

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

No. 2008-0897

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**Appeal of Stonyfield Farm, Inc., H & L Instruments, LLC, and  
Great American Dining, Inc. Under RSA 541:6 from Order of  
Public Utilities Commission**

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**BRIEF FOR THE STATE OF NEW HAMPSHIRE,  
OFFICE OF THE ATTORNEY GENERAL AS AMICUS CURIAE**

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THE STATE OF NEW HAMPSHIRE

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Date: May 6, 2009

Oral argument requested

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**QUESTION PRESENTED**

1. Whether the Public Utilities Commission (“PUC”) correctly ruled that it did not have the authority to overturn the explicit finding made by the legislature in RSA chapter 125-O that the installation of scrubber technology at the PSNH Merrimack Station was in the public interest.

## STATEMENT OF THE FACTS AND OF THE CASE

In 2006, the legislature enacted RSA 125-O:11 through RSA 125-O:18. These sections are collectively referred to as the “Mercury Emissions” subdivision. The legislature enacted this subdivision after receiving significant public comment and testimony. See RSA 125-O:11-18 (Supp. 2008). The purpose of the subdivision is to reduce mercury emissions from the Merrimack Station in Bow, New Hampshire. See RSA 125-O:11 (Supp. 2008). To achieve this goal, the legislature required PSNH to install “scrubber technology” at the Merrimack Station no later than July 1, 2013. RSA 125-O:13, I (Supp. 2008). The legislature specifically found that: “The installation of [scrubber] technology is in the public interest of the citizens of New Hampshire and the customers of the affected sources.” RSA 125-O:11, VI (Supp. 2008).

On August 22, 2008, the PUC, by Secretarial Letter, opened an investigation into the issue of increased costs related to the scrubber project at Merrimack Station. Stonyfield Notice of App., p. 14.<sup>1</sup> As part of this process, the PUC examined whether it was necessary for the PUC to make a determination with respect to the public interest of scrubber technology installation. Id. at 14-15. To assist in its examination, the PUC requested legal argument from PSNH and the Office of the Consumer Advocate. Id. at 15. On September 19, 2008, the PUC issued a decision in which it stated that the PUC lacked the authority to pre-approve installation but retained its authority to determine prudence. Id. at 25.

On October 17, 2008, Stonyfield Farm, Inc., et al., filed a motion for rehearing with the PUC. Id. at 28. In its motion for rehearing, the petitioners claimed that the costs of installation had increased dramatically and that this increase merited a re-examination of the legislative

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<sup>1</sup> References to the Stonyfield Farm, Inc. et al., notice of appeal filed with this Court on December 11, 2008, shall be “Stonyfield Notice of App., p. \_\_\_.”

References to the Stonyfield Farm, Inc. et al. appendix shall be “Stonyfield Appendix, p. \_\_\_.”

References to the Stonyfield Farm, Inc. et al. brief shall be “Stonyfield Brief, p. \_\_\_.”

References to the State’s appendix shall be “State’s Appendix, p. \_\_\_.”

finding regarding public interest. See id. at 28-35. PSNH had previously made its own assertions regarding costs, stating in a letter dated September 8, 2008, that for a project of this magnitude, significant preparations must be undertaken long prior to actual installation and that delaying these preparations would result in significant cost increases. Stonyfield Appendix, pp. 39-40. PSNH asserted that it began significant preparations for the installation of scrubber technology at the Merrimack Station shortly after the enactment of the Mercury Emissions subdivision. Id. PSNH objected to the motion for rehearing for these reasons and numerous other legal arguments. Stonyfield Notice of App., p. 37.

In a decision dated November 12, 2008, the PUC denied the motion for rehearing and determined, among other things, that it did not have the authority to overturn the finding of the legislature that the installation of scrubber technology was in the public interest. Id. at 49. Stonyfield Farm, Inc., et al. (“Appellants”) now appeal that decision.

## SUMMARY OF THE ARGUMENT

The PUC correctly determined that it lacked authority to overturn the explicit finding of the legislature that the installation of scrubber technology at the Merrimack Station is in the public interest.<sup>2</sup> This ruling not only comports with the plain meaning of the specific legislative findings described in RSA 125-O:11, but also effectuates the purpose of the entire Mercury Emissions subdivision which purports to greatly reduce mercury emissions in the immediate future by mandating the installation of scrubber technology by 2013. The ruling does not undermine the provision in RSA 125-O:13 that requires PSNH to obtain all necessary regulatory approvals. This provision is both necessary and valid with respect to any approval not based on a finding of public interest. The PUC ruling also does not render meaningless RSA 369-B:3-a, which continues to apply to certain other PSNH divestitures and modifications. In addition, the legislative history indicates that the legislature did not intend for the PUC to revisit the finding of public purpose in RSA chapter 125-O.

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<sup>2</sup> In this appeal, the State takes no position with respect to whether the installation of scrubber technology at Merrimack Station is appropriate as a policy matter. This brief is intended only to aid in the interpretation of the existing statutory language.

## ARGUMENT

### **I. STANDARD OF REVIEW.**

The PUC ruled as a matter of law that it lacked authority to examine whether the installation of scrubber technology at the Merrimack Station is in the public interest. Stonyfield Notice of App., p. 55. This Court reviews interpretations of a statute *de novo*. Mailloux v. Town of Londonderry, 151 NH 555, 558 (2004).

### **II. THE PUC CORRECTLY RULED THAT IT MAY NOT RE-EVALUATE WHETHER THE INSTALLATION OF SCRUBBER TECHNOLOGY AT THE MERRIMACK STATION IS IN THE PUBLIC INTEREST.**

#### **A. RSA 125-O Makes a Clear Determination That the Installation of Scrubber Technology at the Merrimack Station is in the Public Interest.**

In matters of statutory interpretation, the New Hampshire Supreme Court is “the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole.” In the Matter of Baker and Winkler, 154 N.H. 186, 187 (2006). When interpreting a statute, the court first examines the language of the statute and, where possible, ascribes the plain and ordinary meaning of the words used. Oullette v. Town of Kingston, 157 N.H. 604, 609 (2008). “If the language used is clear and unambiguous, [the court] will not look beyond the language of the statute to discern legislative intent.” Taylor v. Town of Wakefield, 158 N.H. 35, 39 (2008).

RSA chapter 125-O contains clear and definitive language regarding scrubber technology. In RSA 125-O:11, VI, the statute states: “The installation of [scrubber] technology is in the public interest of the citizens of New Hampshire and the customers of the affected sources.” RSA 125-O:11, VI (Supp. 2008). Nothing in RSA 125-O:11, or in the remainder of RSA chapter 125-O, indicates that the legislature intended that its definitive statement regarding public benefit be restricted or re-analyzed. By using this language, the legislature made a clear

determination regarding the need for scrubber technology at Merrimack Station. The PUC, an entity created under the auspices of the legislature and endowed with only those powers granted to it by the legislature, may not now make a contrary finding. Appeal of Public Service Co., 122 N.H. 1062, 1066 (1982). Therefore, the PUC correctly determined that it lacked authority to analyze whether the installation of scrubber technology is in the public interest.

**B. The PUC's Interpretation Gives Meaning and Effect to All Statutory Provisions.**

The PUC's decision gives effect to all relevant statutory provisions. When construing a statute, the court does "not consider the words or phrases in isolation, but rather within the context of the statute as a whole." Chesley v. Harvey Ind. Inc., 157 N.H. 211, 213 (2008). "The legislature is not presumed to waste words or enact redundant provisions, and every word of a statute should be given effect whenever possible." Town of Amherst v. Gilroy, 157 N.H. 275, 279 (2008). The PUC's interpretation gives effect and meaning to each of the statutory provisions in RSA chapter 125-O as well as those in RSA 369-B:3-a.

**1. The PUC's Decision Gives Meaning and Effect to All of the Findings and Purposes Described in RSA 125-O:11.**

As noted above, 125-O:11, VI, states: "The installation of [scrubber] technology is in the public interest of the citizens of New Hampshire and the customers of the affected sources." RSA 125-O:11, VI (Supp. 2008). Other provisions of this section either require or are premised on the installation of scrubber technology at the Merrimack Station. For instance, RSA 125-O:11 states:

The requirements of this subdivision will prevent, at a minimum, 80 percent of the aggregated mercury content of the coal burned at these plants from being emitted into the air by no later than the year 2013. To accomplish this objective, the best known commercially available technology shall be installed at Merrimack Station no later than July 1, 2013.

RSA 125-O:11, I (Supp. 2008). Similarly, RSA 125-O:11, III, which begins with the phrase “[a]fter scrubber technology is installed at Merrimack Station,” presumes the installation of scrubber technology. RSA 125-O:11, III (Supp. 2008). The presumption of scrubber installation appears again in RSA 125-O:11, V. Finally, RSA 125-O:11, VIII, states that the mercury reduction requirements achieved through the mandated scrubber installation “represent a thoughtful balancing of cost, benefits, and technological feasibility and therefore the requirements shall be viewed as an integrated strategy of non-severable components.” RSA 125-O:11, VIII (Supp. 2008). An interpretation of the statute in a manner that mandates scrubber installation and limits PUC review of the project best effectuates these purposes and findings.

**2. The PUC’s Decision Gives Effect to All Aspects of RSA 125-O:13, Including the Provision Requiring Necessary Regulatory Approvals.**

In addition to the provisions of RSA 125-O:11 listed above, in order to implement the findings of the legislature, RSA 125-O:13, I, directs the following: “The owner shall install and have operational scrubber technology to control mercury emissions at Merrimack Units 1 and 2 no later than July 1, 2013.” RSA 125-O:13, I (Supp. 2008). The paragraph continues:

The achievement of this requirement is contingent upon obtaining all necessary permits and approvals from federal, state, and local regulatory agencies and bodies; however, all such regulatory agencies and bodies are encouraged to give due consideration to the general court’s finding that the installation and operation of scrubber technology at Merrimack Station is in the public interest.

Id.

The Appellants argue that this second provision trumps the previously referenced findings regarding public need and the mandatory installation requirement at the beginning of RSA 125-O:13, I. Appellants argue that both the word “contingent” and the phrase that encourages regulatory agencies “to give due consideration to the general court’s finding” indicate that the initial inquiry regarding the need for scrubber technology is one which the

legislature intended to leave open for the PUC. However, in order to give effect to the initial sentence in RSA 125-O:13, I, the numerous other references to scrubber technology, and the specific legislative finding of public benefit, this contingency provision must be read in the context of the entire statute. The decision of the PUC that it may not re-examine the legislative finding of public benefit is consistent with the overall statutory context.

The scope of the “contingency” provision in RSA 125-O:13 is necessarily quite broad. Given the scale of the proposed project, many federal, state, and local approvals could be needed. These could range from federal regulatory authorizations, to other state permits such as those needed to impact wetlands, to local permissions for zoning. The legislature did not determine what other approvals would be necessary for this project. In this case, the legislature simply chose not to pre-empt these as yet unidentified authorizations and made sure to specify that any other “necessary” authorizations would still have to be obtained. The contingency provision in RSA 125-O:13 is designed to deal with the many other regulatory authorizations that could arise and, in fact, have arisen outside of the issue of whether the scrubber installation is in the public interest. The specific legislative finding that the scrubber project is in the public interest need not be discarded in order to give the contingency provision effect and meaning.

**3. The PUC’s Decision Does Not Undermine the Effectiveness of RSA 369-B:3-a.**

The PUC’s interpretation gives meaning to the RSA 125-O Mercury Emission subdivision while still retaining the meaning and effect of RSA 369-B:3-a. Among other things, RSA 369-B:3-a requires the PUC to examine whether any proposed modification or retirement of PSNH fossil fuel or hydroelectric generation assets is in the public interest. RSA 369-B:3-a (Supp. 2008). This section applies to all PSNH fossil fuel or hydroelectric generation assets.

Under the PUC's decision, RSA 369-B:3-a remains effective with respect to all PSNH divestitures, retirements, and modifications related to any of its fossil fuel and hydroelectric generation assets other than the installation of scrubber technology at Merrimack Station as described in RSA 125-O:13. These requirements would not apply to the scrubber project because it is the one modification where the legislature has already made a definitive finding of public benefit. In other words, RSA 369-B:3-a establishes a general rule with many applications and the provisions of RSA 125-O establish a narrow exception to this general rule.

As noted by the PUC, the text of RSA 125-O:18 further bolsters the interpretation that RSA 369-B:3-a does not apply to the installation of scrubber technology. RSA 125-O:18 specifically describes the relationship between RSA 125-O and RSA 369-B:3-a. RSA 125-O:18 states: "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 (Supp. 2008). The PUC correctly points out that the legislature's specific inclusion of this provision with respect to divestiture lends further support to the interpretation that, in general, the legislature did not intend RSA 369-B:3-a to apply to the scrubber project modification.

#### **4. The PUC's Decision Recognizes the Indivisible Character of RSA Chapter 125-O.**

The PUC's interpretation of the statute is consistent with the overall statutory scheme. First, RSA 125-O:11 through 18, the subdivision entitled "Mercury Emissions," is based solely on the installation of scrubber technology at the Merrimack Station. The detailed and intricate provisions of the Mercury Emissions subdivision would have no effect if the PUC could override the essential finding of the legislature that installation of such scrubber technology is in the public interest.

Further, the Mercury Emissions subdivision is an integral and indivisible part of the multi-pollutant program beginning at section 1 of RSA chapter 125-O and continuing through section 18. No provision found in these sections may be implemented in a manner inconsistent with its other parts. Specifically, RSA 125-O:10 states:

No provision of RSA 125-O:1 through RSA 125-O:18 of this chapter shall be implemented in a manner inconsistent with the integrated, multi-pollutant strategy of RSA 125-O:1 through RSA 125-O:18 of this chapter, and to this end, the provisions of RSA 125-O:1 through RSA 125-O:18 of this chapter are not severable.

RSA 125-O:10 (Supp. 2008). As stated above, the Mercury Emissions subdivision can only be implemented if scrubber technology is installed at the Merrimack Station. The effect of not implementing this subdivision could have serious consequences for the multi-pollutant program as a whole – a program that includes detailed regulatory requirements providing for reductions in other pollutants such as NO<sub>x</sub> and SO<sub>2</sub>.

### **III. THE LEGISLATIVE HISTORY SUPPORTS THE FINDING OF THE PUC THAT IT MAY NOT RE-EVALUATE WHETHER THE INSTALLATION OF A SCRUBBER AT THE MERRIMACK STATION IS IN THE PUBLIC INTEREST.**

#### **A. The Legislative History Indicates that the Legislature Intended That Its Decision as to Public Benefit Would be Final.**

“If a statute is ambiguous, the Supreme Court considers legislative history to aid its analysis.” State v. Whittey, 149 N.H. 463, 467 (2003). As stated previously, the State does not believe that these provisions, read in their entirety and given their ordinary meaning, are ambiguous. However, to the extent the court does believe there is an ambiguity, the legislative history demonstrates that the PUC’s interpretation of the statute is correct.

The legislature held extensive hearings regarding the adoption of RSA 125-O:11 through 18. During those hearings, the legislature received testimony from many parties including Robert Scott, Director of the Air Division of the New Hampshire Department of Environmental

Services (“DES”). By law, DES is the agency charged with implementing the regulatory aspects of the multi-pollutant program. On April 11, 2006, during a hearing before the Senate Committee on Energy and Economic Development, Director Scott provided the following testimony in support of House Bill 1673-FN, the bill that was later codified as RSA 125-O:11 through RSA 125-O:18:

It’s also been raised, why are we being prescriptive? Why are we in this regular ... in this law to PSNH to put in a scrubber? And I have to take some personal responsibility for that; I advocated for that myself. Why would I do that? Everybody, including myself I think agrees that we want to see mercury reductions, a high level of mercury reductions sooner than later. We know today that the installation of scrubbers which have a wonderful benefit of SO<sub>2</sub> reductions, also reduce mercury at a high percentage. That is today the best technology, especially taking in to account the multi-pollutant benefits that we know of. *What we wanted to avoid is extra time being given, another year, two years of a selection process, what’s the best technology, the owner’s having to go to PUC to convince them that this is the best technology, and then perhaps having some other company come in and say, “Well, I had this new alchemy and I can do something even better.” That’s all fine and dandy, but what we’re concerned about is we don’t want to have this as a method where we’re constantly delaying the installation. By calling out scrubber technology in the bill, we’re signaling PSNH from the word go to start to engineer, design and build scrubber technology right away.* The bill has in it, within one year of passage of the bill, they are required to have all their applications in to us, which means there’s a lot of engineering work they have to do. This is starting ... this is in the ground writing for the plan, and this is why we did that.

Stonyfield App., p. 112 (emphasis added). Director Scott’s testimony indicates that the bill was drafted in order to prevent PUC review of the installation of scrubber technology. No contrary testimony appears in the record. Therefore, to the extent the court finds any ambiguity in the statute, the legislative history further supports the PUC’s refusal to revisit the legislature’s finding of public need.

**B. The Legislative History Does Not Indicate that the Legislature Intended the Issue of Public Interest to be Re-examined by the PUC if Technology Costs Changed.**

The Appellants claim that the legislative history favors an interpretation that the legislature intended the PUC to review the cost of the scrubber and use this information to determine whether installation was in the public interest. The legislative history does not support this conclusion for several reasons.

First, it is clear from the testimony that the original price quotation was an estimate only. The Fiscal Note for House Bill 1673-FN states: “PSNH *estimates* that the installation will be at a cost not to exceed \$250 million in 2013 dollars or \$197 million in 2005 dollars.” State’s Appendix, p. 24 (emphasis added). During the legislative hearing, representative Gene Anderson discussed the size of the project and noted the “*estimated* cost at about \$270 million dollars.” Stonyfield Appendix, p. 94 (emphasis added). Nothing indicates that PSNH ever indicated that this estimate was a firm price that could never be exceeded regardless of overall market conditions.

Second, neither the language of the statute, nor the testimony before the legislature indicates that the Mercury Emissions subdivision was created to be contingent on a certain price. In the legislature, there was significant discussion about price and a recognition that delay could result in further cost increases. During the hearing before the Senate Committee on Energy and Economic Development, for example, Representative Jay Phinizy stated: “And one of the things that concerns me about extending the time line entirely too far out is whether or not we really come into compliance in a reasonable amount of time and whether or not we will come into far greater costs further down the line.” Stonyfield Appendix, p. 88. This was one reason why it was imperative to begin construction as soon as possible. However, no one offered any

testimony suggesting that the statute would be contingent on the cost of the project at the time of physical construction.

Finally, and most important, although legislative history may be used as an interpretive aid with respect to ambiguous language, it should not be used to insert language into a statute that the legislature chose not to add. In re N.H. Dept. of Trans., 144 N.H. 555, 558 (1999) (court will look to legislative history as a guide to meaning of statute only if ambiguity requires choice); see Town of Amherst v. Gilroy, 157 N.H. 275, 277-78 (2008). Here Appellants do not argue that the legislative history regarding cost estimates should be used to interpret a specific term. See Stonyfield Brief, pp. 10-13. Instead, the Appellants treat the legislative history as if it were itself a statutory provision that requires interpretation and implementation. Id. The court should reject this analysis.

The crux of the Appellants' argument does not pertain to the interpretation of the statute regarding the PUC's authority. Rather, the Appellants appear to suggest that when the legislature determined that the scrubber was in the public interest, the legislature acted wrongly or based its decision on misinformation. Whether or not the legislature correctly decided that the scrubber was in the public interest, however, is not at issue. As the PUC correctly concluded, the legislature did in fact decide that the installation of this technology was in the public interest and, therefore, the statute must be implemented according to its terms. Only the legislature may alter this finding, and to date, it has not done so.

### **CONCLUSION**

For the reasons stated above, the State respectfully requests this Court to affirm the decision of the PUC.

The State requests oral argument to be presented by K. Allen Brooks (15 minutes).

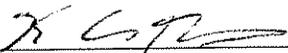
Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

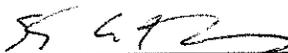
Kelly A. Ayotte  
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Date: May 6, 2009

  
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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing have on this day been mailed first class postage prepaid to the parties on the attached service list.

  
\_\_\_\_\_  
K. Allen Brooks

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Docket No. 2008-0897

APPEAL OF STONYFIELD FARM, INC., H & L INSTRUMENTS, LLC, AND  
GREAT AMERICAN DINING, INC. UNDER RSA 541:6 FROM ORDER OF  
PUBLIC UTILITIES COMMISSION

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**State's Appendix**

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HB 1673-FN - AS INTRODUCED

2006 SESSION

06-2816

06/03

HOUSE BILL ***1673-FN***

AN ACT relative to the reduction of mercury emissions.

SPONSORS: Rep. Ross, Hills 3; Rep. Slocum, Hills 6; Rep. Kaen, Straf 7; Rep. Phinizy, Sull 5;  
Rep. Maxfield, Merr 6; Sen. Green, Dist 6; Sen. Johnson, Dist 2; Sen. Burling,  
Dist 5; Sen. Odell, Dist 8; Sen. Hassan, Dist 23

COMMITTEE: Science, Technology and Energy

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ANALYSIS

This bill provides for an 80 percent reduction of mercury emissions from coal-burning power plants by requiring the installation of scrubber technology no later than July 1, 2013 and provides economic incentives for earlier installation and greater reductions in emissions.

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Explanation: Matter added to current law appears in ***bold italics***.  
Matter removed from current law appears [~~in brackets and struck through.~~]  
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.



1 VII. Notwithstanding the provisions of RSA 125-O:1, VI, the purchase of mercury credits or  
2 allowances to comply with the mercury reduction requirements of this subdivision or the sale of  
3 mercury credits or allowances earned under this subdivision is not in the public interest.

4 VIII. The mercury reduction requirements set forth in this subdivision represent a careful,  
5 thoughtful balancing of cost, benefits, and technological feasibility and therefore the requirements  
6 shall be viewed as an integrated strategy of non-severable components.

7 125-O:12 Definitions. In this subdivision:

8 I. "Affected sources" means existing coal-burning power plant units in this state, specifically  
9 Merrimack Units 1 and 2 in Bow and Schiller Units 4, 5, and 6 in Portsmouth.

10 II. "Baseline mercury emissions" means the total annual mercury emissions from all of the  
11 affected sources, calculated in accordance with RSA 125-O:14, II.

12 III. "Baseline mercury input" means the total annual mercury input found in the coal used  
13 by all of the affected sources, calculated in accordance with RSA 125-O:14, I.

14 IV. "Owner" means the owner or owners of the affected sources.

15 V. "Scrubber technology" means a wet flue gas desulphurization system.

16 125-O:13 Compliance.

17 I. The owner shall install and have operational scrubber technology to control mercury  
18 emissions at Merrimack Units 1 and 2 no later than July 1, 2013. The achievement of this  
19 requirement is contingent upon obtaining all necessary permits and approvals from federal, state,  
20 and local regulatory agencies and bodies; however, all such regulatory agencies and bodies are  
21 encouraged to give due consideration to the general court's finding that the installation and  
22 operation of scrubber technology at Merrimack Station is in the public interest. The owner shall  
23 make appropriate initial filings with the department and the public utilities commission, if  
24 applicable, within one year of the effective date of this section, and with any other applicable  
25 regulatory agency or body in a timely manner.

26 II. Total mercury emissions from the affected sources shall be at least 80 percent less on an  
27 annual basis than the baseline mercury input, as defined in RSA 125-O:12, III, beginning on  
28 July 1, 2013.

29 III. Prior to July 1, 2013, the owner shall test and implement, as practicable, mercury  
30 reduction control technologies or methods to achieve early reductions in mercury emissions below the  
31 baseline mercury emissions. The owner shall report the results of any testing to the department and  
32 shall submit a plan for department approval before commencing implementation.

33 IV. If the net power output (as measured in megawatts) from Merrimack Station is reduced,  
34 due to the power consumption requirements or operational inefficiencies of the installed scrubber  
35 technology, the owner may invest in capital improvements at Merrimack Station that increase its  
36 net capability, within the requirements and regulations of programs enforceable by the state or  
37 federal government, or both.

1 V. Mercury reductions achieved through the operation of the scrubber technology greater  
 2 than 80 percent shall be sustained insofar as the proven operational capability of the system, as  
 3 installed, allows. The department, in consultation with the owner, shall determine the maximum  
 4 sustainable rate of mercury emissions reductions and incorporate such rate as a condition of  
 5 operational permits issued by the department for Merrimack Units 1 and 2. This requirement in no  
 6 way affects the ability of the owner to earn over-compliance credits consistent with RSA 125-O:16, II.

7 VI. The purchase of mercury emissions allowances or credits from any established emissions  
 8 allowance or credit program shall not be allowed for compliance with the mercury reduction  
 9 requirements of this chapter.

10 VII. If the mercury reduction requirement of paragraph II is not achieved in any year after  
 11 the July 1, 2013 implementation date, and after full operation of the scrubber technology, then the  
 12 owner may utilize early emissions reduction credits or over-compliance credits, or both, to make up  
 13 any shortfall, and thereby be in compliance.

14 VIII. If the mercury reduction requirement of paragraph II is not achieved by the owner in  
 15 any year after the July 1, 2013 implementation date despite the owner's installation and full  
 16 operation of scrubber technology, consistent with good operational practice, and the owner's  
 17 exhaustion of any available early emissions reduction or over-compliance credits, then the owner  
 18 shall be deemed in violation of this section unless it submits a plan to the department, within  
 19 30 days of such noncompliance, and subsequently obtains approval of that plan for achieving  
 20 compliance within one year from the date of such noncompliance. The department may impose  
 21 conditions for approval of such plan.

22 125-O:14 Measurement of Baseline Mercury Input and Emissions.

23 I. Baseline mercury input shall be determined as follows:

24 (a) No later than the first day of the second month following the effective date of this  
 25 section, and continuing for 12 months thereafter, a representative monthly sample of the coal used  
 26 traditionally (not to include trial or test coal blends) by each affected source shall be collected from  
 27 each of the units identified in subparagraph (b) and analyzed to determine the average mercury  
 28 content of the fuel for each unit expressed in pounds of mercury input per ton of coal combusted at  
 29 each affected source. The mercury content of the coal derived from these analyses for each affected  
 30 source shall be multiplied by the average annual throughput of coal for the period 2003, 2004, and  
 31 2005 (average tons of coal combusted per year) for each respective affected source to yield the  
 32 average pounds of mercury input per year into each affected source. The sum of these annual input  
 33 pound averages from each affected source shall equal the baseline mercury input.

34 (b) Determination of the mercury content of the coal shall follow appropriate ASTM  
 35 testing procedures (ASTM D3684-01). For purposes of baseline mercury input determination, coal  
 36 sampling shall occur at Merrimack Unit 1 and Unit 2, and at either Schiller Unit 4 or Unit 6, which  
 37 shall serve to represent all Schiller units. At least 4 of the samples taken from each of these units  
 38 shall correspond with the stack testing done at each of these units under paragraph II.

1 II. Baseline mercury emissions shall be determined as follows:

2 (a) A minimum of 4 stack tests shall be conducted at each of the units specified in  
 3 subparagraph (b) using appropriate testing protocols, to determine a statistically valid average  
 4 mercury emissions rate for each unit expressed in pounds of mercury emitted per ton of coal  
 5 combusted at each affected source. The rate for each affected source shall be multiplied by the  
 6 average annual throughput of coal for the period 2003, 2004, and 2005 (average tons of coal  
 7 combusted per year) for each respective affected source to yield the average pounds of mercury  
 8 emitted per year from each affected source. The sum of these annual emitted pound averages from  
 9 each affected source shall equal the baseline mercury emissions.

10 (b) For purposes of the baseline mercury emissions determination, stack tests shall be  
 11 conducted at Merrimack Unit 1 and Unit 2, and at either Schiller Unit 4 or Unit 6, which shall serve  
 12 to represent all Schiller units. If mercury emissions improvements are made or are being made  
 13 during the testing period, the stack tests shall be conducted without the improvements running at  
 14 the time of the tests.

15 III. The owner shall provide its plans to accomplish the testing requirements under paragraphs I  
 16 and II to the department for its approval. The owner shall provide written reports to the department, for  
 17 verification and approval, that include the test results and calculations used to determine:

18 (a) The baseline mercury input. The owner shall submit the report no later than  
 19 15 months following the effective date of this section.

20 (b) The baseline mercury emissions. The owner shall submit the report no later than  
 21 18 months following the effective date of this section.

22 125-O:15 Monitoring of Mercury Emissions. Prior to the availability and operation of  
 23 continuous emissions monitoring (CEM) systems, and subsequent to the baseline emissions testing  
 24 under RSA 125-O:14, II, stack tests or another methodology approved by the department shall be  
 25 conducted twice per year to determine mercury emissions levels from the affected sources. Any stack  
 26 tests performed shall employ a federally recognized and approved methodology, proposed by the  
 27 owner and employing a test protocol approved by the department. When a federal performance  
 28 specification takes effect, and a mercury CEM system capable of meeting the federal specifications  
 29 becomes available, a mercury CEM system, approved by the department, shall be installed at  
 30 Merrimack Units 1 and 2 and at other affected sources as deemed appropriate by the department.

31 125-O:16 Economic Performance Incentives.

32 I.(a) The department shall issue to the owner early emissions reduction credits in the form of  
 33 credits or fractions thereof for each pound of mercury or fraction thereof reduced below the baseline  
 34 mercury emissions, on an annual basis, in the period prior to July 1, 2013. Ratios of early reductions  
 35 credits to pounds of mercury reduced shall be as follows: 1.5 credits per pound reduced prior to July 1,  
 36 2008; 1.25 credits per pound for reductions between July 1, 2008 and December 31, 2010; and 1.1  
 37 credits per pound for reductions between January 1, 2011 and July 1, 2013.

1 (b) Reductions shall be calculated based upon the results of stack tests conducted,  
 2 measurement by continuous emission monitoring, or other methodology approved by the department  
 3 to confirm emissions during the time of operation of mercury reduction technology. Early emissions  
 4 reduction credits may be banked by the owner or utilized after July 1, 2013 to meet the reduction  
 5 requirement of RSA 125-O:13, II as allowed under RSA 125-O:13, VII. Early emissions reduction  
 6 credits are not sellable or transferable to non-affected sources; however, upon the July 1, 2013  
 7 compliance date, the owner may request a one-for-one conversion of early emissions reduction credits  
 8 to over-compliance credits.

9 (c) Should a federal rule applicable to mercury emissions at one or more of the affected  
 10 sources be enacted with an implementation date prior to July 1, 2013, then early reduction credits  
 11 may only be earned for emissions reductions that exceed the level required by the federal rule of the  
 12 affected sources in aggregate or the baseline mercury emissions level, whichever is lower, at the  
 13 same ratios listed in subparagraph (a).

14 (d) Early emissions reduction credits shall not be used for compliance with the  
 15 requirement of RSA 125-O:13, II prior to the installation of scrubber technology, and shall not be  
 16 used as a means to delay the installation of the scrubber technology.

17 II.(a) The department shall issue to the owner over-compliance credits in the form of credits  
 18 or fractions thereof for each pound of mercury or fraction thereof reduced in excess of the emissions  
 19 reduction requirement of RSA 125-O:13, II, on an annual basis, following the compliance date of  
 20 July 1, 2013. The ratios of over-compliance credits to excess pounds of mercury reduced shall be as  
 21 follows: 0.5 credits per pound reduced for reductions between 80 and 85 percent; 1 credit per pound  
 22 reduced for reductions between 85 and 90 percent reduction; and 1.5 credits per pound reduced for  
 23 reductions of 90 percent or greater. Over-compliance credits may be banked for future use. The  
 24 requirements of RSA 125-O:13, V shall not alter the emissions levels at which over-compliance  
 25 credits are earned.

26 (b) Should a federal rule applicable to mercury emissions at one or more of the affected  
 27 sources be enacted, then over-compliance credits may only be earned for emissions reductions that  
 28 exceed the level required by the federal rule of the affected sources in aggregate or the requirement  
 29 of RSA 125-O:13, II, whichever is lower, at the same ratios listed in subparagraph (a).

30 (c) At the request of the owner of an affected source, over-compliance credits may be  
 31 surrendered by the owner to the department and SO<sub>2</sub> allowances shall be transferred to the owner  
 32 at a rate of 55 tons SO<sub>2</sub> allowances for every one over-compliance credit. Transfer shall be limited to  
 33 a maximum of 20,000 total tons SO<sub>2</sub> allowances transferred in a given year, defined as the sum of all  
 34 SO<sub>2</sub> allowances received by the affected sources under RSA 125-O:4, IV(a)(2) and IV(a)(3), and under  
 35 this subparagraph. SO<sub>2</sub> allowances shall be credited to the affected sources' accounts in the  
 36 following year in accordance with RSA 125-O:4, IV(a)(4).

37 125-O:17 Variances. The owner may request a variance from the mercury emissions reduction  
 38 requirements of this subdivision by submitting a written request to the department. The request

1 shall provide sufficient information concerning the conditions or special circumstances on which the  
2 variance request is based to demonstrate to the satisfaction of the department that variance from the  
3 applicable requirements is necessary.

4 I. Where an alternative schedule is sought, the owner shall submit a proposed schedule  
5 which demonstrates reasonable further progress and contains a date for final compliance as soon as  
6 practicable. If the department deems such a delay is reasonable under the cited circumstances, it  
7 shall grant the requested variance.

8 II. Where an alternative reduction requirement is sought, the owner shall submit  
9 information to substantiate an energy supply crisis, a major fuel disruption, an unanticipated or  
10 unavoidable disruption in the operations of the affected sources, or technological or economic  
11 infeasibility. The department, after consultation with the public utilities commission, shall grant or  
12 deny the requested variance. If requested by the owner, the department shall provide the owner  
13 with an opportunity for a hearing on the request.

14 125-O:18 Cost Recovery. If the owner is a regulated utility, the owner shall be allowed to  
15 recover via regulated rates all prudent costs of complying with the requirements of this subdivision  
16 in a manner approved by the public utilities commission.

17 2 Repeal. The following are repealed:

18 I. RSA 125-O:3, III(c), relative to an annual cap applicable to total mercury emissions.

19 II. RSA 125-O:4, IV(d), relative to the use of future mercury allowances to meet a portion of  
20 the emission cap for mercury.

21 3 Compliance Dates: Mercury Emissions Excluded. Amend RSA 125-O:9 to read as follows:

22 125-O:9 Compliance Dates. The owner or operator of each affected source shall comply with the  
23 provisions of this chapter, *excluding the subdivision on mercury emissions, RSA 125-O:11*  
24 *through 125-O:18*, by December 31, 2006.

25 4 Effective Date. This act shall take effect 30 days after passage.

LBAO  
06-2816  
12/12/05

**HB 1673-FN - FISCAL NOTE**

AN ACT relative to the reduction of mercury emissions.

**FISCAL IMPACT:**

The Department of Environmental Services and the Public Utilities Commission stated this bill will have an indeterminable impact on state, county and local expenditures in future years. There will be no fiscal impact on state, county and local revenue.

**METHODOLOGY:**

The Department of Environmental Services (DES) and the Public Utilities Commission (PUC) state this bill intends to reduce mercury emissions from Merrimack Station, a coal burning electric generation plant in Bow, New Hampshire, currently owned by Public Service Company of New Hampshire (PSNH). As required, PSNH would install a wet flue desulphurization scrubber system at the plant. The technology would significantly reduce the plant's sulfur dioxide emissions and is expected to reduce the plant's mercury emissions by at least 80%. The equipment is to be installed no later than July 1, 2013. PSNH estimates that the installation will be at a cost not to exceed \$250 million in 2013 dollars or \$197 million in 2005 dollars. Any rate impact, therefore, would most likely be felt after the period of time identified in this fiscal note. In assessing the rate impact for the control equipment, the \$250 million would be offset to some degree by savings resulting from PSNH's reduced need to purchase sulfur dioxide allowances, and additional revenues, as PSNH would be able to sell excess sulfur dioxide allowances if it achieves greater than 80% mercury reduction. Based on PSNH's estimates, the cost charged to the state, counties and localities in the first year of operation of the scrubber system would be approximately \$1.9 million. After 10 years of operation, those entities would experience a net savings of approximately \$500,000 per year. PSNH analyzed 3 different cost impact scenarios based on a low (\$573/ton), moderate (\$1,073/ton), and high (\$1,573/ton) SO2 allowance price. DES states that the current price exceeds \$1,400/ton. At the current price, over the 10-year time period, the project should result in net savings to PSNH.

