

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

No. 2008-0897

**APPEAL OF STONYFIELD FARM, INC. & A.
UNDER RSA 541:6 AND RSA 365:21
FROM ORDER OF THE PUBLIC UTILITIES COMMISSION**

**BRIEF
OF THE NEW HAMPSHIRE
OFFICE OF CONSUMER ADVOCATE**

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NH RSA 363:28

363:28 Office of the Consumer Advocate. –

I. The office of the consumer advocate shall be an independent agency administratively attached to the public utilities commission pursuant to RSA 21-G:10. The office shall consist of the following:

(a) A consumer advocate, appointed by the governor and council, who shall be a qualified attorney admitted to practice in this state. The consumer advocate shall serve a 4-year term and until a successor is appointed and qualified.

(b) An assistant consumer advocate appointed by the consumer advocate, who shall be a full-time classified employee.

(c) A secretary appointed by the consumer advocate.

(d) Two additional staff people appointed by the consumer advocate. When filling these positions, the consumer advocate should consider appointing rate analysts or economists.

II. The consumer advocate shall have the power and duty to petition for, initiate, appear or intervene in any proceeding concerning rates, charges, tariffs, and consumer services before any board, commission, agency, court, or regulatory body in which the interests of residential utility consumers are involved and to represent the interests of such residential utility consumers.

III. The consumer advocate shall have authority to contract for outside consultants within the limits of funds available to the office.

IV. The consumer advocate shall have authority to promote and further consumer knowledge and education.

V. The consumer advocate shall publicize the Link-Up New Hampshire and Lifeline Telephone Assistance programs in order to increase public awareness and utilization of these programs.

Source. 1981, 220:7; 354:1. 1985, 300:4. 1986, 146:1. 1987, 136:3, eff. May 7, 1987. 1999, 167:2, eff. Aug. 30, 1999. 2001, 4:1, eff. May 27, 2001. 2007, 263:174, eff. July 1, 2007.

NH RSA 365:5

365:5 Independent Inquiry. – The commission, on its own motion or upon petition of a public utility, may investigate or make inquiry in a manner to be determined by it as to any rate charged or proposed or as to any act or thing having been done, or having been omitted or proposed by any public utility; and the commission shall make such inquiry in regard to any rate charged or proposed or to any act or thing having been done or having been omitted or proposed by any such utility in violation of any provision of law or order of the commission.

Source. 1911, 164:10. 1913, 145:9. PL 238:6. RL 287:6. 1951, 203:11 par. 5, eff. Sept. 1, 1951.

NH RSA 374:1

374:1 Service. – Every public utility shall furnish such service and facilities as shall be reasonably safe and adequate and in all other respects just and reasonable.

Source. 1911, 164:4. PL 240:1. RL 289:1. 1951, 203:21, eff. Sept. 1, 1951.

NH RSA 374:2

374:2 Charges. – All charges made or demanded by any public utility for any service rendered by it or to be rendered in connection therewith, shall be just and reasonable and not more than is allowed by law or by order of the public utilities commission. Every charge that is unjust or unreasonable, or in excess of that allowed by law or by order of the commission, is prohibited.

Source. 1911, 164:4. PL 240:2. RL 289:2. 1951, 203:22, eff. Sept. 1, 1951.

NH RSA 374:3

374:3 Extent of Power. – The public utilities commission shall have the general supervision of all public utilities and the plants owned, operated or controlled by the same so far as necessary to carry into effect the provisions of this title.

Source. 1911, 164:5. PL 240:3. RL 289:3. 1951, 203:20, eff. Sept. 1, 1951.

NH RSA 541:13

541:13 Burden of Proof. – Upon the hearing the burden of proof shall be upon the party seeking to set aside any order or decision of the commission to show that the same is clearly

unreasonable or unlawful, and all findings of the commission upon all questions of fact properly before it shall be deemed to be prima facie lawful and reasonable; and the order or decision appealed from shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable.

Source. 1913, 145:18. PL 239:11. 1937, 107:24; 133:85. RL 414:13.

NH RSA 541-A:1

541-A:1 Definitions. – In this chapter:

- I. "Adjudicative proceeding" means the procedure to be followed in contested cases, as set forth in RSA 541-A:31 through RSA 541-A:36.
- II. "Agency" means each state board, commission, department, institution, officer, or any other state official or group, other than the legislature or the courts, authorized by law to make rules or to determine contested cases.
- III. "Committee" means the joint legislative committee on administrative rules, unless the context clearly indicates otherwise.
- IV. "Contested case" means a proceeding in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after notice and an opportunity for hearing.
- V. "Declaratory ruling" means an agency ruling as to the specific applicability of any statutory provision or of any rule or order of the agency.
- VI. "File" means the actual receipt, by the director of legislative services, of a document required to be submitted during a rulemaking process established by this chapter.
- VI-a. "Final legislative action" means the defeat of a joint resolution sponsored by the legislative committee on administrative rules pursuant to RSA 541-A:13, VII(b) in either the house or the senate, or the failure of the general court to override the governor's veto of the joint resolution.
- VII. "Fiscal impact statement" means a statement prepared by the legislative budget assistant, using data supplied by the rulemaking agency, and giving consideration to both short- and long-term fiscal consequences and includes the elements required by RSA 541-A:5, IV.
- VIII. "License" means the whole or part of any agency permit, certificate, approval, registration, charter or similar form of permission required by law.
- IX. "Licensing" means the agency process relative to the issuance, denial, renewal, revocation, suspension, annulment, withdrawal or amendment of a license, or the imposition of terms for the exercise of a license.
- X. "Nonadjudicative processes" means all agency procedures and actions other than an adjudicative proceeding.
- XI. "Order" means the whole or part of an agency's final disposition of a matter, other than a rule, but does not include an agency's decision to initiate, postpone, investigate or process any matter, or to issue a complaint or citation.
- XII. "Party" means each person or agency named or admitted as a party, or properly seeking and entitled as a right to be admitted as a party.

XIII. ""Person" means any individual, partnership, corporation, association, governmental subdivision, or public or private organization of any character other than an agency.

XIV. ""Presiding officer" means that individual to whom the agency has delegated the authority to preside over a proceeding, if any; otherwise it shall mean the head of the agency.

XV. ""Rule" means each regulation, standard, or other statement of general applicability adopted by an agency to (a) implement, interpret, or make specific a statute enforced or administered by such agency or (b) prescribe or interpret an agency policy, procedure or practice requirement binding on persons outside the agency, whether members of the general public or personnel in other agencies. The term does not include (a) internal memoranda which set policy applicable only to its own employees and which do not affect private rights or change the substance of rules binding upon the public, (b) informational pamphlets, letters, or other explanatory material which refer to a statute or rule without affecting its substance or interpretation, (c) personnel records relating to the hiring, dismissal, promotion, or compensation of any public employee, or the disciplining of such employee, or the investigating of any charges against such employee, (d) declaratory rulings, or (e) forms. The term ""rule" shall include rules adopted by the director of personnel, department of administrative services, relative to the state employee personnel system. Notwithstanding the requirements of RSA 21-I:14, the term ""rule" shall not include the manual described in RSA 21-I:14, I or the standards for the format, content, and style of agency annual and biennial reports described in RSA 21-I:14, IX, which together comprise the manual commonly known as the administrative services manual of procedures. The manual shall be subject to the approval of governor and council.

XVI. ""Standing policy committee" means a committee listed in rules of the house of representatives or the senate to which legislation including rulemaking authority was originally referred for hearing and report.

Source. 1994, 412:1, eff. Aug. 9, 1994. 2000, 288:2. 2006, 145:2, eff. July 21, 2006.

STATEMENT OF FACTS

On August 7, 2008, Northeast Utilities (NU), the parent company of Public Service Company of New Hampshire (PSNH), filed a quarterly earnings report with the U.S. Securities and Exchange Commission. *See* Appendix to Appellant’s Brief, p. 36. Therein, NU disclosed a more than 80 percent increase in the cost of installing a wet flue gas desulphurization system (Scrubber Project) at PSNH’s Merrimack Station. *Id.*

On August 22, 2008, in response to NU’s SEC filing, the New Hampshire Public Utilities Commission (PUC) issued a secretarial letter in docket DE 08-103. *Id.* Therein, the PUC stated its intention “pursuant to RSA 365:5 and 365:19 to inquire into: the status of PSNH’s efforts to install scrubber technology; the costs of such technology; and the effect installation would have on energy service rates ... for PSNH customers.” *Id.* With regard to its inquiry, the PUC directed PSNH to file certain updated factual information about the Scrubber Project. *Id.*

In addition to its factual inquiry, the PUC’s August 22 letter to PSNH also set forth a legal inquiry. *See* Appendix to Appellant’s Brief, pp. 36-37. The PUC specifically identified RSA 125-O:11 and RSA 369-B:3-a the substantive basis for its legal inquiry, and suggested a “potential conflict between these statutory provisions.” *Id.* The PUC directed PSNH to file “a memorandum of law addressing the nature and extent of the Commission’s authority relative to the Merrimack Station scrubber project” and also invited a memorandum of law from the NH Office of Consumer Advocate (OCA). *Id.*

On August 26, 2008, pursuant to RSA 363:28 and on behalf of PSNH’s residential customers, the OCA filed with the PUC a notice of its intent to participate in the docket. *See* Appendix to OCA’s Brief, p. 1. On September 2, 2008, PSNH filed a response to the

Commission's August 22 secretarial letter, including a memorandum of law, a project status report, and a response to specific economic inquiries. *See* Appendix to Appellant's Brief, 38-79. On September 11, 2008, the OCA filed a Memorandum of Law. *See* Appendix to OCA's Brief, p. 2. In its cover letter to the memorandum, the OCA recommended that the PUC include other interested stakeholders in its process. *See* Id.

Other interested parties also filed letters with the PUC during this time frame. *See* Id. at 14-18. Several of these letters requested that the PUC commence an adjudicatory proceeding to consider the issues raised by the PUC's August 22 letter to PSNH. *See* Id.

On September 19, 2008, without seeking further input from interested parties, the PUC issued Order No. 24,898. Notice of Appeal, pp. 14-27. Therein, the PUC ruled that RSA 369-B:3-a and RSA 125-O:11 are "mutually exclusive and cannot logically co-exist." *Id.* at 20. The PUC also ruled that "the proper interpretation of the conflicting statutes in this situation is that the Legislature intended the more recent, more specific statute, RSA 125-O:11, to prevail." *Id.* at 22. With regard to RSA 125-O:13, the PUC ruled, "Since we find that the Legislature has presumptively determined the scrubber to be in the public interest, we conclude that Commission approval pursuant to RSA 369-B:3-a is not a necessary approval under RSA 125-O:13." *Id.* at 24.

On October 17, 2008, TransCanada Hydro Northeast, Inc. (TransCanada) and Edward M. B. Rolfe filed motions for rehearing. *See* Appendix to OCA's Brief, pp. 19-38. The New England Power Generators Association filed a letter in support of TransCanada's Motion and requested that the Commission "provide stakeholders with a full and transparent opportunity" to participate in the review of the project. Appendix to OCA's Brief, p 39-40. Three commercial ratepayers, Stonyfield Farm, Inc., H&L Instruments, LLC and Great American

Dining, Inc. (collectively, the Commercial Ratepayers) also filed a Motion for Rehearing. *See* Appendix to Appellant’s Brief, p.154. The motions for rehearing raised issues related to the PUC’s process in the docket, as well as substantive issues related to the PUC’s interpretation of RSA 125-O and RSA 369-B:3-a. *Id.* On October 23, 2008, PSNH filed objections to all three motions for rehearing. *See Id.* at p. 163.

On November 12, 2008 the PUC issued Order No. 24, 914 denying all motions for rehearing. *See* Appendix to OCA’s Brief, p. 41. This appeal followed.

SUMMARY OF ARGUMENT

The PUC acted contrary to the law when it found that it lacked the authority to perform its statutorily required duty to protect the interests of retail ratepayers of PSNH under RSA 369-B:3-a. The PUC also erred when it found, without undertaking an adjudicative proceeding open to all affected parties, that a conflict existed between RSA 369-B:3-a and RSA 125-O. These two laws can and should be read together in order to give both laws the effect that the Legislature intended.

ARGUMENT

- I. The PUC erred as a matter of law when it interpreted RSA 125-O:11 as precluding its review of the installation of scrubber technology at PSNH’s Merrimack Station pursuant to RSA 369-B:3-a and RSA 125-O:13.

The Court is “the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole.” Appeal of Verizon New England et al., 153 NH 50, 63 (2005) (citation omitted). “In interpreting a statute, [the Court] first look[s] to the language of the statute itself, and, if possible construe[s] the language according to its plain and

ordinary meaning.” Id. Further, the Court “interpret[s] statutes in the context of the overall statutory scheme and not in isolation.” Id. On appeal, the Court reviews the PUC’s interpretation of statutes de novo. *See* RSA 541:13; and *see, e.g., In re Portsmouth Regional Hospital*, 148 NH 55 (2002).

RSA 369-B:3-a requires the PUC to review modifications to PSNH’s generation assets, including Merrimack Station. *See Appeal of Pinetree Power, Inc.*, 152 NH 92, 95 (2005) (“The PUC regulates divestiture and modification of PSNH’s generation assets pursuant to RSA 369-B:3-a.”). The legal standard applicable to such a review is whether the modification “is in the public interest of retail customers of PSNH.” RSA 369-B:3-a. PSNH’s installation of scrubber technology at Merrimack station constitutes a modification under RSA 369-B:3-a. *See* Notice of Appeal, p. 21.

RSA 125-O:13, I mandates that PSNH install scrubber technology at Merrimack Station in order to reduce mercury pollution from the plant by 80% by a certain date. This mandate, however, “is contingent upon obtaining all necessary permits and approvals from federal, state, and local regulatory agencies and bodies.” RSA 125-O:13 (emphasis added). There is no dispute that the PUC is a state agency that regulates PSNH’s service and rates, *see, e.g.,* RSA 374:1, RSA 374:2, and RSA 374:3, or that absent consideration of the pertinent provision of RSA 125-O, the PUC’s review pursuant to RSA 369-B:3-a constitutes a necessary approval of a modification of one of PSNH’s generating plants. *See Appeal of Pinetree Power, Inc.*, 152 NH 92, 96 (2005) (“RSA 369-B:3-a is a clear directive by the legislature to the PUC specifically regarding PSNH,” requiring the determination of whether a modification to generation assets is in the public interest of retail customers of PSNH.).

RSA 125-O:11, VI includes a finding of the Legislature that the installation of scrubber technology “is in the public interest of the citizens of New Hampshire and the customers of the affected sources.” However, though the Legislature made a finding that reducing mercury is in the public interest generally, that finding did not preclude the PUC’s required finding that the project is in the public interest of PSNH’s retail customers as required by RSA 369-B:3-a. In fact, when conducting such a review of the proposed modifications to Merrimack Station, as contemplated by RSA 125-O:13, I, the PUC is “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.” PSNH is also required to make “appropriate” filings with the PUC for the purpose of this review. *Id.*

The PUC characterized as “collateral” the consideration of RSA 125-O:13, and instead focused its review and based its rulings on RSA 125-O:11, VI. *See* Notice of Appeal, at 9-11 and 24. However, RSA 369-B:3-a, RSA 125-O:11, and RSA 125-O:13 can and should be read together in order to give them full effect. The legislature is not presumed to waste words or enact redundant provisions and whenever possible, every word of a statute should be given effect. Town of Amherst v. Gilroy, ___ NH ___, 950 A.2d 193, 197 (2008) (citation omitted). “If any reasonable construction of the two statutes taken together can be found,” both statutes apply. Public Serv. Co. v. Lovejoy Granite Co., 114 N.H. 630 (1974) (Court will not find implied repeal where any reasonable construction of two statutes exists).

Moreover, the language of RSA 125-O:13, I is clear. Simply put, PSNH may not proceed with the modifications to Merrimack Station required by RSA 125-O:13, I unless and until it obtains a determination by the PUC pursuant to RSA 369-B:3-a that the modifications to the plant are in the public interest of retail customers of the utility.

RSA 125-O:11 also should not be considered in isolation of its context. *See Appeal of Verizon New England et al.*, 153 NH 50, 63 (2005) (Court interprets statutes in the context of the overall statutory scheme and not in isolation). Instead, RSA 125-O:11 should be interpreted in conjunction with RSA 125-O:13, I, in which the PUC is “encouraged to give due consideration to” the Legislature’s public interest finding when it reviews the Scrubber Project pursuant to RSA 369-B:3-a. *Id.*

Considered in context, the plain language of RSA 125-O:11 does not divest the PUC of its authority to make the public interest determination required by RSA 369-B:3-a. Subject to constitutional limitations, the regulation of utilities “is the unique province of the legislature.” *Appeal of Richards*, 134 NH 148, 158 (1991) (citations omitted). “For substantially all of such regulation, the legislature has recognized the need for expertise not readily available as part of legislative resources, and has therefore delegated its power to a standing regulatory commission of the legislature’s creation,” in this case the PUC. *Id.* at 158 (citations omitted). The legislature recognized the need for the PUC’s expertise and resources when it delegated to the PUC the power to determine pursuant to RSA 369-B:3-a whether modifications to PSNH’s generation are in the public interest of PSNH retail customers.

The PUC is uniquely charged with protecting the interests of public utility ratepayers, a duty so important that it should not be eliminated without express legislative action. With its specialized knowledge and resources, the PUC is also better equipped to undertake the extensive exercise of making this determination. “By the plain language of th[is] statute, the public interest standard for modification is broader than just economic interests.” *Appeal of Pinetree Power*, 152 NH 92, 97 (2005). In addition to rate benefits for PSNH’s retail

customers, the standard for modification also requires the PUC to consider health, environmental and security benefits. *Id.* at 96-97. Therefore, the legislature’s own finding in RSA 125-O:11 that mercury reductions are in the public interest, was intended not to replace this extensive exercise under RSA 369-B:3-a, but rather to assist it.

The Legislature promulgated RSA 125-O in June 2006. RSA 369-B:3-a was in effect at that time. It is presumed that the Legislature is “familiar with all existing laws applicable to the subject matter, whether constitutional, statutory, or common, and intended the statute to harmonize completely with those laws and aid in the effectuation of the general purpose and design of the same.” *Presumptions in Aid of Construction*, 82 C.J.S. Statutes § 310 (updated June 2008) *citing* South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998) (The Supreme Court of the United States assumes that Congress is aware of existing law when it passes legislation) (other citations omitted).

Furthermore, “[w]hen ascertaining legislative intent, a court assumes not only that a legislature knew the laws in effect at the time, but also that it knew the judicial interpretation of those [preexisting] laws. *Presumptions in Aid of Construction*, 82 C.J.S. Statutes § 310 (updated June 2008) (citations omitted). Accordingly, the Legislature knew, or is presumed to have known about the requirements of RSA 369-B:3-a, and the Court’s interpretation of those requirements, when it enacted RSA 125-O *et seq.* See Appeal of Pinetree Power, 152 NH 92 (2005). In fact, that the Legislature knew of RSA 369-B:3-a at the time that it promulgated RSA 125-O can not be disputed because another section of the law, RSA 125-O:18, specifically refers to RSA 369-B:3-a.

If the Legislature had intended to repeal or limit the effectiveness of RSA 369-B:3-a it could have done so expressly. See, e.g., Green Crow Corp. v. Town of New Ipswich, ___

NH ___, 950 A.2d 163, 166, and 167 (2008) (Concluding that the legislature could have used certain language to except the applicability of other statutory requirements if it had intended to do so). For instance, the Legislature could have used words to the effect of, “‘Notwithstanding any other provisions of this chapter to the contrary,’ ... [to] make[] plain that [RSA 125-O:11 and RSA 125-O:13] stand[] alone, exclusive of other contrary provisions of RSA [369-B:3-a].” *Id.* at 166. The Legislature did not do this, nor did it add any language to RSA 125-O:11 or RSA 125-O:13 exempting PSNH from the previously-existing requirements of RSA 369-B:3-a. In fact, to the contrary, by requiring PSNH to obtain “all necessary ... approvals” from “state ... regulatory agencies,” RSA 125-O:13, I, before proceeding with the Scrubber Project, the Legislature contemplated and required such a review by the PUC.

By interpreting RSA 125-O:11 as foreclosing the determination required by RSA 369-B:3-a, and also RSA 125-O:13, the PUC acted contrary to law. Consequently, the Court should reverse and remand this matter to the PUC for such a determination with regard to the Scrubber Project.

- II. The PUC erred as a matter of law when it determined, without commencing an adjudicative proceeding, its authority to make a determination concerning the Scrubber Project under RSA 369-B:3 and RSA 125-O:13.

The PUC’s consideration of facts and legal authority related to the Scrubber Project and its determination pursuant RSA 369-B:3-a and RSA 125-O constituted a contested case and required an adjudicatory process. The failure of the PUC to conduct an adjudicatory process in the underlying docket constitutes an issue of law. The Court reviews issues of law *de novo*. RSA 541:13; *see, e.g., In re Portsmouth Regional Hospital*, 148 NH 55 (2002).

RSA 541-A:31, I requires an agency to commence an adjudicative proceeding “if a matter has reached a stage at which it is considered a contested case.” Adjudicative proceedings require, among other things, reasonable notice. RSA 541-A:31, III. The development of a record is also required. *See* RSA 541-A:31, VI. In this case the PUC did not issue an Order of Notice, which is its customary public notice when it opens a docket. Instead, as stated above, the PUC issued a secretarial letter directing PSNH to file a memorandum of law and inviting the OCA to do so as well. *See* Appendix to Appellant’s Brief, p. 36. However, RSA 541-A:31, I required the PUC to commence an adjudicatory proceeding, as its “inquiry” constituted a contested case, and not selectively invite only some parties to participate.

RSA 541-A:1, IV defines “contested case” as “a proceeding in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after notice and an opportunity for hearing.” The language of the applicable statute or statutes determines whether there is a contested case, and an adjudicatory process is required. *See Appeal of the Office of the Consumer Advocate*, 148 NH 134, 137 (2002) (Court recognizes that RSA 541-A:31 requires adjudicative proceedings for contested cases, but states that the plain language of the applicable statute determines whether hearing is required). The statutes pertinent to the PUC’s legal inquiry in the underlying proceeding, and the Court’s determination on appeal, are RSA 365:5, RSA 369-B:3-a, and RSA 125-O:13.

RSA 365:5 authorizes the PUC, on its own initiative, to inquire about whether a utility is violating any law. This authority is “merely ancillary to other express powers and duties.” *State v. NH Gas & Electric Co. et al.*, 86 NH 16, ___, 163 A. 724, 732 (1932). In other words, the PUC’s inquiries under this statutory provision concern express duties to

enforce statutory mandates. *Id.* “In the performance of its duties under [this] section ... the commission acts in a supervisory and inquisitorial capacity, in which its function is not unlike that of a grand jury, to present for reasonable causes charges against a utility in the nature of an information for a breach of [an express statutory mandate].” *Id.* at 733.

RSA 125-O:13, I, and RSA 369-B:3-a were the express statutory mandates at issue before the PUC. As stated earlier, RSA 125-O:13, I requires PSNH, before it proceeds with the Scrubber Project, to obtain a determination from PUC pursuant to RSA 369-B:3-a regarding whether the project is in the public interest of PSNH’s retail customers. The language of RSA 369-B:3-a explicitly refers to the “economic interest of retail customers of PSNH,” and “cost recovery.” Consequently, a PUC proceeding to consider and make determinations about these substantive issues concerning PSNH customers constitutes a contested case, and requires at the very least reasonable notice and an opportunity for intervention and participation by all those whose “rights, duties or privileges” may be impacted by the PUC’s decision, as required by RSA 541-A:1, IV.

The PUC has interpreted RSA 369-B:3-a as requiring “an adjudicative proceeding allowing for the full range of due process requirements, including testimony by PSNH and other interested parties, discovery, cross-examination of witnesses, briefs, issuance of a decision, motions for rehearing and appeals.” Notice of Appeal, at 22-23, fn. 2. The only proceeding that has been held pursuant to RSA 369-B:3-a concerned PSNH’s modification to Schiller Station and was conducted as an adjudicatory proceeding. *Id.*; *see also* Appeal of Pinetree Power, 152 NH 92 (2005).

The PUC opened DE 08-103 in furtherance of both factual and legal inquiries. Despite its characterization of the nature of the docket as a “repository for the materials to be

filed by PSNH,” the PUC received filings from others requesting the commencement of an adjudicatory proceeding, and the PUC even invited a memorandum of law from the OCA. *See* Appendix to Appellant’s Brief, at 37.

Within this context, the PUC ruled on the scope of its legal authority under RSA 369-B:3-a and RSA 125-O:13. *See* Notice of Appeal, pp. 14-27. The PUC also ruled that it was not required to commence an adjudicative proceeding before making this ruling of law. *Id.*

Rather than the process it utilized to make its rulings, the PUC should have issued an Order of Notice to commence an adjudicatory proceeding to consider its authority under RSA 369-B:3-a, as well as certain sections of RSA 125-O. As under its usual practice, the Order of Notice should have included a deadline for intervention requests and scheduled a prehearing conference, at which the PUC could have ruled on these intervention requests and set a schedule for briefing the legal issues. Because the it failed to treat the underlying docket as a contested case requiring the commencement of an adjudicatory proceeding, the PUC erred as a matter of law and the Court should remand this matter and instruct the PUC to commence an adjudicatory proceeding pursuant to RSA 369-B:3-a.

CONCLUSION

When the legislature enacted RSA 125-O and found that significantly reducing mercury emissions from electric generation plants is in the public interest, it did not divest the PUC of its important duty to protect the interests of retail customers of PSNH. Instead, it explicitly required that in complying with the mercury law, PSNH must seek all approvals required by state agencies including the PUC. Despite the significant impact of the Scrubber Project on PSNH’s ratepayers and the fact that it requires significant modifications to the

plant, no review of the project has been performed by the PUC. Therefore, and for the reasons set forth above, the Court should remand this case back to the PUC and require that the PUC commence an adjudicative proceeding to review the Scrubber Project under RSA 369-B:3-a.

WAIVER OF ORAL ARGUMENT

The Office of Consumer Advocate respectfully waives oral argument.

Respectfully Submitted,



Meredith A. Hatfield
Consumer Advocate

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Supreme Court Rule 16(10), that I have served by first-class mail or hand-delivery two copies of this brief to the other counsel in the case.

3-23-09
Date


Meredith A. Hatfield, Esq.

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

No. 2008-0897

**APPEAL OF STONYFIELD FARM, INC. & A.
UNDER RSA 541:6 AND RSA 365:21
FROM ORDER OF THE PUBLIC UTILITIES COMMISSION**

**APPENDIX TO BRIEF
OF THE NEW HAMPSHIRE
OFFICE OF CONSUMER ADVOCATE**

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STATE OF NEW HAMPSHIRE

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September 11, 2008

Debra A. Howland
Executive Director and Secretary
New Hampshire Public Utilities Commission
21 S. Fruit Street, Suite 10
Concord, New Hampshire 03301-7319

**RE: DE 08-103 Public Service Company of New Hampshire
Investigation of Merrimack Station Scrubber Project**

Dear Ms. Howland:

I enclose for filing the Office of Consumer Advocate's Memorandum of Law which the Commission invited in its secretarial letter dated August 22, 2008. We appreciate the opportunity to contribute to the Commission's inquiry and consideration of the important legal issues in this case. We urge the Commission to determine as expeditiously as possible the threshold legal issue of its authority to review the Merrimack Station scrubber project, so that the parties may proceed quickly to the substantive public interest determination required.

We note that the OCA has limited its filing to only the legal questions asked by the Commission. We have not conducted any discovery or analysis on PSNH's substantive filing regarding the updated costs of the scrubber project. We will begin that work once the Commission rules on the pending legal question and issues a procedural schedule in the docket. When the Commission proceeds to the next phase, we encourage it to seek the participation and input of all stakeholders.

Respectfully,

Meredith A. Hatfield
Consumer Advocate

Enclosure

cc: Service List and Interested Parties List

THE STATE OF NEW HAMPSHIRE

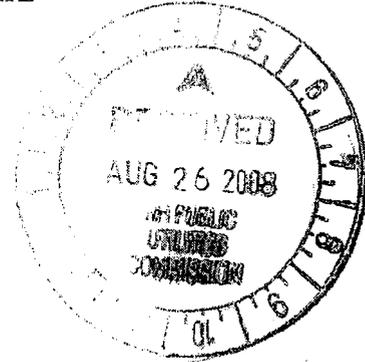
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August 26, 2008

Debra Howland
Executive Director & Secretary
New Hampshire Public Utilities Commission
21 S. Fruit Street, Suite 10
Concord, New Hampshire 03301-7319

**RE: DE 08-103 Public Service Company of New Hampshire - Merrimack Station
Scrubber Project**

Dear Ms. Howland:

Pursuant to the Inter-agency Memorandum of Understanding, dated April 28, 2000 between the Office of Consumer Advocate (OCA) and the Commission, the OCA hereby notifies the Commission it will be participating in the above referenced matters on behalf of residential ratepayers consistent with RSA 363:28.

Please add ocalitigation@oca.nh.gov to your email service list. Please also add Ken E. Traum, Meredith A. Hatfield, Rorie E.P. Hollenberg and Stephen R. Eckberg to your service list. Please also include the OCA on the distribution list for any Memoranda or Staff Recommendations filed in this docket. Thank you.

Respectfully,

Meredith A. Hatfield
Consumer Advocate

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THE STATE OF NEW HAMPSHIRE
BEFORE THE PUBLIC UTILITIES COMMISSION

Public Service Company of New Hampshire
Investigation of Merrimack Station Scrubber Project

Docket No. DE 08-103

OFFICE OF CONSUMER ADVOCATE'S MEMORANDUM OF LAW
ON THE PUC'S AUTHORITY TO INVESTIGATE AND DETERMINE WHETHER
PSNH'S MODIFICATIONS TO MERRIMACK STATION ARE IN THE PUBLIC INTEREST

I. Introduction

On August 22, 2008, the New Hampshire Public Utilities Commission (PUC) issued a secretarial letter directing Public Service Company of New Hampshire (PSNH) to file certain information. Specifically, the PUC stated:

“PSNH is directed to file, by September 12, 2008, a comprehensive status report on its installation plans, a detailed cost estimate for the project, an analysis of the anticipated effect of the project on energy service rates, and an analysis of the effect on energy service rates if Merrimack Station were not in the mix of fossil and hydro facilities operated by PSNH.”¹

In its secretarial letter, the Commission refers to PSNH's parent company's (Northeast Utilities, or “NU”) quarterly earnings report (10-Q) filed with the Securities and Exchange Commission (SEC) on August 7, 2008. In its 10-Q, “NU identified an estimated project cost of \$457 million, which represents approximately an 80 percent increase over the original estimate of \$250 million.”²

The Commission went on in the letter to identify a “potential conflict” between RSA 125-O:11 and RSA 369-B-3:a, and directed PSNH to file “a memorandum of law addressing the nature and extent of the Commission's authority relative to the Merrimack Station scrubber

¹ DE 08-103, PSNH Merrimack Station Scrubber Project, Request for Information, Secretarial Letter, August 22, 2008.

² *Id.*

project.”³ PSNH filed its response (PSNH Response) and memorandum of law (PSNH Memorandum) on September 2, 2008.⁴

The secretarial letter also invited the OCA to file a memorandum of law. This memorandum responds to that invitation.

II. The PUC has the authority to investigate PSNH’s modifications to Merrimack Station.

The PUC is a specialized state agency with technical expertise in the field of public utilities⁵ and is vested by the NH Legislature with “plenary authority” over PSNH.⁶ RSA 347:3 endows the PUC with “‘general supervision of all public utilities ... so far as necessary’ to effectuate the Commission’s various enabling statutes.”⁷ In carrying out its general supervisory duties, the Commission acts as “the arbiter between the interests of the customer and the interests of regulated utilities.”⁸

³ *Id.* at p. 2.

⁴ PSNH’s cover letter and memorandum of law filed in this docket on September 2, 2008 includes many comments and arguments on the issue of whether the scrubber project is in the “public interest.” This suggests that the company seeks to litigate the public interest issue as though it is now before the PUC. However, because the public interest issue is not before the PUC until the threshold legal question of the PUC’s authority is addressed, the OCA reserves the right to respond at a later time to PSNH’s public interest claims and argument.

⁵ See Appeal of Manchester Gas Co., 129 N.H. 800, 806 (1987) (Supreme Court recognizes and refuses to “second-guess” the PUC’s exercise of its informed expertise.” See also Pennichuck Corp. v. City of Nashua, 2004 WL 1950458 (unpublished N.H. Super. Court Order in 04-E-0062, Aug 31, 2004) (citation omitted) (Superior Court recognizes doctrine of primary jurisdiction, which “encourage[s] the exercise of agency expertise” by “mandate[ing] that a court refrain from exercising its jurisdiction to decide a question until it has first been decided by a specialized agency that also has jurisdiction to do so”); and In re Pinetree Power, Inc., 152 N.H. 92, 871 A.2d 78, N.H., 2005 (“When we are reviewing agency orders that seek to balance competing economic interests, our responsibility is not to supplant the PUC’s balancing with one more nearly to our liking”).

⁶ PSNH Power Quality Improvement Team Pilot Project, Order No. 24,632 (June 8, 2006), at p. 6; and Granite State Electric Company d/b/a National Grid, Public Service Company of New Hampshire, Unitil Energy Systems, Inc., Business & Industry Association of New Hampshire and Select Energy, Inc., Request to Change Name of Default Service to Basic Energy Service in Customer Communications, Order No. 24,614 (April 13, 2006), at p. 7.

⁷ Granite State Electric Company d/b/a National Grid et als., Order No. 24,614 at 7.

⁸ RSA 363:17-a.

The PUC's authority includes, *inter alia*, the power and duty to investigate PSNH's modifications to any of its generating plants, including the Merrimack Station coal plant in Bow. PSNH is well acquainted with this process.⁹

Specifically, RSA 365:5 allows the Commission, on its own motion or upon petition of a public utility, "to investigate or make inquiry in a manner to be determined by it as to any rate charged or proposed or as to any act or thing having been done, or having been omitted or proposed by any public utility." Also, RSA 365:19 explicitly authorizes the PUC to conduct an "independent investigation as in its judgment the public good may require." Additionally, RSA 374:4 delegates to the PUC both the "power" and the "duty, to keep informed as to all public utilities in the state," and RSA 374:5 requires every utility to report to the PUC cost information prior to making any additions or improvements to its plant.

Both alone, as well as taken together, these PUC enabling statutes are clear and lead to one conclusion. When it commenced this investigation of PSNH's modifications to Merrimack Station, as well as directed PSNH to file certain cost-related information, the PUC properly exercised its lawful authority to investigate these modifications.

III. The PUC has the authority to determine whether the modifications to PSNH's Merrimack Station are in the public interest.

A. RSA 369-B:3-a requires the PUC to review the Merrimack Station modifications.

During the restructuring of the electric industry in New Hampshire, the Legislature restricted PSNH's ability to divest itself of its generation assets.¹⁰ In addition to restricting the sale of PSNH's fossil fuel and hydro-electric generating assets until at least April 30, 2006, the Legislature also specified that the PUC must approve any modifications or retirements of such assets that PSNH seeks to undertake. "Prior to any divestiture of its generation assets, PSNH

⁹ See In re Pinetree Power, Inc., 152 N.H. 92, 96 (2005) (PUC reviewed PSNH's modifications to Schiller plant).

¹⁰ See RSA 369-B:3-a.

may modify ... such generation assets if, among other findings, the commission finds that it is in the public interest of retail customers of PSNH to do so.”¹¹

The New Hampshire Supreme Court has held, in a case concerning PSNH’s modification of one of its other coal plants, that “RSA 369-B:3-a is a clear directive by the legislature to the PUC specifically regarding PSNH.”¹² Under this “clear directive,” only modifications that are consistent with the public interest of PSNH’s retail customers are permitted. Therefore, RSA 369-B:3-a requires that the PUC review the proposed \$457 million modification of the Merrimack plant in order to make a finding that the project is in the public interest.

B. PSNH can not complete Merrimack Station modifications without PUC financing approval pursuant to RSA 369.

PSNH will also require long-term financing to complete the proposed modifications to Merrimack Station. PSNH’s filings in this docket project that the updated cost of these modifications will be \$457 million.¹³ However, PSNH currently only has authority to issue up to \$200 million in long-term debt securities, and its ability to incur short-term debt in 2008 is limited to a maximum of 10 percent of net fixed plant plus \$35 million (or approximately \$144 million).¹⁴ The OCA is not aware of the extent of PSNH’s outstanding debt at this time, but it seems clear that with these current debt limits, PSNH will require additional financing to complete the scrubber project.

¹¹ RSA 369-B:3-a.

¹² In re Pinetree Power, Inc., 152 N.H. 92, 96 (2005).

¹³ See PSNH Response at p. 13. PSNH also provides their estimates of the impact of the project on rates with the revised cost estimate. See PSNH Response at p. 14. Assuming for the sake of argument that PSNH’s cost estimates are accurate, the OCA has estimated, based on PSNH’s data and the company’s proposal to depreciate the project over 15 years, that in the first year of the project the average customer (using 650 kWh per month) would see an increase in their bill of approximately \$3.00 per month. In years 2 through 15, the increase would be approximately \$2.00 per month.

¹⁴ See Public Service Company of NH, Petition for Approval of Issuance of Long-term Debt Securities and Permanent Increase in Short-term Debt Limit, Order No. 24,781 (August 3, 2007) (approving relief requested), as amended by Orders 24,821 (January 30, 2008) and 24,845 (April 14, 2008) (increasing the authorized credit spread applicable to long-term financing approved in Order No. 24,781).

PSNH may not undertake additional long-term debt financing, however, without the approval of the PUC. RSA 369:1 requires PSNH to obtain approval from the PUC to borrow funds “payable more than 12 months after the date thereof.” In considering whether to allow a utility to incur long-term debt, the PUC must determine whether, under all the circumstances, a proposed financing is “consistent with the public good.”¹⁵

The New Hampshire Supreme Court has held that the “public good” determination required under RSA 369 includes considerations beyond the terms of the proposed borrowing.¹⁶ “In such an inquiry, the Commission looks beyond actual terms of the proposed financing and must also consider the planned use of the proceeds and the effect on rates.”¹⁷ During the so-called “Easton” review, in determining whether the proposed use would be in the public good, the PUC is required to consider whether the uses to which the loan would be put could be economically justified compared to other options available to the utility.¹⁸

PSNH should therefore seek approval from the PUC, through an Easton review, for the additional debt needed to complete the modifications to Merrimack Station before it proceeds with those modifications. Other New Hampshire utilities seeking to invest significant sums in capital improvements have sought the PUC’s permission before undertaking such costly projects.¹⁹ This is the prudent approach that PSNH should follow. Arguably, PSNH should have

¹⁵ RSA 369:4.

¹⁶ See Appeal of Easton, 125 N.H. 205 (1984).

¹⁷ Hampstead Area Water Company, Petition for Approval of Financing, Order No. 24,864 (June 20, 2008) citing Appeal of Easton, 125 N.H. at 211 (1984).

¹⁸ Id.

¹⁹ See, e.g., Pittsfield Aqueduct Company, Petition for Authority to Borrow up to \$750,000, Order No. 24,610 (March 31, 2006), at p. 2 (“Pursuant to RSA 369:1, utilities in New Hampshire may issue evidence of indebtedness payable more than 12 months after the date thereof only if the Commission finds the proposed issuance to be ‘consistent with the public good.’ The New Hampshire Supreme Court has observed that our review should look beyond actual terms of the proposed financing to the use of the proceeds of those funds and the effect on rates,” citing Appeal of Easton, 125 N.H. 205, 211 (1984)); see also Petition of Concord Steam for Approval of Transfer of Utility Assets, Distribution System Upgrades and Steam Purchase Agreement, Docket No. DG 08-107, filed August 29, 2008, at p. 6 (“the Company requests that the Commission open a docket to conduct something akin to a so-called Easton review, which is typically conducted as part of a proceeding in which a public utility seeks authority to engage in a financing transaction, particularly where the proceeds

sought this review immediately upon learning that the costs of the scrubber project had grown by 80%. PSNH's failure to do so should not now result in the company arguing against required PUC reviews because a delay in the project will cost ratepayers more.

To allow PSNH to proceed further with the proposed modifications, without conducting an "Easton" review, fails to protect PSNH ratepayers, whose interests the PUC must weigh heavily in such a review. The longer PSNH waits for PUC approval of the financing it requires to finish the modifications to Merrimack Station, the more money they will have invested.²⁰ The more money PSNH invests, the more likely the PUC will be hard pressed not to find that the investment is in the public good. Waiting to consider and determine whether the financing of the modifications is in the public good, as required by RSA 369:1 and RSA 369:4, and which the PUC is duly authorized to do, is unfair to ratepayers, and is imprudent.

- C. Review of the modifications to the Merrimack Station, pursuant to RSA 369-B:3-a, and review of the long-term debt required to finance these modifications, are conditions precedent to PSNH's compliance with RSA 125-O:11.

RSA 125-O requires PSNH to reduce mercury emissions by 80% by installing a "scrubber technology" at Merrimack Station no later than July 1, 2013.²¹ In addition to this directive, the Legislature also made clear that PSNH still must seek all necessary approvals before proceeding with the scrubber project. "The achievement of this requirement is *contingent* upon obtaining all necessary permits and approvals from federal, state, and local regulatory

of the financing will be used for a significant capital project. In such proceedings, the Commission has traditionally examined the prudence of the proposed use of the proceeds of the financing and the effect of such an expenditure on rates.")

²⁰ PSNH reports that the company has already spent approximately \$10 million dollars on the scrubber project. See PSNH Response at p. 6.

²¹ See RSA 125-O:11, I and II; and RSA 125-O:13, I.

agencies and bodies.”²² The interpretation of this language is at the heart of the PUC’s legal inquiry concerning its jurisdiction.²³

The language of RSA 125-O:13, I, is clear; the PUC need look no further than “the plain and ordinary meaning of the words used.”²⁴ PSNH may not proceed with the modifications to Merrimack Station required by RSA 125-O:11 and RSA 125-O:13 until it obtains the PUC approvals required by statutes including RSA 369-B:3-a and RSA 369.

In addition, there is no conflict between these statutes.²⁵ At least with regard to RSA 125-O:11 and RSA 369-B:3-a, PSNH agrees.²⁶ The legislature is not presumed to waste words or enact redundant provisions and whenever possible, every word of a statute should be given effect.²⁷ And as PSNH also acknowledges in its memorandum, “[i]f any reasonable construction of the two statutes taken together can be found,” the Supreme Court will apply both statutes.”²⁸

The Legislature promulgated RSA 125-O in June 2006. Both RSA 369-B:3-a and RSA 369:4 were in effect at that time. It is presumed that the Legislature is “familiar with all existing

²² RSA 125-O:13, I (emphasis added).

²³ In light of the pivotal nature of the interpretation of this phrase to the PUC’s threshold legal question, it is remarkable that PSNH spends so little time on this issue in its lengthy legal memorandum. PSNH only makes three passing references to this phrase. See PSNH Memorandum at pp. 6, 18 and 21. Even more remarkable for a company well versed with legal requirements associated with operating as a public utility in New Hampshire is PSNH’s conclusion that the “permits and approvals” required by RSA 125-O:13 just “do not include” statutes enforced by the PUC. *Id.* at p. 21.

²⁴ See, e.g., Green Crow Corp. v. Town of New Ipswich, 950 A.2d 163, 164-165, N.H. (2008) (“We look to the plain and ordinary meaning of the words used in the statute and will not examine legislative history unless the statutory language is ambiguous, consider what the legislature might have said; or add words not included in the statute.”)

²⁵ There is also no conflict created by the requirement that the reductions in mercury emissions required by accomplished “as soon as possible.” RSA 125-O:11, I. “Possible” means capable of existing, happening, being done, etc.” The Oxford American Desk Dictionary, Oxford University Press, 1998. When it used the word “possible,” the Legislature acknowledged that PSNH may need some time to obtain “all necessary permits and approvals from federal, state, and local regulatory agencies and bodies,” RSA 125-O:13, I, including the PUC’s reviews.

²⁶ See PSNH Memorandum at p. 12 (“The Secretarial Letter states that there is ‘a potential conflict between’ the Scrubber Law and RSA 369-B:3-a. PSNH finds no such conflict.”)

²⁷ Town of Amherst v. Gilroy, 950 A.2d 193, 197 __ NH __ (2008) (citation omitted).

²⁸ PSNH Memorandum at p. 15, citing Board of Selectmen of Merrimack v. Planning Board of Merrimack, 118 N.H. 150 (1978) citing State v. Miller supra; Public Serv. Co. v. Lovejoy Granite Co., 114 N.H. 630, 325 A.2d 785 (1974) (Supreme Court will not find implied repeal where any reasonable construction of two statutes exists).

laws applicable to the subject matter, whether constitutional, statutory, or common, and intended the statute to harmonize completely with those laws and aid in the effectuation of the general purpose and design of the same.”²⁹ Moreover, “[w]hen ascertaining legislative intent, a court assumes not only that a legislature knew the laws in effect at the time, but also that it knew the judicial interpretation of those [preexisting] laws.”³⁰ Accordingly, the Legislature knew, or is presumed to have known about the requirements of RSA 369-B:3-a, RSA 369:1 and RSA 369:4 when it enacted RSA 125-O.³¹

With this awareness, had the Legislature wanted to repeal or limit the effectiveness of RSA 369-B:3-a, RSA 369:1, or RSA 369:4, it could have done so expressly.³² The Legislature did not do this or add any language to RSA 125-O:11 or RSA 125-O:13 exempting PSNH from the previously-existing requirements of RSA 369:1, RSA 369:4, RSA 369-B:3-a (or any other statute applicable to PSNH and enforced by the PUC). In fact, to the contrary, by requiring PSNH to obtain “all necessary ... approvals” from “state ... regulatory agencies” before proceeding with the modifications to Merrimack Station, the Legislature clearly contemplated and required review by the PUC.

²⁹ Presumptions in Aid of Construction, 82 C.J.S. Statutes § 310 (updated June 2009) citing South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 118 S. Ct. 789, 139 L. Ed. 2d 773, 28 Env'tl. L. Rep. 20293 (1998) (The Supreme Court of the United States assumes that Congress is aware of existing law when it passes legislation); Kelley v. Georgia Dept. of Human Resources, 269 Ga. 384, 498 S.E.2d 741 (1998); Application of American Restaurant Operations, 264 Kan. 518, 957 P.2d 473 (1998); MacMillan v. State Compensation Ins. Fund, 285 Mont. 202, 947 P.2d 75, 13 I.E.R. Cas. (BNA) 1655 (1997); State v. Levandowski, 955 S.W.2d 603 (Tenn. 1997); State v. Tiraboschi, 269 Ga. 812, 504 S.E.2d 689 (1998); Keller v. Merrick, 955 P.2d 876 (Wyo. 1998); Robert D. Holloway, Inc. v. Pine Ridge Addition Residential Property Owners, 332 Ark. 450, 966 S.W.2d 241 (1998); Theriot v. Midland Risk Ins. Co., 694 So. 2d 184 (La. 1997); and Sizemore v. State Farm General Ins. Co., 202 W. Va. 591, 505 S.E.2d 654 (1998).

³⁰ Presumptions in Aid of Construction,, 82 C.J.S. Statutes § 310 (updated June 2009) (citations omitted).

³¹ In fact, that the Legislature knew of RSA 369-B:3-a at the time that it promulgated RSA 125-O can not be disputed. A later section of RSA 125-O specifically refers to that statute. See RSA 125-O:18 (providing for recovery of prudent costs associated with compliance and referring to RSA 369-B:3-a).

³² See, e.g., Green Crow Corp. v. Town of New Ipswich, 950 A.2d 163, 166, and 167, N.H. (2008) (Concluding that the legislature could have used “Notwithstanding any other provisions of this chapter to the contrary” or similar language to except the applicability of other statutory requirements if it had intended to do so). For instance, the Legislature could have used words to the effect of, “Notwithstanding any other provisions of this chapter to the contrary, ... [to] make[] plain that [RSA 125-O:11 and RSA 125-O:13] stand [] alone, exclusive of other contrary provisions of RSA [369 or RSA 369-B].” Green Crow Corp. v. Town of New Ipswich, 950 A.2d at 166.

Perhaps even more importantly, the Legislature also stated that in their consideration of approvals for the project, agencies such as the PUC “*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.*”³³ With this language, the Legislature clearly recognizes that agencies with jurisdiction over the project must undertake their own reviews of the project, and merely “encourages” agencies to “consider” the Legislature’s finding that the project is in the public interest in making their own separate determinations. PSNH’s contention that the PUC’s “public interest finding” mandated by RSA 369-B:3-a would be “duplicative of” the Legislature’s “public interest” finding in RSA 125-O:11, I, overlooks the simple but important fact that there have been significant developments in the scrubber project since the time that the Legislature reviewed it and made this finding, namely that PSNH estimates that the costs have increased by 80%.³⁴

Lastly, RSA 125-O must be read in the context of other statutes applicable to PSNH, including RSA 369-B:3-a and RSA 369.³⁵ It is a long-standing canon of statutory construction that individual sections of a statute are not to be read independently, and must instead be read together to lead to a reasonable result.³⁶ This is especially the case in this instance, as RSA 125-O:11 *et seq.* is an environmental statute that applies to a generating plant owned by a regulated public utility. PSNH may not simply apply RSA 125-O in a vacuum, without regard to the overarching set of laws regulating public utilities. Before PSNH modifies Merrimack Station, the PUC must consider the implications of the application of RSA 125-O on PSNH and

³³ RSA 125-O:13, I (emphasis added).

³⁴ See PSNH Memorandum at p. 13.

³⁵ See, e.g., *In re Pinetree Power, Inc.*, 152 N.H. 92, 96 (2005) (Court defined “statutory scheme” for purposes of interpreting “public interest” requirement in RSA 369-B:3-a as including the restructuring statute, RSA 374-F).

³⁶ See *id.*, and see *Green Crow Corp. v. Town of New Ipswich*, 950 A.2d 163, 164-165, N.H. (2008) (“We interpret a statute to lead to a reasonable result and review a particular provision, not in isolation, but together with all associated sections’ ... ‘Our goal is to apply statutes in light of the legislature’s intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme.’”)(citations omitted).

its consumers, as well as on the entire complex statutory scheme related to the operation of electric utilities and electricity generation and sale.³⁷

In sum, the Legislature has spoken clearly. PSNH must obtain the necessary PUC approvals, including those explicitly required by RSA 369-B:3-a and RSA 369, before it may proceed with modifications to Merrimack Station pursuant to RSA 125-O.

IV. Conclusion

For the foregoing reasons, the PUC has the authority to investigate and determine whether PSNH's modifications to Merrimack Station are in the public interest. The OCA urges the PUC to proceed expeditiously with its review in order to ensure that the fundamental goal of RSA 125-O, to reduce toxic mercury emission from coal-burning power plants, is implemented prudently and uses ratepayer funds in a just and reasonable manner.

Respectfully submitted,



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³⁷ As stated earlier, the statutory scheme developed by the Legislature for the regulation of public utilities clearly charges the PUC with "general supervision of all public utilities and the plants owned, operated or controlled" by them, RSA 374:3, so that utilities deliver "reasonable safe and adequate" service, RSA 374:1, at "just and reasonable" rates. RSA 374:4. The PUC also has authority to enforce compliance with the restructuring laws. *See, e.g.*, RSA 374-F:1, III (defining interdependent policy principles to guide the PUC in implementing electric utility industry restructuring).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion was forwarded this day by electronic mail to the parties on the service list and the interested parties email list in this docket.

September 11, 2008



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VIA HAND DELIVERY

September 12, 2008

Debra A. Howland, Executive Director & Secretary
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, NH 03301-2429



Re: Docket No. DE 08-103, Merrimack Station Scrubber Project Request for Information

Dear Ms. Howland:

By letter dated August 22, 2008 the New Hampshire Public Utilities Commission (“Commission”) indicated that it had determined to inquire into the status of Public Service Company of New Hampshire’s (“PSNH”) efforts to install scrubber technology at Merrimack Station in Bow, including the costs of such technology and the effect installation would have on energy service rates. The Commission cited the current project cost as being “approximately an 80 percent increase over the original estimate”. The Commission also noted certain relevant statutory provisions and indicated that there is a potential conflict between them. In that letter the Commission directed PSNH to make a filing and indicated that the Office of Consumer Advocate “may also file a memorandum of law” by September 12, 2008. The Commission made no mention in that letter of any opportunity for Staff of the Commission or any other party that might have an interest in this proceeding to file comments or memoranda of law on the issues that are part of the inquiry.

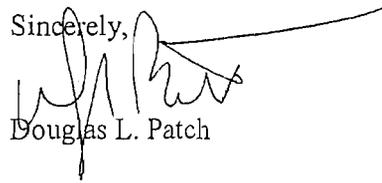
I am writing on behalf of TransCanada Hydro Northeast Inc. (“TransCanada”) to request that the Commission provide public notice of this proceeding, as it typically does in any proceeding that it opens, through an order of notice in which it invites the participation of interested parties. By doing so the Commission will provide a full and fair opportunity for any other interested parties to participate in this inquiry. In the August 22, 2008 letter the Commission cited RSA 365:5 and RSA 365:19 as the authority for conducting this inquiry. RSA 365:19 says: “any party whose rights may be affected shall be afforded a reasonable opportunity to be heard with reference” to the investigation. It is a basic principle of due process, underscored in various provisions of New Hampshire law, including the Administrative Procedures Act, and New Hampshire Supreme Court case law, that this Commission has followed throughout its existence, that affected parties be given a full and fair opportunity to participate in proceedings before the Commission, subject to the Commission’s rules and other

provisions of law governing intervention and participation in open proceedings. TransCanada respectfully requests that the Commission do the same with this docket by opening this proceeding to any interested parties through the issuance of an order of notice and the conduct of a full and fair proceeding to consider the issues noted in the August 22, 2008 letter.

I would note that we concur with the recommendation which the Consumer Advocate included in her letter dated September 11, 2008 that you encourage the participation and input of all stakeholders.

Thank you for considering this request. Also, please add me to the mailing list for this docket.

Sincerely,



Douglas L. Patch

cc: Attorney Robert A. Bersak, PSNH
Meredith Hatfield, Consumer Advocate

473188_1.DOC



CONSERVATION LAW FOUNDATION

Via Hand-Delivery and E-mail (Commission) and First Class Mail and E-mail (Parties)

September 12, 2008

Debra A. Howland
Executive Director and Secretary
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite Ten
Concord, New Hampshire 03301-7319



Re: DE 08-103 – Merrimack Station Scrubber Project

Dear Director Howland:

I write regarding the New Hampshire Public Utilities Commission's (Commission) August 22, 2008, Secretarial letter requesting information from Public Service Company of New Hampshire (PSNH), in connection with PSNH's planned installation of a wet flue gas desulphurization system at Merrimack Station (Scrubber Project).

The Commission's request was sent in response to Northeast Utilities' (PSNH's parent company) disclosure in its August 7, 2008, 10-Q filed with the Securities and Exchange Commission that the Scrubber Project will now cost an estimated \$457 million—an approximately 80 percent increase over the original cost estimate of \$250 million. The Commission's action correctly underscores the important and pressing public policy concerns at issue here, and CLF commends the Commission for initiating its inquiry.

Because this project raises such important policy questions, CLF urges the Commission to publicly notice the docket, and provide the normal procedural vehicles for ensuring public participation. CLF members' "rights, duties, privileges, immunities or other substantial interests may be affected by the proceeding," and thus CLF would otherwise meet the Commission's standard for intervention. See RSA 541-A:32.I(b).

NHPUC SEP 12 '08 PM 3:19

27 North Main Street, Concord, New Hampshire 03301-4930 • Phone 603-225-3060 • Fax 603-225-3059 • www.clf.org

MAINE: 14 Maine Street, Suite 200, Brunswick, Maine 04011-2026 • Phone 207-729-7733 • Fax 207-729-7373
MASSACHUSETTS: 62 Summer Street, Boston, Massachusetts 02110-1016 • Phone 617-350-0990 • Fax 617-350-4030
RHODE ISLAND: 55 Donance Street, Providence, Rhode Island 02903-2221 • Phone 401-351-1102 • Fax 401-351-1130
VERMONT: 15 East State Street, Suite 4, Montpelier, Vermont 05602-3010 • Phone 802-223-5992 • Fax 802-223-0060

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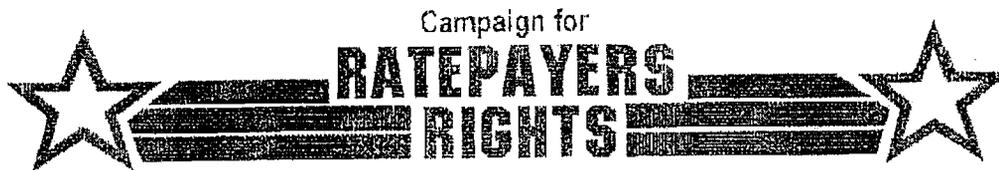
A robust review of the issues based on input from all relevant parties would assist the Commission in its consideration of the important questions it has posed, including the anticipated effect of the Scrubber Project on energy service rates, and the effect on energy service rates if Merrimack Station is not included among the mix of fossil and hydro facilities operated by PSNH. Most importantly, a broader inquiry would shed light on the question whether there may be other feasible alternatives, employing different technologies, that could achieve the mercury reduction targets more cost effectively. CLF respectfully requests that the Commission assure the participation of those whose vital interests are at stake by publicly noticing the docket.

Sincerely,



Melissa A. Hoffer
Director and Vice President
New Hampshire Advocacy Center

Copy to: Robert A. Bersak, Esq.
Meredith A. Hatfield, Esq.



September 12, 2008

VIA HAND DELIVERY

Ms. Debra Howland
Executive Director & Secretary
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, NH 03301



**RE: Docket No. DE 08-103
PSNH Investigation of Merrimack Station Scrubber Technology**

Dear Ms. Howland,

Please find below comments offered by the Campaign for Ratepayers' Rights (CRR) regarding PSNH's plan to employ scrubber technology at Merrimack Station.

CRR is a New Hampshire nonprofit organization that has been defending the rights of the State's utility customers since 1983. CRR has intervened in numerous proceedings before the Public Utilities Commission, has lobbied for legislation before the State Legislature, and has argued cases before the New Hampshire Supreme Court. CRR advocates for fair, reliable and sustainable energy policies that serve the best interests of New Hampshire's citizens.

CRR respectfully requests that the Commission publicly notice the above-referenced docket so as to allow for public participation on this important issue. The Secretarial letter issued by the Commission on August 22, 2008 accurately references the significance of PSNH utilizing such technology, and how the project relates to the public interest. Additionally, the rights or substantial interests of other parties, including members of the Campaign for Ratepayers' Rights, may be affected by this project.

Should the Commission choose to publicly notice the docket, CRR looks forward to participating with other parties in these discussions. Thank you for the opportunity to convey our comments on this issue.

Sincerely,

A handwritten signature in black ink, appearing to read "Patrick Arnold", is written over a horizontal line.

Patrick Arnold
Executive Director

P.O. Box 563, Concord, NH 03302
Visit us online at <http://www.ratepayersrights.org>

NHPUC SEP12'08 PM 4:12

THE STATE OF NEW HAMPSHIRE
BEFORE THE
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

Investigation of PSNH's Installation
Of Scrubber Technology at Merrimack Station

DE 08-103

MOTION FOR REHEARING
and RECONSIDERATION
of ORDER NO. 24,898
September 19th, 2008

OF

Edward M.B. ROLFE

NOW COMES Edward M.B. ROLFE pursuant to N.H. RSA 541:3 and 541:4, respectfully moves the New Hampshire Public Utilities Commission ("the Commission") to reconsider and rehear its decision Order No. 24,898. In support of this Motion, Edward Rolfe states as follows:

1. On September 19, 2008, the Commission issued Order No. 24,898 ("the Order") which concluded the State's Mercury Scrubber law RSA 125-O:11,1 took precedent over other considerations in the investment by PSNH in its Merrimack Station. I have a few concerns with this Order.
2. The first defect is procedural. The Commission invited only two parties (PSNH and the OCA), and should have "noticed" it as a public hearing. RSA 541:3 requires public notice and an opportunity for participation by those who will be affected by the Commission's decisions. This oversight violated my right, as a PSNH rate payer, to due

process in this matter.

3. The second defect is that the Commission, in my opinion, came to the wrong decision regarding the interplay of the “Mercury Statute” and all the other Statutes that the Commission is charged with implementing on behalf of rate payers (ref. RSA 365 and RSA 374).

4. I also contend that the Commission failed to regard future additional costs that are to be absorbed by the PSNH in complying with Federal EPA Clean Air and Clean Water regulations, as well as RGGI Standards.

5. Additionally, the Commission did not consider the investment in this 40-year old coal plant in the context of several developing State policies, such as the Governor’s Climate Change Action Plan Task Force (which is to report to the Executive in December of this year), as well as energy policies to deal with recent fluctuations in fuel costs.

6. Recent turmoil in financial markets and government-banking restructuring also suggests that many of the premises upon which PSNH justified its investment may be subject to further scrutiny rendering any predictions of the final cost, and subsequent increase in electric rates suspect. It would seem prudent to reconsider these assumptions in the light of newly defined economic environment.

7. Finally, I also urge the Commission to reevaluate the Memorandum of Law submitted by the Office of Consumer Advocacy, dated September 11th, 2008, as it suggests many effects of the scrubber project on energy service rates. For example, RSA

347:3 endows the Commission with “general supervision of all public utilities . . .”
. . . acting as “the arbiter between the interests of the customer and the interest of the
regulated utilities”.

WHEREFORE, Edward M.B. Rolfe respectfully request that this honorable
Commission:

- A. Grant rehearing and reconsideration of its Order; and
- B. Grant such further relief as it deems appropriate.

Respectfully submitted,



Edward M.B. ROLFE
28 Academy St. / P.O. Box 361
Franconia, NH 03580
Voice (603) 823-0019
mrbear@sover.net

STATE OF NEW HAMPSHIRE
BEFORE THE
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

Docket No. DE 08-103

INVESTIGATION OF PSNH'S INSTALLATION OF SCRUBBER
TECHNOLOGY AT MERRIMACK STATION

Motion for Reconsideration and Rehearing

NOW COMES TransCanada Hydro Northeast Inc. ("TransCanada"), by and through its undersigned counsel, and pursuant to N.H. RSA 541:3 and 541:4, respectfully moves the New Hampshire Public Utilities Commission ("Commission") to reconsider and rehear Order No. 24,898 issued in the above-captioned matter on September 19, 2008 ("the Order"). In support of this Motion, TransCanada states as follows:

Background

1. TransCanada owns approximately 567 MW of hydroelectric generation capacity on the Connecticut and Deerfield Rivers, which TransCanada purchased from USGen New England, Inc. in April of 2005, consisting of hydroelectric stations and associated reservoirs and dams located in New Hampshire, Vermont and Massachusetts.
2. On August 22, 2008 the Commission opened an investigation by Secretarial Letter ("the Letter") following a quarterly earnings report filed by Northeast Utilities with the Securities and Exchange Commission on August 7, 2008 that disclosed that the estimated cost of installing a wet flue gas desulphurization system, also referred to as scrubber technology, at Public Service Company of New Hampshire's ("PSNH") Merrimack Station, had increased by approximately 80 percent over the original

estimate.¹ According to the quarterly earnings report, the installation cost had increased from an original estimate of \$250 million to \$457 million. In the Letter opening the investigation, the Commission directed PSNH to file by September 12, 2008 a “comprehensive status report on its installation plans, a detailed cost estimate for the project, an analysis of the anticipated effect of the project on energy service rates, and an analysis of the anticipated effect of the project on energy service rates if Merrimack Station were not in the mix of fossil and hydro facilities operated in New Hampshire.”

3. In the Letter, the Commission noted that there was a potential statutory conflict as to the nature and extent of its authority relative to the scrubber project and directed PSNH to file a memorandum of law on the issue by September 12, 2008 and invited the Office of Consumer Advocate (“OCA”) to file a memorandum of law by the same date.

4. On August 25, 2008 PSNH filed a Motion to Waive Rules and to Accelerate Schedule in Docket No. DE 08-103. In its Motion, PSNH urged the Commission to accelerate the schedule, as it noted in the cover letter, “to mitigate the harm that will be caused by delays in the scrubber project”; it also asked the Commission to require the filing of reports and legal memoranda by August 29, 2008. The OCA filed an objection to this Motion on August 25, 2008.

¹ At the June 18, 2008 meeting of the Electric Oversight Committee established pursuant to RSA 374-F:5, PSNH reported on the status of mercury reductions at Merrimack Station. Despite the fact that it is required by RSA 125-O:13,IX to provide “updated cost information” to the Committee, at that meeting PSNH did not present any information on costs, nor did it provide any indication that the costs for the installation of the scrubbers had escalated over original estimates. Given the “quarterly earnings report” filed with the SEC on August 7, 2008 referenced in the Commission’s August 22, 2008 letter, it is illogical to conclude that PSNH did not have information at that point in time about increased costs from the figures it supplied to the Legislature in 2006 that could have and should have been conveyed to this Committee. Clearly the Electric Oversight Committee process is not working in a way that “suggests the Legislature’s intent to retain for itself duties that it would otherwise expect the Commission to fulfill”. See the Order at p. 11.

5. On September 2, 2008 PSNH filed a response to the Commission's request for information, including a memorandum of law, a project status report, and a response to specific economic inquiries. In its memorandum of law, PSNH argued, among other things, that: "There is absolutely no implication within the Scrubber Law that the mandate to install a scrubber at Merrimack Station as soon as possible can be delayed, conditioned, or eliminated in its entirety, by the Commission." PSNH Legal Memorandum, p. 49. PSNH went on to say that the Legislature found that the installation of scrubber technology is in the public interest of customers of PSNH and that "the General Court has removed from the Commission any authority to reach a contrary finding." *Id.* p. 56.

6. On September 11, 2008 the Office of Consumer Advocate filed a memorandum of law in which it argued that the Commission has the authority to investigate PSNH's modifications to Merrimack Station and to determine whether the modifications are in the public interest. The OCA pointed out that PSNH can not complete Merrimack Station modifications without PUC financing approval. In its cover letter the OCA urged the Commission, when it "proceeds to the next phase" to "seek the participation and input of all stakeholders."

7. A number of other interested parties, including TransCanada, filed letters with the Commission in this docket. Governor John Lynch submitted a letter dated September 11, 2008 noting that in light of the increase in costs "serious questions must be addressed regarding the basis for such an increase and the impact on ratepayers." He went on to say that he hoped the Commission "is able to complete this review as expeditiously as possible" and said that "[l]engthy delay raises additional concerns".

State Senator Theodore L. Gatsas indicated, in a letter dated September 5, 2008 that he was “deeply concerned about unnecessary delays and the unintended economic impacts” to the town of Bow. He also said that the legislation was clear that the Commission had no authority “to approve scrubber technology”. The Campaign for Ratepayers Rights (“CRR”) filed a letter dated September 12, 2008 in which it asked the Commission to “publicly notice the above-referenced docket so as to allow for public participation on this important issue.” CRR went on to say that “the rights or substantial interests of other parties, including members of the Campaign for Ratepayers Rights, may be affected by this project.” The New Hampshire State Building and Construction Trades Council submitted a letter dated September 9, 2008 to urge the Commission to “quickly conclude its investigation” so the project can move forward. In a letter dated September 12, 2008, the Conservation Law Foundation (“CLF”) urged the Commission to “publicly notice the docket” and said that CLF’s members’ rights and interests would be affected by the proceeding and that a “robust review of the issues” would assist the Commission. TransCanada’s letter dated September 12, 2008 urged the Commission to provide public notice of the proceeding and offer a full and fair opportunity to all interested parties. TransCanada pointed out that one of the statutes which the Commission cited as its authority for the investigation, RSA 365:19, provides that “any party whose rights may be affected shall be afforded a reasonable opportunity to be heard with reference” to the investigation. On September 17, 2008 the New England Power Generators Association, Inc. submitted a letter requesting the Commission “provide stakeholders with a full and fair opportunity to review the details of PSNH’s proposal and provide comments”.

8. On September 19, 2008, without seeking any further input from interested stakeholders, the Commission issued Order No. 24,898 in which it found that “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.” The Commission noted that it had the authority to determine the prudence of the costs at a later time.

Legal Standard for Rehearing

9. RSA 541:3 provides that “any party to the action or proceeding before the commission, or any person directly affected thereby” may apply for rehearing. Although TransCanada filed a letter with the Commission in this proceeding asking it to open the proceeding, the Commission did not allow any parties, other than PSNH and the OCA, into the proceeding. TransCanada thus can not claim that it was a party to the proceeding, although it is likely that it would have sought intervention if it had been given the opportunity to do so. Unlike PSNH, which is a public utility with a guaranteed rate of return, TransCanada and other merchant generators in NH have no such assurance that they will be paid for any investments and capital improvements they make to their generating facilities. In other words, unlike PSNH, TransCanada assumes the risk of any poor decisions or costs overruns associated with operating and maintaining its assets. To the extent that PSNH receives unfettered discretion to invest ratepayer dollars in modifications to its generating facilities, it will obtain a distinct advantage over TransCanada and other similarly situated competitive generators, which will impair the competitive generation market and harm companies like TransCanada. Thus, TransCanada is directly affected by the Commission’s decision and therefore has

standing to file this motion. *See In re Londonderry Neighborhood Coalition*, 145 N.H. 201, 203 (2000); *New Hampshire Bankers Assn. v. Nelson*, 113 N.H. 127, 129 (1973).

10. RSA 541:4 requires that a rehearing motion “set forth every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable.” RSA 541:3 authorizes the Commission to grant rehearing upon a showing that good reason exists for such relief. Such a showing may be made “by new evidence that was unavailable at the original hearing, or by identifying specific matters that were either ‘overlooked or mistakenly conceived.’” *Verizon New Hampshire Wire Center Investigation*, DT 05-083, DT 06-012, Order No. 24,629 (June 1, 2006), p. 7 quoting *Dumais v. State*, 118 N.H. 309 (1978).

11. As discussed more fully below, the Order is unreasonable and unlawful because the Commission ignored the due process rights of interested parties by refusing to allow their participation in the question of law that it was “investigating”, contrary to the statutes, the longstanding practice of the Commission, and the New Hampshire and United States Constitutions. The Order is also unreasonable and unlawful because it misinterprets the applicable statutes that clearly provide the Commission with not just the authority, but also the duty, to review the costs of this modification to Merrimack Station. Thus, good cause exists for the Commission to rehear and reconsider the Order.

Discussion of Procedural Deficiencies

12. As noted above, the Commission elected to hear only from PSNH and the OCA on this matter.² Despite the fact that the statutory authority that it cited for

² By limiting comments on the legal issue to PSNH and the OCA, the Commission did not allow the Commission Staff to submit a memorandum on the legal issue. This came despite the fact that the Staff, in prefiled testimony and a response to a data request in Docket No. DE 07-108, the PSNH Least Cost Integrated Resource Planning docket, indicated that it did not interpret RSA 125-O “as mandating

undertaking this investigation very clearly says that “any party whose rights might be affected” must be afforded a reasonable opportunity to be heard, see RSA 365:19, the Commission chose not to hear from anyone other than PSNH and the OCA. Clearly there are many parties whose rights are affected by whether the modifications to Merrimack Station should proceed and at what cost. The environmental implications of operating that facility affect many people in New Hampshire and elsewhere. The rate increases that will result from the costs of this project will affect PSNH ratepayers, and there are ramifications to competitors in the marketplace for electricity that result from any decision that leads to either the retirement of a PSNH generating facility or that allows PSNH to continue to own and operate an electric generating facility. Lastly, by subjecting ratepayers to the risks of significant and costly plant modifications (and the potential for future stranded costs), PSNH gains an unfair advantage over competitive generators whose investors must bear all of the risks associated with plant operations and capital improvements. By not affording other parties whose rights are affected by this proceeding the opportunity to be heard, the Commission violated its statutory and constitutional responsibilities.

13. The longstanding practice of the Commission is to seek and obtain input from interested stakeholders through the issuance of an order of notice and an inclusive, transparent proceeding. Over the years, the Commission has typically handled

installation regardless of economics.” In his prefiled testimony in that docket, Staff Analyst George McCluskey said that “Staff does not believe that the Legislature intended scrubbers be installed if the resulting production cost is expected to exceed the cost of retiring the plant and replacing the lost output with market purchases.” Direct Testimony of George R. McCluskey at page 29. Moreover, in response to data request PSNH 1-28, Mr. McCluskey pointed to RSA 125-O:17, which provides PSNH the ability to request a variance from mercury emissions reduction requirements in the event of “an energy supply crisis, a major fuel disruption, an unanticipated or unavoidable disruption in the operations of the affected sources, or technological or economic infeasibility.” He went on to say that Staff interpreted this provision to mean that “the circumstances surrounding the scrubber investment could be such that the public interest would be better served by PSNH doing something other than what is envisioned in the legislation.”

important matters of this nature by issuing an order of notice that provides an opportunity for all interested parties to request intervention and, if the Commission grants a party that opportunity, to participate in the process of investigating, reviewing and considering all of the issues in a particular docket. This traditionally inclusive process was not employed here. No order of notice was issued and no parties, other than PSNH and the OCA, were allowed to participate. Although the OCA has the power and duty to appear in any proceeding involving rates and the statutory responsibility of representing residential utility customers, RSA 363:28, the OCA does not have the authority or duty to speak for other stakeholders. Residential utility customers are clearly some, but not all, of the parties whose rights will be affected by the Commission's decision. By limiting participation in this matter to PSNH and the OCA, the Commission has excluded many other parties whose rights and interests are affected, and in so doing, has run afoul of the due process protections of the New Hampshire and United States Constitutions that entitle interested parties, whose rights, duties, and interests are affected, to a meaningful opportunity to be heard. *Society for Protection of New Hampshire Forests v. Site Evaluation Committee*, 115 N.H. 163, 168 (1957).

14. The Commission's decision is also unlawful and unreasonable for its failure to commence an adjudicative hearing as required by RSA 541-A:31, I at the time that this matter reached the stage at which it was considered a contested case. A "contested case" is a "proceeding in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after notice and an opportunity for hearing." RSA 541-A:1,IV. The provisions of RSA 541-A:31, I require an adjudicative proceeding if the matter reaches a stage at which it is considered contested. Any

adjudicative proceeding must provide an opportunity for “all parties to respond and present evidence and argument on all issues involved.” RSA 541-A:31,IV. The determination of whether the Commission has the authority to review the modifications to Merrimack Station is clearly a contested case under the NH Administrative Procedures Act, and as such, the proceeding should have followed the requirements of RSA 541-A.

15. For all of the reasons noted above, the Commission’s failure to seek and obtain the comments of interested parties was a procedural defect that violated the rights of those interested parties and was contrary to the law, the longstanding practice of the Commission, and the New Hampshire and United States Constitutions.

Discussion of Statutory Interpretation

16. As the OCA pointed out in its memorandum of law, the Commission has plenary authority over PSNH. By law, the Commission has general supervision over public utilities, RSA 374:3, the authority to conduct investigations of any acts or rates of those utilities, RSA 365:5 and 19, the power and duty to keep informed, RSA 374:4, and utilities must report cost information to the Commission prior to making any additions or improvements, RSA 374:5. Moreover, RSA 378:7 clearly provides the Commission with authority to take ratemaking action against a public utility “upon complaint” and “after a hearing” into whether the practices of the utility affecting its rates are “unjust” or “unreasonable.”

17. Under RSA 369-B:3-a the Commission must approve any modifications or retirements of fossil fuel and hydro-electric generating assets. Before this can happen, the Commission must find that it would be in the public interest to do so. The

Commission thus “regulates divestiture and modification of PSNH’s generation assets pursuant to RSA 369-B:3-a.” *Appeal of Pinetree Power*, 152 N.H. 92, 95 (2005).

18. Although RSA 125-O requires PSNH to install scrubber technology at Merrimack Station to reduce mercury emissions, it also clearly requires PNSH to seek all necessary approvals before proceeding with the scrubber project: “The achievement of this requirement is contingent upon obtaining all necessary permits and approvals from federal, state, and local regulatory agencies and boards.” RSA 125-O:13,I. The Commission is clearly one of the state regulatory agencies, if not the primary state agency, involved with any approvals that PSNH must obtain before making modifications to assets that are included in its rate base and paid for by ratepayers.

19. The Commission must look to the plain and ordinary meaning of the words in RSA 125-O:13 when it interprets this statute. *Appeal of Ashland Elec. Dept.*, 141 N.H. 336, 338 (1996). As RSA 125-O,13,I also says: “all 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.” [Emphasis added.] It is important to note that the wording of the statute encourages, but does not require that regulatory agencies give “due consideration” to the Legislature’s finding that the installation of the scrubbers is in the public interest. Giving “due consideration” to a finding of public interest is far different than being precluded from examining whether the modifications are, or are not, in the public interest. If the Legislature intended to usurp the Commission’s ability to rule on the public interest issue, it would have expressly said so. That is not what the Legislature said. The language of the statute cited above is not consistent with the Commission’s finding in the Order that

the “Legislature has already made an unconditional determination that the scrubber project is in the public interest.” The Order at p.12. If in fact the Legislature made such an unconditional determination, why did it provide for the variances contained in RSA125-O:17, including giving the owner of the facility the ability to seek an alternative reduction by substantiating “economic infeasibility” ? TransCanada submits that when the statute is read as a whole it is clear that it does not support an interpretation that the Commission is precluded from reviewing the modifications and making its own finding of whether the modifications are in the public interest. The Commission could clearly do this while still giving “due consideration” to the Legislature’s finding. For these reasons, the Commission’s decision is erroneous as a matter of law.

20. Nowhere in RSA 125-O does the Legislature state that the Commission is specifically precluded from performing its traditional statutory duties under RSA 374:3, 365:5, 365:19, 374:4 and 378:7, among others. It is absurd and illogical to conclude that the Legislature intended to upset and subvert a regulatory paradigm within which the Commission has operated for years and that is fundamental to public utility regulation in New Hampshire and every other state. Because “implied repeal of former statutes is a disfavored doctrine in this State”, *Board of Selectmen v. Planning Bd.*, 118 N.H. 150, 152-153 (1978), it is erroneous as a matter of law to conclude that RSA 125-O has implicitly repealed the above-cited statutes. Yet, that is essentially the effect of the Order. Accordingly, it must be reconsidered and reheard.

21. The Commission’s fundamental duty is to act as “the arbiter between the interests of the customer and the interests of the regulated utilities.” RSA 363:17-a. If the Commission is not performing this function in relation to PSNH’s multimillion dollar

expenditures, then no other regulatory body is. If the Legislature intended to radically change the relationship between PSNH and the Commission, it could have and should have said so explicitly. RSA 125-O contains no such legislative direction. In fact, as noted above, RSA 125-O contains far different direction to regulatory agencies with regard to a public interest finding.

22. Statutes should be interpreted in light of the Legislature's intent in enacting them and in light of the policy to be advanced. *State v. Polk*, 927 A.2d 514 (2007). It is absurd to believe that the Legislature intended to advance a policy of allowing unfettered and unlimited recovery of expenses for modification of Merrimack Station, or that it was left to PSNH's discretion to determine whether the costs have become economically infeasible.

23. When statutory language is ambiguous, courts examine the statute's overall objective and presume that the Legislature would not pass an act that would lead to an absurd or illogical result. *See Estate of Gordon-Couture v. Brown*, 152 N.H. 265 (2005). Under the interpretation of the statutes the Commission has put forth, there is no limit on the amount of money that PSNH can spend on the modifications to Merrimack Station and no regulatory agency that can limit those expenditures. Clearly this would be an absurd and illogical result and therefore the Commission's interpretation can not stand.

24. "In ascertaining the meaning of any statute it is material to consider the circumstances under which the language is used, its legislative history and the objectives it seeks to attain." *Newell v. Moreau*, 94 N.H. 439, 443 (1947). Here, the Legislature's characterization of the scrubber technology as "in the public interest" was premised upon

the costs of the scrubber technology being “a reasonable cost to ratepayers”. See House Science and Technology Committee Majority Report, House Calendar 22, February 17, 2006, page 1280. This basic premise of the costs to ratepayers being reasonable is also reflected in the language of the purpose section, RSA 125-O:11,V: “The installation of scrubber technology will not only reduce mercury emissions significantly but will do so without jeopardizing electric reliability and *with reasonable costs to consumers.*”

[Emphasis added.] The Legislative history, particularly the hearings before both the House and Senate Committees, is replete with references to the modifications costing \$250 million in 2013 dollars (\$197 million in 2005 dollars). PSNH representatives said this, as did the Department of Environmental Services (“DES”), and the New Hampshire Clean Power Coalition. DES even went so far as to say: “Based on data shared by PNSH, the total capital cost for this full redesign *will not exceed* \$250 million dollars (2013\$) or \$197 million (2005\$)”. [Emphasis added.] See Letter from Michael P. Nolin to The Honorable Bob Odell, Chairman NH Senate Energy and Economic Development Committee, dated April 11, 2006. Clearly, given these representations to the Legislature, and the substantial increase from the figures quoted to them, currently at \$457 million, these costs have become unreasonable. Thus, to the extent, if any, that the Commission is bound to the Legislature’s public interest determination regarding the scrubbers, it is not appropriate to interpret that determination as applying to cost estimates that have dramatically increased from the figures provided since the statute was enacted.

25. Where reasonably possible, two conflicting statutes dealing with the same subject matter should be construed so as not to contradict each other, or consistently with each other in order to lead to reasonable results and effectuate the Legislature’s purpose.

Petition of Public Service Co. of N.H., 130 N.H. 265, 282 (1988); *In Re New Hampshire Public Utilities Commission Statewide Electric Utility Restructuring Plan*, 143 N.H. 233, 240 (1998). The only way to reconcile RSA 369-B:3-a with RSA 125-O consistently is for the Commission to determine that it has the authority to review a modification to a generating facility. TransCanada submits that there is more than sufficient support in RSA 125-O for the Commission to determine that it has this authority.

26. Although the Commission indicated in the Order that it does have authority to determine at a later time the prudence of the costs of complying with the requirements of RSA 125-O, the Commission has traditionally viewed a prudence review as being very limited in scope and breadth. “A prudence review, as we understand the concept, involves an after-the-fact review of investment decisions, in light of actual performance, but limited to what was reasonably foreseeable at the time of the decisions.” *Public Service Company of New Hampshire, Petition for Authority to Modify Schiller Station*, 89 NH PUC 70, 94 (2004). A prudence review under these circumstances clearly does not protect ratepayers from economically infeasible expenditures on plant modifications and therefore does not constitute a meaningful review.

27. TransCanada agrees with the OCA’s position that the Legislature did not intend to preclude the Commission from conducting an “Easton” review of the financing for this project, *see Appeal of Easton*, 125 N.H. 205 (1984), which would involve a public good determination as provided in RSA 369 that includes considerations beyond the terms of the proposed borrowing to pay for the project.

28. The meager legislative history that the Commission cites in the Order at page 10 does not support the interpretation that the Commission gives to RSA 125-O. Just because members of the Senate Finance Committee considered time to be of the essence does not support a determination that the Commission has no authority to make a public interest determination regarding the scrubber expenditures and/or installation. TransCanada in fact believes that the legislative history supports a far different conclusion. There is support in the legislative history for the fact that the Legislature was trying to act fast because it believed that in doing so it would save ratepayers a lot of money. That has clearly not happened. There is nothing in the legislative history that TransCanada could find to support the conclusion which the Commission reached, that the Legislature intended to take away the authority which the Commission has under other laws to review the expenditures for the modifications.

29. TransCanada asserts, for all of the reasons noted above, and for the reasons noted in the OCA's legal memorandum, Staff's testimony in DE 07-103, and the Motion for Rehearing by Certain Commercial Ratepayers, that the Commission's decision is unlawful and unreasonable. TransCanada hereby incorporates by reference the arguments included in the OCA's memorandum on file in this docket, in Staff's testimony in DE 07-103, and in the Motion for Rehearing by Certain Commercial Ratepayers being filed on the same day as TransCanada's motion. TransCanada respectfully requests that the Commission take official notice, pursuant to RSA 541-A:33,V, of the record in Docket No. DE 07-108. TransCanada also notes that the New England Power Generators Association supports this motion.

Conclusion

30. For the reasons stated above, the Order is unlawful and unreasonable both procedurally and substantively. TransCanada respectfully urges the Commission to reconsider and rehear the decision so that it can correct the procedural failures, hear from interested parties, and ultimately apply a lawful and reasonable interpretation of the statutes.

WHEREFORE, TransCanada respectfully requests that the Commission:

- A. Convene an adjudicative proceeding as provided in N.H. Admin. Rule Puc 2505.13 and RSA 541-A:31, I on the contested matters raised herein;
- B. Take official notice of the record in Docket No. DE 07-108;
- C. Provide all parties whose rights may be affected a reasonable opportunity to be heard on all of the issues in this docket;
- D. Grant a rehearing of this matter under RSA 541:3; and
- E. Grant such further relief as it deems appropriate.

Respectfully submitted,

TRANSCANADA HYDRO NORTHEAST INC.

By their Attorneys

Orr & Reno, PA
One Eagle Square; PO Box 3550
Concord, NH 03301-3550

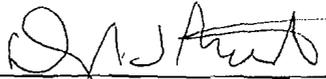
By: 

Douglas L. Patch
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CERTIFICATE OF SERVICE

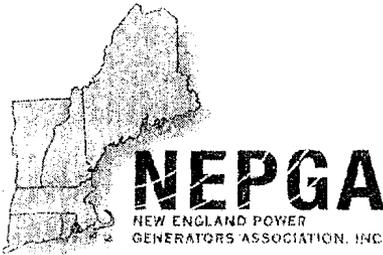
I hereby certify that a copy of the foregoing was, on this date, sent either by first-class mail, postage prepaid, or by electronic mail to those persons listed on the Service List.

Date: October 17, 2008



Douglas L. Patch

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October 17, 2008

VIA ELECTRONIC AND FIRST CLASS MAIL

Debra A. Howland
Executive Director and Secretary
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite Ten
Concord, New Hampshire 03301-7319
debra.howland@puc.nh.gov

RE: DE 08-103 – Merrimack Station Scrubber Project

Dear Director Howland

I write on behalf of the New England Power Generators Association, Inc. (“NEPGA”) in support of TransCanada Hydro Northeast Inc.’s Motion for Reconsideration and Rehearing of Order No. 24,898 pertaining to Public Service Company of New Hampshire’s (“PSNH”) planned installation of a wet flue gas desulphurization system at Merrimack Station.¹ NEPGA is the largest trade association representing competitive electric generating companies in New England. NEPGA’s member companies represent approximately 25,000 megawatts of generating capacity in all six states of the region, and 2,310 megawatts in New Hampshire. NEPGA’s mission is to promote sound energy policies which will further economic development, jobs, and balanced environmental policy.

Consistent with our letter dated September 17, 2008, in this matter, NEPGA respectfully requests that the Commission provide stakeholders with a full and transparent opportunity to review the details of PSNH’s proposal and provide comments on whether this initiative is in the best interest of New Hampshire’s consumers. While the time and resources that would be dedicated to this proceeding would be considerable, the process is abundantly necessary to satisfy New Hampshire’s obligation to protect consumer interests.

¹ The views expressed in this letter do not necessarily represent the positions of each of NEPGA’s members. In addition, nothing in this letter should be deemed to waive any rights that NEPGA or any of its members may have to otherwise challenge the administrative, procedural or substantive validity of this proceeding in any forum.

For the foregoing reasons, NEPGA respectfully requests that the Commission grant TransCanada's Motion and provide stakeholders with a full and transparent opportunity to review the details of PSNH's proposal and provide comments on whether this initiative is in the best interest of New Hampshire's consumers. If you have any questions, please don't hesitate to contact me.

Sincerely,



Christopher P. Sherman

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DE 08-103

INVESTIGATION OF PSNH'S INSTALLATION OF
SCRUBBER TECHNOLOGY AT MERRIMACK STATION

Order Denying Motions for Rehearing

ORDER NO. 24,914

November 12, 2008

I. BACKGROUND

This investigation was opened following a quarterly earnings report filed by Northeast Utilities¹ with the Securities and Exchange Commission on August 7, 2008. The earnings report disclosed that the cost of installing a wet flue gas desulphurization system, commonly referred to as scrubber technology, at Public Service Company of New Hampshire's (PSNH's) Merrimack Station had increased from an original estimate of \$250 million to \$457 million. RSA 125-O:11 et seq. requires PSNH to install the scrubber technology at Merrimack Station in order to reduce mercury emissions.

At the outset, the Commission identified a potential statutory conflict as to the nature and extent of its authority relative to the scrubber project. In particular, RSA 125-O:11, VI, which states that it is in the public interest for PSNH to install scrubber technology at the Merrimack Station, and RSA 369-B:3-a, which states that PSNH may modify its generation assets only if the Commission finds that it is in the public interest to do so, on their face create conflicting mandates. The Commission directed PSNH to file a memorandum of law on the issues by September 12, 2008, and also invited the Office of the Consumer Advocate (OCA) to file a memorandum of law by the same date.

¹Northeast Utilities is the parent company of Public Service Company of New Hampshire.

On September 19, 2008, the Commission issued Order No. 24,898 (Order). In that Order, the Commission concluded that the Legislature intended that the more recent, more specific statute, RSA 125-O:11-18, prevail over RSA 369-B:3-a. Given the Legislature's specific finding in 2006 that the installation of scrubber technology at the Merrimack Station is in the public interest, the statute's rigorous timelines and incentives for early completion, and the statute's requirement of annual progress reports to the Legislature, the Commission found that the Legislature did not intend that the Commission undertake a separate review pursuant to RSA 369-B:3-a.

On October 17, 2008, TransCanada Hydro Northeast, Inc. (TransCanada), three commercial ratepayers, Stonyfield Farm, Inc., H&L Instruments, LLC and Great American Dining, Inc. (collectively, the Commercial Ratepayers) and Edward M. B. Rolfe filed motions for rehearing. On October 23, 2008, PSNH filed objections to all three motions for rehearing.

II. MOTIONS FOR REHEARING

A. Standing

1. TransCanada

TransCanada owns 567 MW of hydroelectric generating capacity on the Connecticut and Deerfield Rivers. As an owner of competitive generation facilities, TransCanada describes itself as a competitor of PSNH's Merrimack Station. According to TransCanada, allowing PSNH to add scrubber technology at ratepayer expense adversely impacts competitive generators like TransCanada, which must bear the risk of their own investment decisions. As a result, TransCanada alleges that it has sufficient interest in this matter to move for rehearing.

2. Commercial Ratepayers

The Commercial Ratepayers assert standing for their request for rehearing based upon rate impacts that they allege will occur as a result of increased costs for the installation of a scrubber at Merrimack Station.

3. Mr. Rolfe

Mr. Rolfe describes his interest in this docket as that of a PSNH ratepayer.

B. Procedural Issues

1. TransCanada

TransCanada claims that the Commission's failure to open the proceeding to all other interested parties deprived it of the opportunity to be heard on issues that may have "ramifications to competitors in the marketplace for electricity." TransCanada's Motion for Rehearing, p.7. Further, TransCanada asserts that the Commission should have commenced a full adjudicative proceeding, pursuant to RSA 541-A:1, IV and 541-A:31, I, and that failure to commence such a proceeding violated due process.

2. Commercial Ratepayers

The Commercial Ratepayers argue that the Commission should have commenced a proceeding under RSA 365:19 which included all potentially interested parties. They claim that failing to allow them to be heard in such a proceeding denies them due process "on issues for which [they] will have to pay significant costs." Commercial Ratepayers' Motion for Rehearing, p.2.

3. Mr. Rolfe

Mr. Rolfe claims that the Commission violated his right to due process by inviting only two parties, PSNH and the OCA, to be heard in this case.

C. Statutory Interpretation

1. TransCanada

TransCanada disagrees with the Commission's statutory analysis. It argues that the Commission has plenary authority over PSNH and that, based upon the requirement of necessary permits and approvals contained in RSA 125-O:13, I, the Commission should have reviewed the scrubber prior to construction pursuant to RSA 369-B:3-a. According to TransCanada, the words requiring "due consideration" of the Legislature's public good finding do not evidence Legislative intent to usurp the Commission's review under RSA 369-B:3-a. Further, TransCanada points out that RSA 125-O does not expressly prohibit Commission review under RSA 369-B:3-a, or other statutes. TransCanada argues that, pursuant to RSA 363:17-a, the Commission has a duty to consider the interests of both customers and utility investors. TransCanada asserts that duty requires a pre-construction review of the proposed scrubber installation.

TransCanada next contends that the language of RSA 125-O is ambiguous, requiring an inquiry into its legislative history. According to TransCanada, the legislative history demonstrates that the Legislature was considering estimated costs of \$250 million for scrubber installation when it passed RSA 125-O. TransCanada does not consider an after-the-fact prudence review by the Commission an adequate review. Finally, TransCanada agrees with OCA that a review of any financing needed by PSNH for the scrubber would require an "Easton"

review by the Commission of more than just the terms of the financing. *See*, RSA 369; and *Appeal of Easton*, 125 N.H. 295 (1984).

2. Commercial Ratepayers

The Commercial Ratepayers take the position that the Commission's interpretation of RSA 125-O is in error. They claim that 125-O:11, V and IV were based upon a much lower cost of installation, i.e., \$250 million rather than current estimates of \$457 million. The Commercial Ratepayers argue that RSA 125-O:13 requires that the Commission determine the public interest under RSA 369-B:3-a, giving due consideration to the Legislature's public interest finding under RSA 125-O:11. According to the Commercial Ratepayers, such due consideration should include consideration of the change in cost estimates for the scrubber installation.

The Commercial Ratepayers argue that by ascribing to the Legislature the power to determine the public interest of the scrubber installation, the Commission has relinquished the proper exercise of its executive powers and/or quasi judicial powers. *See*, N.H. Constitution, Pt. 1, art. 37. *See, e.g., McKay v. N.H. Compensation Appeals Bd.*, 143 N.H. 722 (1999).

The Commercial Ratepayers claim that the Commission erred in finding that its review was limited to a prudence review under RSA 125-O:18 and further erred in finding that RSA 125-O:11 and RSA 369-B:3-a conflict. They argue that these two provisions can be read together to allow a Commission public interest review of the scrubber prior to construction. Moreover, they argue that the Commission's public interest review under RSA 369-B:3-a should consider the costs of future compliance with other environmental laws including the Clean Air Act² and the Clean Water Act.³ Finally, the Commercial Ratepayers argue that the Commission

² 42 U.S.C. § 7412(d)

³ 33 U.S.C. § 1326(b)

should consider alternatives to installing scrubbers at Merrimack Station in terms of costs, public health, environmental protection and long term energy benefits.

3. Mr. Rolfe

Mr. Rolfe argues that the Commission reached the wrong decision regarding the interplay of the mercury statute, RSA 125-O:11-18, and RSA Chapters 365 and 374. Mr. Rolfe claims that the Commission failed to consider additional costs that may be imposed on PSNH in complying with the federal Clean Air Act, the federal Clean Water Act and the New Hampshire Regional Greenhouse Gas Initiative (RGGI) standards. He also argues that the Commission did not view Merrimack Station, a 40-year old coal plant, in the context of the Governor's Climate Change Action Plan Task Force. Mr. Rolfe contends that turmoil in the financial markets may further impact the final costs of installation.

III. PSNH OBJECTIONS TO MOTIONS FOR REHEARING

A. Standing

1. TransCanada

PSNH challenged TransCanada's standing to move for reconsideration, claiming that TransCanada is not directly affected by the Order. PSNH alleges that any harm claimed by TransCanada is the result of it being unregulated, a status it chose when it purchased its generating assets. According to PSNH, TransCanada purchased its generating facilities in 2005, two years after passage of RSA 369-B:3-a. As a result, there have not been any changes to the state of the New Hampshire generation market since TransCanada entered that market in 2005. Because PSNH is subject to prudence review by the Commission, it takes issue with TransCanada's claims that PSNH's investment decisions are without risk. PSNH concludes that

TransCanada has not shown that it will suffer any injury in fact. *Appeal of Richards*, 134 N.H. 148, 155 (1991).

2. Commercial Ratepayers

PSNH argues that the Commercial Ratepayers will not suffer any injury for two reasons. First, PSNH will only recover its prudent costs of construction and operation of the scrubber through its default energy charges. Second, the Commercial Ratepayers now have a choice of their electric supplier and therefore may avoid any costs imposed by the scrubber simply by choosing another supplier. PSNH observes that there are numerous suppliers listed on the Commission's website as ready and willing to serve New Hampshire electric customers. As a result, PSNH argues that the Commercial Ratepayers' claims of injury are merely speculative and they lack standing to request a rehearing of the Order. *In re Londonderry Neighborhood Coalition*, 145 N.H. 201, 203 (2000).

B. Procedural Issues

In response to due process claims, PSNH asserts that the Commission is free to determine the manner in which it conducts an inquiry. *See*, RSA 365:5. PSNH argues that since the Commission determined that it did not have the authority to conduct a public interest review under RSA 369-B:3-a, and reached that legal conclusion without the necessity of relying upon any specific facts, the Commission's process was sufficient and appropriate. PSNH points out that the Commission did not determine whether PSNH should install scrubber technology at Merrimack Station, but instead found that RSA 125-O:11-18 mandated the installation. PSNH concludes that by finding it had no authority to consider the public interest of the scrubber

installation, the Commission did not determine any rights, duties or privileges of the moving parties.

PSNH also claims that the motion by the Commercial Ratepayers does not conform to the requirements of RSA 541:4 because it incorporated by reference arguments by the OCA, the Conservation Law Foundation and TransCanada. PSNH takes the position that those arguments are not fully set forth in the motion and consequently are not preserved for appeal.

PSNH states that Mr. Rolfe failed to serve his motion upon PSNH as required by N.H. Code of Admin. Rules Puc 203.11 (c). According to PSNH, it did not receive a copy of Mr. Rolfe's motion until October 23, 2008. As a result, PSNH takes the position that the Commission may not consider Mr. Rolfe's motion for reconsideration.

C. Statutory Interpretation

PSNH acknowledges that the Commission's authority is plenary in matters of ratemaking. *See, Legislative Utility Consumers Council v. Public Service Co.*, 119 N.H. 332, 341 (1979). PSNH observes, however, that the Commission's authority is delegated by the legislature and is limited to those powers expressly delegated or fairly implied. *See, New England Telephone & Telegraph Co.*, 103 N.H. 394, 397 (1961). PSNH points out that in this case the legal questions do not involve the Commission's ratemaking function, and therefore concludes that the Commission's authority over installation of the scrubber is limited to that expressly delegated to it.

PSNH rejects the Commercial Ratepayers' argument that the constitutional separation of powers prevents the Legislature from limiting the Commission's exercise of its executive or quasi-judicial powers. According to PSNH, the Commission's powers are derived only from the

Legislature and are not derived from any other generalized powers of supervision. PSNH claims that it is well established that ratemaking is a legislative function. *See, Duquesne Light Co. v. Barash*, 488 U.S. 299, 313 (1989). PSNH argues that there is no separation of power constraint from the Commission taking its direction from the Legislature. Finally, PSNH takes the position that the Legislature did not direct the Commission to review the scrubber installation and argues that the Commission's legal analysis was correct and consistent with the Legislature's intent.

IV. COMMISSION ANALYSIS

A. Standing

We find that TransCanada, the Commercial Ratepayers and Mr. Rolfe⁴ each have stated a sufficient interest in this case to request rehearing pursuant to RSA 541:3. TransCanada may be affected economically by a significant capital investment in PSNH's Merrimack station insofar as it has an impact on TransCanada's ability to compete in the electricity marketplace in New Hampshire. The Commercial Ratepayers and Mr. Rolfe may be affected financially by changes in PSNH's default energy service rate either as customers taking default energy service, or as customers of competitive electric suppliers. The electric supply market in PSNH's service territory is influenced by PSNH's default service rate because that rate is the backstop for all other competitive offerings. If PSNH's default service rate increases, competitive offerings may also increase.

B. Procedural Issues

The parties filing motions for rehearing have claimed that their rights to due process have been denied because we did not commence a full adjudicative proceeding to determine the scope of the Commission's authority with respect to PSNH's installation of scrubber technology at

⁴ As explained below, for other reasons we have not considered Mr. Rolfe's motion in reaching our decision.

Merrimack Station. We initiated this proceeding pursuant to the Commission's investigative authority as set forth in RSA 365:5 and 365:19. In the course of that investigation, we directed the public utility, viz., PSNH, to submit a memorandum of law addressing the scope of our authority. We also invited the OCA, which has a special status and a specific responsibility with respect to residential ratepayers, pursuant to RSA 365:28, to submit a memorandum of law. Neither of these actions was required by statute, nor by considerations of due process, but they were undertaken as a means of further informing our consideration of the threshold issue concerning the scope of our legal authority with respect to PSNH's installation of scrubber technology at the Merrimack Station. Our investigation, moreover, did not disclose facts on which we based our conclusion of law, thus the requirement of RSA 365:19 to afford a reasonable opportunity to be heard does not apply.⁵ Accordingly, the process we employed to consider the scope of our authority is consistent with our governing statutes and does not violate due process. To conclude otherwise would suggest that the Commission could never reach a conclusion regarding the extent of its authority in any matter without first commencing an adjudicative proceeding and providing for public input; such a result would impermissibly restrict the Commission's powers and would be administratively unworkable.

Nevertheless, assuming for the sake of argument that a due process deficiency may have occurred, it has been cured through the rehearing process, which permits any directly affected person to apply for rehearing. Due process requires that parties be provided an adequate opportunity to be heard. *See, Society for the Protection of New Hampshire Forests v. Site Evaluation Committee*, 115 N.H. 163, 169 (1975). When issues of fact are in dispute, due

⁵ TransCanada's arguments about past Commission practice, and the issuance of an order of notice, etc., are inapt and would apply only if we were to conclude that we had the authority to proceed under RSA 369-B:3-a and were acting under color of that authority.

process may require something more than a filing. *Id.* In this case, however, we are faced with a question of law, not questions of fact. As a result, the motions for rehearing filed in this case, which contain extensive analyses of the statutes at issue, comprise an adequate opportunity to present legal arguments for our consideration, and therefore afford due process. We also observe that, in the event any party ultimately seeks review of our legal conclusion, the process that we have employed has very likely provided the timeliest path to appellate review.

Finally, with respect to PSNH's argument that we should not consider Mr. Rolfe's motion for rehearing as a result of his failure to serve it on other parties, PSNH is correct that Mr. Rolfe did not comply with Puc 203.11(c). Furthermore, as the Commission noted in *Re Connecticut Valley Electric Company*, 88 NHPUC 355 (2003), failure to comply with service requirements constitutes sufficient grounds to determine that a motion for rehearing has not been properly made. While we have not considered Mr. Rolfe's motion as a basis for reaching our decision, we nevertheless observe that his arguments are largely duplicative of various arguments made by TransCanada and the Commercial Ratepayers, which we have considered.

C. Statutory Interpretation

The threshold issue to be determined in this case is the extent of the Commission's authority to determine in advance whether the installation of a scrubber at PSNH's Merrimack Station is in the public interest. The Commission's authority is derived legislatively and therefore this case requires statutory interpretation. In Order No. 24,898, we undertook an analysis of RSA 125-O:11-18 and RSA 369-B:3-a, and we found that the Legislature's public interest finding in RSA 125-O:11 that scrubber technology should be installed at Merrimack Station superseded the Commission's authority under RSA 369-B:3-a to determine whether it is

in the public interest for PSNH to modify Merrimack Station. Consequently, 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.

When considering motions for rehearing, we must grant rehearing in order to correct an unlawful or unreasonable decision. RSA 541:3. *See, Campaign for Ratepayers Rights*, 145 N.H. 671, 674 (2001). In this case, the parties seeking rehearing have not identified any new evidence needed to interpret RSA 369-B:3-a or RSA 125-O:11-18, nor have they identified any matters that were either overlooked or mistakenly conceived. Furthermore, the legal arguments and legislative history presented in the motions for rehearing are substantially duplicative of arguments presented in the legal memoranda of PSNH and OCA.

The Commercial Ratepayers posit that the Legislature based its enactment of RSA 125-O:11-18 on a specific level of investment, i.e., \$250 million, and that any departure from that level of investment by PSNH confers authority on the Commission. However, reading such a cost limitation into the Legislature's public interest finding goes beyond the express terms of the statute.⁶ We note that the Legislature did refer to economic infeasibility when it allowed PSNH to seek a variance under section 125-O:17, but it did not provide a process for the Commission to compel such an action. The Legislature could have provided express cost limitations on the scrubber installation, but it did not. In retrospect, it certainly can be argued that the better approach as a matter of policy may have been to provide a mechanism for addressing increased

⁶ Under the Commercial Ratepayers' theory, the Legislature's public interest finding would be restricted to a specific level of costs and the Commission would effectively be required to second guess the Legislature's public interest finding at any dollar level above \$250 million. Hence, for all practical purposes, the Legislature's public interest finding would be so limited as to be negated, and the RSA 369-B:3-a approach would be resurrected to require Commission permission before PSNH could act. We find such a constrained reading of the statute to be incompatible with the generally expansive statutory scheme adopted by the Legislature to bring about the installation of scrubber technology.

cost estimates. Such a hypothetical circumstance, however, does not create a basis for the Commission to exert authority not contemplated by statute.

We will not repeat here our discussion of why RSA 369-B:3-a does not constitute a necessary approval under RSA 125-O:13. We do, however, deem it useful to address TransCanada's argument that the Legislature, by providing PSNH the opportunity of seeking, pursuant to RSA 125-O:17, a variance from the mercury emissions reductions requirements, was somehow signaling that the Commission has the authority under certain circumstances to determine, in advance, whether the scrubber project is in the public interest.

RSA 125-O:17 constitutes a mechanism for PSNH to seek relief from the Department of Environmental Services (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, 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 requirements 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 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.

With regard to the question of whether the Commission should conduct an “Easton” review of the project as part of a request for approval of financing for the project pursuant to RSA 369:1, we note that there is no pending financing approval request before us from PSNH for this project. As noted in Order No. 24,898, such approval is not required prior to the start of construction.

Finally, the Commercial Ratepayers’ argument that our interpretation of RSA 125-O:11-18 violates the New Hampshire constitution’s requirement for the separation of powers is not correct. *See* N.H. Const. Part I, Art. 37. The Commission’s authority to regulate public utilities is statutory and is not based on common law rights or remedies. Thus, the case cited by the Commercial Ratepayers, *McKay v. N.H. Compensation Appeals Bd.*, 143 N.H. 722 (1999), is inapposite. In *McKay*, the workmen’s compensation statute provided an administrative alternative to common law tort claims, which are normally handled by the judiciary. In this case, no party has argued that RSA 125-O:11-18 or RSA 369-B:3-a provides an alternative to common law remedies. Instead, RSA 125-O:11-18 codifies a presumptive public interest determination by the Legislature, supplanting an assignment of the task of determining the public interest to the Commission, which is itself legislatively created.

Based upon the foregoing, it is hereby

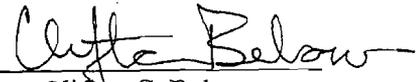
ORDERED, that the motions for rehearing are denied.

By order of the Public Utilities Commission of New Hampshire this twelfth day of

November 2008.


Thomas B. Getz
Chairman


Graham J. Morrison (KWS)
Commissioner


Clifton C. Below
Commissioner

Attested by:


Lori A. Davis
Assistant Secretary