:40.

FURTHER ORDERED, that Mr. Smagula's testimony from page 25, line 7, through page 26, line 18, and Mr. Smagula's Attachment 5 are no longer stricken.

By order of the Public Utilities Commission of New Hampshire this fourteenth day of October, 2014.

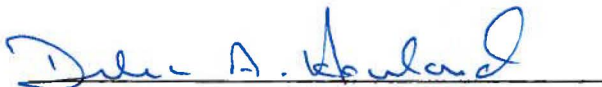


Martin P. Honigberg
Commissioner



Michael J. Iacopino
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Attested by:



Debra A. Howland
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