STATE OF NEW HAMPSHIRE
SUPREME COURT

2008-0897

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

BRIEF OF STONYFIELD FARM, INC., H & L INSTRUMENTS, LLC, AND GREAT AMERICAN DINING, INC.

Appellants

Edward A. Haffer
Sheehan Phinney Bass & Green, P.A.
1000 Elm Street
Manchester, NH 03101
(603) 627-8115

March 23, 2009

Mr. Haffer will argue.

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QUESTIONS PRESENTED

1. Did the Public Utilities Commission ("PUC") erroneously rule that the Legislature made an "unconditional" finding that installation of "scrubber technology" at Merrimack Station is in the "public interest of the citizens of New Hampshire and the customers of the affected sources" (RSA 125-O:11, VI)? App. 154.

2. Concerning the meaning of "reasonable costs to consumers" (RSA 125-O:11, V), did the PUC erroneously disregard legislative history revealing that the cost of installation of scrubber technology would not exceed $250 million in 2013 dollars, whereas it is now estimated to be almost double that amount — specifically, $457 million? App. 154.

3. In ruling that it lacks authority under RSA 369-B:3-a to make a finding of public interest on installation of scrubber technology at Merrimack Station, did the PUC fail to harmonize RSA 125-O:11-18 with RSA 369-B:3-a? App. 154.

4. In ruling that under RSA 125-O:11-18 the PUC is "limited" to determining at a "later time" the prudence of the costs of complying with the requirements of RSA 125-O:11-18, did the PUC erroneously insert a timing limitation into the statute that neither appears on its face nor may be reasonably inferred? App. 154.

5. In ruling that it lacks authority under RSA 369-B:3-a to determine whether installation of scrubber technology at Merrimack Station is "in the public interest of retail customers of PSNH [Public Service Company of New Hampshire]," did the PUC deny the Commercial Ratepayers an adequate opportunity to be heard on issues for which they may bear significant costs? App. 154.

6. In a proceeding under RSA 369-B:3-a to determine whether installation of scrubber technology at Merrimack Station is "in the public interest of retail customers of PSNH,"

must the PUC consider all issues relevant to costs raised by such customers and other affected parties, including: **(a)** the cost of the installation itself; **(b)** the cost of related compliance obligations, such as those under the Clean Air Act (42 U.S.C. §7401 et seq.) and Clean Water Act (33 U.S.C. §1251 et seq.); and **(c)** the cost of reasonable alternatives? App. 154.

LAW INVOLVED

The Constitutional provision involved is N. H. Constitution, Pt. 1, Art. 12 (due process). App. 1. The statutory provisions involved are: RSA 125-O, particularly §§ 11-18 (App. 2, 8-13); RSA 369-B, particularly §3-a (App. 20, 26); RSA 365:19 (App. 33); and RSA 541-A:31, I. (App. 34).

STATEMENT OF THE CASE

This is an appeal by commercial ratepayers under RSA 541:6 from a decision of the PUC that:

> ... as a result of the Legislature's mandate that the owner of Merrimack Station install scrubber technology by a date certain, and its finding pursuant to RSA 125-O:11 that such installation of scrubber technology at PSNH's Merrimack Station is in the public interest of the citizens of New Hampshire and the customers of the station, the Commission lacks the authority to make a determination pursuant to RSA 369-B:3-a as to whether this particular modification is in the public interest. [P. 32 hereto.]

STATEMENT OF FACTS

RSA 125-O, effective as of 2002, establishes a program to reduce emissions of various air pollutants. The program is administered by the Department of Environmental Services ("DES") (§§6-8).[1] Sections 11 through 18, effective as of 2006, deal specifically with "mercury emissions at the coal-burning electric power plants in the state" (§11, I) — more specifically,

[1] As of October 1, 2008, under §5-a, a newly created Energy Efficiency and Sustainable Energy Board has powers to "promote and coordinate" energy programs. Under §4, V, the PUC oversees the recovery of "all prudent costs associated with compliance in a manner consistent with RSA 374-F, RSA 369-B, and the Agreement to Settle PSNH Restructuring."

Merrimack Units 1 and 2 in Bow, and Schiller Units 4, 5, and 6 in Portsmouth (§12, I), all operated by PSNH. This appeal focuses on the Merrimack Units, also known as Merrimack Station (§11, I, III, and IV).

One of the key provisions of RSA 125-O is §13 ("Compliance"), whose ¶I provides in pertinent part:

> The owner **shall install** and have operational scrubber technology to control mercury emissions at Merrimack Units 1 and 2 no later than **July 1, 2013**. The achievement of this requirement is **contingent** upon obtaining **all necessary permits and approvals** from federal, state, and local **regulatory agencies** and bodies; however, **all** such regulatory agencies and bodies are **encouraged** to give **due consideration** to the general court's finding that the installation and operation of scrubber technology at Merrimack Station is in the **public interest**.... [App. 9-10 (emphasis added).]

Another key provision is §11 ("Statement of Purpose and Findings"), which provides in pertinent part:

> The general court **finds** that:
>
> I. It is in the **public interest** to achieve significant reductions in mercury emissions at the coal-burning electric power plants in the state as soon as possible. The requirements of this subdivision will prevent, at a minimum, 80 percent of the aggregated mercury content of the coal burned at these plants from being emitted into the air by no later than the year 2013. To accomplish this objective, the best known commercially available technology **shall be installed** at **Merrimack Station** no later than **July 1, 2013**.
>
> II. The department of environmental services has determined that the best known commercially available technology is a wet flue gas desulphurization system, hereafter "**scrubber technology**," as it best balances the procurement, installation, operation, and plant efficiency costs with the projected reductions in mercury and other pollutants from the flue gas streams of **Merrimack Units 1 and 2**. Scrubber technology achieves significant emissions reduction benefits, including but not limited to, cost effective reductions in sulfur dioxide, sulfur trioxide, small particulate matter, and improved visibility (regional haze).
>
> ———————
>
> 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**.

> VI. The installation of **such** technology is in the **public interest** of the **citizens** of New Hampshire and the **customers** of the affected sources. [App. 9 (emphasis added).]

As to what the Legislature specifically meant by its finding of "reasonable costs to consumers" (§11, V), the legislative history reveals the facts on which that finding was based. The bill that gave rise to RSA 125-O:11-18 was 2006 HB1673-FN. Testimony on that bill took place on April 11, 2006 before the Senate Committee on Energy and Economic Development. Among those testifying was a PSNH representative, who characterized the $250 million cost estimate for the scrubber technology "as an awful lot of money in PSNH's view." App. 109. Further, on the same date to the same Committee, the DES reported as follows: "Based on data shared by PSNH, the total capital cost for this full redesign **will not exceed $250 million dollars (2013$) or $197 million (2005$).**" App. 152 (letter of DES Commissioner to the Chairman of the Senate Energy and Economic Development Committee, dated April 11, 2006 (emphasis added)).

Just two years later, however, the cost had almost doubled, growing to $457 million. On August 22, 2008, the PUC wrote to PSNH, citing the 10-Q filed on August 7, 2008 with the United States Securities and Exchange Commission by Northeast Utilities (NU), PSNH's parent company. App. 36. As stated in the PUC's letter, "In its 10-Q, NU identified an estimated project cost of **$457 million** [for installation of the scrubber technology at Merrimack Station], which represents approximately an **80 percent increase** over the original estimate of $250 million." *Id.* (emphasis added). PSNH responded by letter dated September 2, 2008, saying, "It should surprise no one that the **costs** of this project have **increased significantly** over the original preliminary estimates made in late 2004-2005." App. 40 (emphasis added). On the same date, PSNH filed a Report with the PUC, saying in pertinent part:

- The initial estimated cost of the project was based on a Sargent & Lundy estimate performed in 2005. There have been **significant increases** in the cost of raw materials, steel, labor and energy, since this estimate was made. [App. 48 (emphasis added).]

- PSNH, in consultation with URS, has developed a **revised** project estimate of **$457 million**." [App. 50 (emphasis added).]

Legislative concern with "reasonable costs to consumers" for electricity generated by Merrimack Station is evidenced not only by RSA 125-O:11, V and VI, but also by RSA 369-B. RSA 369-B took effect in 2000, and deals with "restructuring" (§1, I) — i.e., the "divestiture of electric generation by New Hampshire electric utilities" (§1, II). App. 20. One of its principal objectives is the establishment of "**retail electric service at lower costs.**" Section 1, I (*Id.* (emphasis added)). The statute is administered by the PUC. In 2003, it was amended to permit PSNH to retain its "fossil and hydro generation assets." Section 3-a (App. 26.) One such fossil generation asset is Merrimack Station. In keeping with the overall objective of "retail electric service at lower costs," (§1, I), §3-a provides in pertinent part: "Prior to any divestiture of its generation assets, PSNH **may modify** or retire such generation assets **if the commission [PUC] finds that it is in the public interest of retail customers of PSNH** to do so, and provides for the cost recovery of such modification or retirement." *Id.* (emphasis added).

By its letter of August 22, 2008 to PSNH, the PUC opened an investigation into whether a conflict existed between RSA 125-O:11 and RSA 369-B:3-a. App. 36. The PUC directed PSNH to file a memorandum of law on the issue, and invited the Office of Consumer Advocate to do the same. App. 37. Both did so. The appellants here did not receive any notice from the PUC of any opportunity to be heard concerning the PUC's investigation.[2]

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[2] Between September 5 and 12, 2008, Senator Gatsas, the New Hampshire State Building and Construction Trades Council, and Governor Lynch filed letters with the PUC urging expeditious review. P. 21 hereto. On September 12, 2008, the Conservation Law Foundation, the Campaign

After receiving a brief from PSNH and an opposing brief from the Office of Consumer Advocate, the PUC ruled as follows on September 19, 2008:

> **DECIDED**, that, as a result of the Legislature's mandate that the owner of Merrimack Station install scrubber technology by a date certain, and its finding pursuant to RSA 125-O:11 that such installation of scrubber technology at PSNH's Merrimack Station is in the public interest of the citizens of New Hampshire and the customers of the station, the Commission **lacks the authority** to make a determination pursuant to **RSA 369-B:3-a** as to whether this particular modification is in the public interest. [P. 32 hereto (boldface in original in line 1; boldface added otherwise).]

The PUC also ruled that, through the enactment of RSA 125-O:11, VI, "The Legislature has already made an **unconditional** determination that the scrubber project is in the public interest." P. 31 hereto (emphasis added).) It further ruled, "the Commission's authority is limited to determining at a **later** proceeding the prudence of the costs of complying with the requirements of RSA 125-O:11-18 and the manner of recovery for prudent costs." P. 32 hereto (emphasis added).

On October 17, 2008, Stonyfield Farm, Inc., H & L Instruments, LLC, and Great American Dining, Inc.[3] (collectively, "Commercial Ratepayers") timely moved for rehearing. App. 154. As stated in their Motion, "As ratepayers for electricity generated by ... [PSNH], the Commercial Ratepayers will be directly affected by the materially increased costs of installation of scrubber technology at Merrimack Station, and by the Commission's Order." *Id.*

In addition to the issues of statutory construction, referenced above, the Commercial Ratepayers raised two other issues. One was procedural: that they had not received prior notice of the underlying proceeding, and thus were deprived of meaningful participation, contrary to the

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for Ratepayer Rights, and TransCanada Hydro Northeast, Inc. filed letters requesting the matter be noticed for public participation. *Id.*

[3] Great American Dining, Inc. is the managing entity of the Common Man family of restaurants, at least 7 of which buy power from PSNH. App. 154.

requirements of RSA 541-A:31, I, RSA 365:19, and N. H. Constitution, Pt. 1, Art. 12 (due process). The other issue concerned the scope of any hearing under RSA 369-B:3-a:

> The Commercial Ratepayers are aggrieved by the Commission's failure to make a determination on public interest, as required by RSA 369-B:3-a. Any such determination, moreover, should not be confined to the issue of scrubber technology. The Commission should not undertake a fragmented analysis. Rather, in making a determination of public interest under RSA 369-B:3-a, the Commission should also take into account all other pertinent issues bearing on the proposed modification. These issues would include, but not be limited to, anticipated increased costs concerning: (A) compliance obligations under the Clean Air Act (Title V — 42 U.S.C. §7401 et seq.): (B) compliance obligations under the Clean Water Act (NPDES — 33 U.S.C. §1251 et seq.); and (C) reasonable alternatives — in terms of environmental protection, public health, costs, and long-term energy benefits. [App. 160.]

Following an Objection by PSNH (App. 163), the PUC denied the Commercial Ratepayers' Motion on November 12, 2008. P. 34 hereto. This appeal followed within 30 days. RSA 541:6.

Other facts appear in Argument.

SUMMARY OF ARGUMENT

1. Contrary to the ruling of the PUC, the Legislature did not make an "unconditional" finding of public interest concerning installation of scrubber technology at Merrimack Station. Rather, its finding was conditional — conditional "upon [PSNH's] obtaining all necessary permits and approvals from federal, state, and local regulatory agencies" (RSA 125-O:13, I), and conditional upon "reasonable costs to consumers" (RSA 125-O:11, V).

2. As used in RSA 125-O:11, V, the term "reasonable costs to consumers" is ambiguous. To ascertain its meaning, the PUC should have considered the legislative history. Doing so would have revealed that the Legislature was told that the cost of installation of scrubber technology would "not exceed $250 million dollars (2013$)." Yet, by the time the PUC ruled, that amount had almost doubled — to $457 million.

3. In ruling that it lacks authority under RSA 369-B:3-a to make a finding of public

interest on installation of scrubber technology at Merrimack Station, the PUC failed to harmonize RSA 125-O:11-18 with RSA 369-B:3-a — the latter having been enacted only 3 years before the former. RSA 125-O:11-18 does not repeal RSA 369-B:3-a, either expressly or impliedly.

4. In ruling that under RSA 125-O:11-18 the PUC is "limited" to determining at a "later time" the prudence of the costs of complying with the requirements of RSA 125-O:11-18 (p. 32 hereto), the PUC erroneously inserted a timing limitation into the statute that neither appears on its face nor may be reasonably inferred.

5. In ruling that it lacks authority under RSA 369-B:3-a to determine whether installation of scrubber technology at Merrimack Station is "in the public interest of retail customers of PSNH," the PUC denied the Commercial Ratepayers an adequate opportunity to be heard on issues for which they may bear significant costs. Its decision is contrary to RSA 541-A:31, I, RSA 365:19, and N. H. Constitution, Pt. 1, Art. 12 (due process).

6. In a proceeding under RSA 369-B:3-a to determine whether installation of scrubber technology at Merrimack Station is "in the public interest of retail customers of PSNH," the PUC must consider all issues relevant to costs raised by such customers and other affected parties, including: **(a)** the cost of the installation itself; **(b)** the cost of related compliance obligations, such as those under the Clean Air Act (42 U.S.C. §7401 et seq.) and Clean Water Act (33 U.S.C. §1251 et seq.); and **(c)** the cost of reasonable alternatives.

ARGUMENT

I. CONTRARY TO THE RULING OF THE PUC, THE LEGISLATURE'S FINDING OF PUBLIC INTEREST WAS NOT "UNCONDITIONAL" – BUT CONDITIONAL UPON RECEIPT OF "ALL NECESSARY PERMITS AND APPROVALS" FROM GOVERNMENT AGENCIES, AND CONDITIONAL UPON "REASONABLE COSTS TO CONSUMERS."

In ruling that through the enactment of RSA 125-O: 11, VI "The Legislature has already made an **unconditional** determination that the scrubber project is in the public interest," (p. 31 hereto (emphasis added)), the PUC overlooked two important conditions. Either condition, standing alone, is sufficient to disprove the PUC's characterization of the determination as "unconditional."

The first condition is explicitly set forth in RSA 125-O:13 ("Compliance"), whose ¶I provides in pertinent part:

> The owner **shall install** and have operational scrubber technology to control mercury emissions at Merrimack Units 1 and 2 no later than **July 1, 2013**. The achievement of this **requirement** is **contingent** upon obtaining **all necessary permits and approvals** from federal, state, and local **regulatory agencies** and bodies; however, **all** such regulatory agencies and bodies are **encouraged** to give **due consideration** to the general court's finding that the installation and operation of scrubber technology at Merrimack Station is in the **public interest**.... [App. 9-10 (emphasis added).]

The PUC ruled that "the Legislature has made the public interest determination and ***required*** the owner of Merrimack Station, viz., PSNH, to install and have operational scrubber technology ... no later than July 1, 2013." P. 29 hereto (boldface and italics in original). That requirement appears in the very first sentence of §13. Significantly, however, the requirement is not absolute. The very next sentence of §13 makes it explicitly clear that "this requirement is **contingent** upon obtaining **all necessary permits and approvals**" (emphasis added) from government agencies. This "contingent" reference alone is conclusive evidence that the Legislature did not intend that PSNH receive an "automatic pass" on the issue of "public interest."

Yet the "contingent" reference is not the only such conclusive evidence within §13. By "encourag[ing]" regulatory bodies to give "due consideration" to the Legislature's finding of "public interest," §13 also makes it clear that those regulatory bodies **retain** the authority to

make a related decision. Significantly, §13 does **not** say that those regulatory bodies "shall **adopt**" or "shall **defer to**" the Legislature's finding of "public interest." Nor does it even say that they "**shall** give due consideration" to that finding. Rather, it merely says that they "are **encouraged** to give [such] due consideration."

Furthermore, it would be fair to infer that the Legislature also contemplated that regulatory bodies would take into account the **circumstances** under which the Legislature made its own finding. One such circumstance, of course, is the fact that the finding was made based in part on information from PSNH and DES that the cost would not exceed $250 million in 2013 dollars. *See* p. 4, above, and Argument II, below.

The second condition is that the technology come with "reasonable costs to consumers" (RSA 125-O:11, V and VI) — i.e., costs that "will not exceed 250 million dollars (2013$) or 197 million (2005$)." App. 152. As explained in Argument II, below, this condition of "reasonable costs" has been violated by the current cost estimate of $457 million.

The PUC's overlooking of these two important conditions was error. It viewed the public-interest finding in RSA 125-O:11, VI essentially in isolation, and failed to give adequate consideration to the companion provisions of §11, V and §13. It thus ran afoul of a principle of statutory construction counseled by this Court:

> We do not consider words and phrases in isolation, but rather within the context of the statute as a whole. This enables us to better discern the legislature's intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme.

In the Matter of Martin, 156 N.H. 818, 820 (2008).

II. AS USED IN RSA 125-O:11, THE TERM "REASONABLE COSTS TO CONSUMERS" IS AMBIGUOUS. ACCORDINGLY, TO ASCERTAIN ITS MEANING, THE PUC SHOULD HAVE CONSIDERED THE LEGISLATIVE HISTORY.

Again, RSA 125-O:11, V provides, "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 term "reasonable costs to consumers" prompts the question, What, specifically, did the Legislature mean? In other words, the term is ambiguous — or at least admits of more than one reasonable interpretation. "Where the statutory language is ambiguous or where more than one reasonable interpretation exists, we review legislative history to aid in our analysis." *Green Meadows Mobile Homes, Inc. v. City of Concord*, 156 N.H. 394, 395-96 (2007) (internal quotation marks omitted).

Here, the legislative history is clear and instructive. It dispels any doubt about what the Legislature meant by "reasonable costs to consumers." The Legislature received a specific cost estimate from PSNH and DES. That estimate was that "the total capital cost for this full redesign **will not exceed $250 million dollars (2013$) or $197 million (2005$).**" App. 152 (emphasis added). Just two years later, however, the cost had almost doubled, growing to $457 million. App. 36, 50.

The Legislature's finding of "reasonable costs to consumers" informs its finding of "public interest to … customers." Indeed, the two terms appear in successive paragraphs of the same statutory section — ¶¶ V and VI of §11 – and are separated by only 8 words:

> 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.**
>
> VI. The installation of **such** technology is in the **public interest** of the **citizens** of New Hampshire and the **customers** of the affected sources. [App. 9 (emphasis added).]

"Such" technology means technology with "reasonable costs to customers" — which in turn means costs that "will not exceed 250 million dollars (2013$) or 197 million (2005$)." App.

152. In other words, when the Legislature found in RSA 125-0:11, VI that "The installation of **such** technology is in the public interest" (emphasis added), it was referring to a technology with a cost of **only $250 million** (2013 dollars). It was not referring to technology with **nearly double** that cost — i.e., a cost of **$457 million.**

In its Order Denying Motions for Rehearing, the PUC said: "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 finding **at any dollar level above $250 million.**" P. 45 hereto, n. 6 (emphasis added). This is incorrect. The Commercial Ratepayers do not contend that a *de minimis* increase above $250 million (2013 dollars) would unreasonably exceed the Legislative intent. For example, if this case involved an increase to, say, only $255 million, the "reasonable costs" issue would be altogether different. However, no such *de minimis* increase is involved here. Even PSNH itself has characterized the actual increase as "significant" (App. 40, 48); and the PUC has characterized it as "substantial." P. 31 hereto.

Nor do the Commercial Ratepayers undertake to specify exactly where along a continuum a "crossover point" would occur — i.e., a point above which the cost would unreasonably exceed the Legislative intent. They acknowledge that such a "crossover point" exists somewhere along that continuum. Exactly where, however, need not be decided here — because this case is well beyond any such "crossover point." This is not a "close" case. It is, rather, one that involves a **near-doubling** of the costs to consumers in 2013 dollars. No one can reasonably argue that so high a cost is what the Legislature had in mind.

If, nevertheless, a counterargument is advanced to the effect that "such technology" would indeed include a cost as high as $457 million, then that same counterargument could be

used to support a cost as high as $1 billion, or even $10 billion. If the Legislature intended no ceiling to costs, so that near-doubling is permissible, then why isn't quadrupling — or even more — also permissible? The result is absurd — and thus could not have been what the Legislature intended. *E.g., Churchill Realty Trust v. City of Dover Zoning Bd. of Adjust.,* 156 N.H. 668, 676 (2008). The standard is "reasonable costs to consumers" — not "whatever costs to consumers." And when the Legislature established the "reasonable costs" standard, it had a specific amount in mind — one that would "**not exceed**" $250 million in 2013 dollars.

The legislative history thus directly refutes the contention that the PUC was barred by RSA 125-O:11 from making a public-interest determination on the scrubber technology. As is explained below, in Argument III, it should have done so — and it should have done so under RSA 369-B:3-a.

III. IN RULING THAT IT LACKS AUTHORITY UNDER RSA 369-B:3-a TO MAKE A FINDING OF PUBLIC INTEREST, THE PUC FAILED TO HARMONIZE RSA 125-O:11-18 WITH RSA 369-B:3-a.

The Commission erred in concluding that RSA 125-O: 11 and RSA 369-B:3-a conflict, and that RSA 125-O:11, as "the more recent, more specific statute" (p. 35 hereto) "prevail[s]" (*id.*). RSA 369-B:3-a was enacted in 2003, only 3 years before the enactment of RSA 125-O:11. RSA 369-B:3-a provides:

> The sale of PSNH fossil and hydro generation assets shall not take place before April 30, 2006. Notwithstanding RSA 374:30, subsequent to April 30, 2006, PSNH may divest its generation assets if the commission finds that it is in the economic interest of retail customers of PSNH to do so, and provides for the cost recovery of such divestiture. Prior to any divestiture of its generation assets, PSNH **may modify** or retire such generation assets **if the commission finds that it is in the public interest of retail customers of PSNH to do so**, and provides for the cost recovery of such modification or retirement. [App. 26 (emphasis added).]

RSA 369-B:3-a and RSA 125-O:11, VI may be rationally harmonized, and therefore must be. "Where reasonably possible, statutes should be construed as consistent with each other."

Petition of Public Service Co. of New Hampshire, 130 N.H. 265, 282 (1988) (internal quotation marks and citations omitted).

> [A]ll statutes upon the same subject-matter are to be considered in interpreting any one of them. Where reasonably possible, statutes should be construed as consistent with each other. When interpreting two statutes which deal with a similar subject matter, we will construe them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statute.

State v. Farrow, 140 N.H. 473, 475 (1995) (internal quotation marks and citations omitted). *Accord, In re Juvenile*, 156 N.H. 800, 801 (2008).

RSA 369-B:3-a requires the PUC to make a determination of whether installation of scrubber technology at Merrimack Station is "in the public interest of retail customers of PSNH." Certainly, RSA 125-O:11, VI does not expressly repeal this requirement. Nor should one readily conclude that the Legislature would impliedly repeal a requirement enacted only 3 years earlier. Yet that is the upshot of the PUC's decision. Even apart from the mere 3-year separation between the statutes' enactments, the PUC's decision overlooks the fact that "[i]n this state the climate for repeal by implication is frosty and inhospitable. The law does not favor repeal by implication if any other reasonable construction may avoid it." *Opinion of the Justices*, 107 N.H. 325, 328 (1966) (internal quotation marks omitted).

One such reasonable construction is the following: RSA 369-B:3-a must be read in light of RSA 125-O:13, I, which merely "**encourage[s]**" regulatory agencies, including the PUC, to give "**due consideration**" to the Legislature's finding of public interest under RSA 125-O:11, VI. This provision confirms that the Legislature did not intend that its finding of public interest under RSA 125-O:11, VI be given preemptive effect. Rather, it was simply to be given "due consideration"; and impliedly, such consideration would also take into account the circumstances under which the finding was made. *See* Argument I, above.

As suggested in Argument I, above, one such circumstance is the actual cost-estimate underlying the Legislature's finding that installation of the scrubber technology would be accomplished at "reasonable costs to consumers." RSA 125-O:11, VI. As explained in Argument II, above, that circumstance has now changed dramatically — with the cost estimate provided to the Legislature having grown in just two years from $250 million in 2013 dollars to $457 million. That expense — plus other reasonably related expenses (see Argument VI, below) — should be taken into account by the PUC when it conducts a hearing under RSA 369-B:3-a on whether the installation of scrubber technology at Merrimack Station is "in the public interest of retail customers of PSNH."

IV. CONTRARY TO THE RULING OF THE PUC, IT IS NOT "LIMITED" TO DETERMINING THE PRUDENCE OF COSTS AT A "LATER TIME."

The PUC erred in concluding that as a result of RSA 125-O:11-18 it is "**limited** to determining at a **later time** the prudence of the costs of complying with the requirements of RSA 125-O:11-18." P. 32 hereto. No such limitation appears on the face of RSA 125-O:11-18. Nor may any such limitation be reasonably inferred. The PUC's conclusion thus violates the following principle: "We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." *Lambert v. Belknap County Convention*, 157 N.H. 375, 378 (2008).

V. THE PUC HAS NOT GIVEN THE COMMERCIAL RATEPAYERS AN ADEQUATE OPPORTUNITY TO BE HEARD.

In deciding that as a result of RSA 125-O it "lacks authority to pre-approve installation" (p. 31 hereto), the PUC denied the Commercial Ratepayers an adequate opportunity to be heard on issues for which they may bear significant costs. Its decision is contrary to RSA 541-A:31, I, RSA 365:19, and N. H. Constitution, Pt. 1, Art. 12 (due process). Although the PUC "retains its

authority to determine prudence" of costs at a "later time" (p. 31 hereto), that post-installation determination is a belated, and therefore inadequate, opportunity for the Commercial Ratepayers to be heard.

RSA 541-A:31, I is mandatory: "An agency **shall** commence an adjudicative hearing if a matter has reached a stage at which it is considered a **contested** case, or if the matter is one for which a provision of law requires a hearing only upon the request of a party." (Emphasis added.) Certainly, the Commercial Ratepayers contest any allowance of the installation of the scrubber technology without a consideration of appropriate conditions and possible superior alternatives. Hence, they have a right to a hearing under RSA 541-A:31, I.

Similarly, the Commercial Ratepayers have a right to a hearing under RSA 365:19, which provides:

> In any case in which the commission may hold a hearing it may, before or after such hearing, make such independent investigation as in its judgment the public good may require; provided, that, whenever such investigation shall disclose any facts which the commission shall intend to consider in making any decision or order, such facts shall be stated and made a part of the record, and **any party whose rights may be affected shall be afforded a reasonable opportunity to be heard with reference thereto or in denial thereof.** [App. 33 (emphasis added).]

Both of the above-quoted statutes operate to give the Commercial Ratepayers a right to a hearing under RSA 369-B:3-a. Given the fact that the Commercial Ratepayers are retail customers of PSNH, such a hearing is particularly appropriate. Again, RSA 369-B:3-a provides that the PUC may allow a pre-divestiture modification of generation assets only if it finds that the modification is "in the public interest of retail customers of PSNH."

Although the above statutory provisions make it unnecessary for the Court to reach related constitutional concerns, they are nonetheless implicated. The PUC's decision has the effect of automatically allowing the installation of the scrubber technology without adequate

consideration of the interests of the Commercial Ratepayers, who may bear significant costs as a result. This violates their rights to due process. *See, e.g., Appeal of Mountain Springs Water Co., Inc.*, 123 N.H. 653, 657 (1983) (PUC's automatic penalty affecting certain persons was without "sufficient consideration given to certain due process concerns. *See* N. H. Const, pt. I, arts. 2, 12.").

VI. THE PUC MUST CONDUCT A PUBLIC INTEREST HEARING UNDER RSA 369-B:3-a, AND CONSIDER ALL ISSUES RELEVANT TO COSTS.

Again, RSA 369-B:3-a provides:

> The sale of PSNH fossil and hydro generation assets shall not take place before April 30, 2006. Notwithstanding RSA 374:30, subsequent to April 30, 2006, PSNH may divest its generation assets if the commission finds that it is in the economic interest of retail customers of PSNH to do so, and provides for the cost recovery of such divestiture. Prior to any divestiture of its generation assets, PSNH **may modify** or retire such generation assets **if the commission finds that it is in the public interest of retail customers of PSNH to do so**, and provides for the cost recovery of such modification or retirement. [App. 26 (emphasis added).]

The installation of the scrubber technology at Merrimack Station is a pre-divestiture modification of a PSNH fossil (coal-burning) generating plant. It thus fits squarely within the 4 corners of RSA 369-B:3-a.

In assessing "the public interest of retail customers of PSNH," the PUC should be mindful that one of the fundamental purposes of RSA 369-B is to "provide retail electric service at lower costs." RSA 369-B:1, I. In ascertaining whether a modification will support a finding of "retail electric service at lower costs," the PUC should not fragment the modification into discrete parts. Rather, it should examine the modification as a whole, considering all reasonably related parts together. Here, therefore, the PUC's analysis should not be confined solely to the cost of installation of the scrubber technology itself. Rather, it should take into account all other pertinent costs reasonably relating to that installation. Those costs would include, but not be

limited to: (A) costs of related compliance obligations under the Clean Air Act (Title V — 42 U.S.C. §7401 et seq.): (B) costs of related compliance obligations under the Clean Water Act (NPDES — 33 U.S.C. §1251 et seq.); and (C) costs of reasonable alternatives — in terms of environmental protection, public health, costs, and long-term energy benefits.[4]

Appeal of Easton, 125 N.H. 205 (1984), is instructive. It dealt with a petition to the PUC by the New Hampshire Electric Cooperative ("Co-op") under RSA 369 for authority to borrow money to continue to finance its interest in the Seabrook nuclear power project. The Co-op argued that the proceeding before the PUC should be limited to examining the amount of the proposed financing. The PUC essentially agreed, ruling that the proceedings were limited to the narrow question of whether the amount of the proposed financing was in the public good. Intervenors in the proceeding appealed, contending that the scope of the PUC's analysis was too narrow, and that the PUC's analysis should extend to the prudence of the object of the proposed financing. This Court ruled that the proceeding below had been unduly narrow. It remanded the case to the PUC, holding:

> [T]his Court long has held that the PUC has a duty to determine whether, **under all the circumstances**, the financing is in the **public good** — a decision which includes considerations **beyond** the terms of the proposed financing. We have held that the PUC may "attach reasonable conditions as it finds to be necessary in the public interest." [125 N.H. at 213 (emphasis added).]

Although *Easton* involved RSA 369, its rationale may be fairly applied to a proceeding under RSA 369-B:3-a. Here, therefore, a PUC "public interest" proceeding under RSA 369-B:3-a should take into account "all the circumstances" of the proposed modification — i.e., not only the cost of installation of the scrubber technology itself, but also the costs of related compliance obligations for air and water pollution, and the costs of reasonable alternatives.

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[4] The PUC itself apparently agrees, although only in the context of a "later prudence review." Pp. 46-47 hereto.

CONCLUSION

For the foregoing reasons, the Commercial Ratepayers respectfully submit that the PUC's decision should be reversed. The case should be remanded to the PUC to conduct a "public interest" hearing under RSA 369-B:3-a, and in so doing, to consider all issues relevant to costs raised by such customers and other affected parties, including: **(a)** the cost of the installation itself; **(b)** the cost of related compliance obligations, such as those under the Clean Air Act (42 U.S.C. §7401 et seq.) and Clean Water Act (33 U.S.C. §1251 et seq.); and **(c)** the cost of reasonable alternatives.

Respectfully submitted,
STONYFIELD FARM, INC.,
H & L INSTRUMENTS, LLC, and
GREAT AMERICAN DINING, INC.,
By their attorneys,
Sheehan Phinney Bass & Green, P.A.

Dated: March 23, 2009

By: _____

Edward A. Haffer, NH Bar No. 1052
1000 Elm Street
P.O. Box 3701
Manchester, NH 03105-3701
T: 603-627-8115
F: 603-641-2352
E: ehaffer@sheehan.com

REQUEST FOR ORAL ARGUMENT

The Commercial Ratepayers respectfully request oral argument, to be made by Mr. Haffer, not to exceed 15 minutes.

CERTIFICATE OF SERVICE

I certify that two copies of the foregoing have been mailed this date to the attached Service List.

_____
Edward A. Haffer

SERVICE LIST

Debra A. Howland
Executive Director & Secretary
NHPUC
21 S. Fruit Street, Suite 10
Concord, NH 03301-2429

Office of the Attorney General
33 Capitol St.
Concord, NH 03301-6397

Robert Bersak, Esq.
PSNH
780 N Commercial St
PO Box 330
Manchester NH 03105-0330

Gerald M Eaton, Esq.
PSNH
780 N Commercial St
PO Box 330
Manchester NH 03105-0330

Gary A Long
PSNH
780 North Commercial Street
PO Box 330
Manchester NH 03105-0330

Allen Desbiens
PSNH
780 N Commercial St
PO Box 330
Manchester NH 03105-0330

Meredith A. Hatfield, Esq.
Office of Consumer Advocate
21 South Fruit St Ste 18
Concord NH 03301

Rorie Hollenberg, Esq.
Office Of Consumer Advocate
21 South Fruit St Ste 18
Concord NH 03301-2429

Ken E. Traum
Office of Consumer Advocate
21 South Fruit St., Ste 18
Concord NH 03301-2429

Stephen R. Eckberg
Office Of Consumer Advocate
21 South Fruit St Ste 18
Concord NH 03301

Melissa Hoffer, Esq.
Conservation Law Foundation
27 N Main St
Concord NH 03302

Kristine E. Kraushaar, Esq.
Conservation Law Foundation
27 N Main St
Concord NH 03301-4930

Douglas Patch, Esq.
Orr & Reno, P.A.
PO Box 3550
Concord, NH 03302

Edward M.B. Rolfe
PO Box 361
Franconia NH 03580

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DE 08-103

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

Decision Concerning Statutory Authority

ORDER NO. 24,898

September 19, 2008

I. BACKGROUND

This investigation was opened by Secretarial Letter on August 22, 2008, following a quarterly earnings report filed by Northeast Utilities[1] 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, a coal-fired electric generation facility in the town of Bow, in order to reduce mercury emissions.

Pursuant to RSA 365:5 and 365:19, 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 effect on energy service rates if Merrimack Station were not in the mix of fossil and hydro facilities operated in New Hampshire." The Commission also noted that there was a potential statutory conflict as to the nature and extent of its authority relative to the scrubber

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

project. In particular, it cited 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. Consequently, 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.

PSNH moved on August 25, 2008 to accelerate the dates of the required filings and on the same date the OCA objected to accelerating the deadline for filing its memorandum of law. On August 28, 2008, the Commission denied the motion as it applied to the OCA's filing. PSNH filed its status report and memorandum of law on September 3, 2008, and the OCA filed its memorandum of law on September 11, 2008. In addition, Senator Theodore L. Gatsas, the New Hampshire State Building and Construction Trades Council, and Governor John H. Lynch filed letters, on September 5, 2008, September 9, 2008, and September 12, 2008, respectively, urging an expeditious review. On September 12, 2008, the Conservation Law Foundation, the Campaign for Ratepayer Rights and TransCanada Hydro each filed letters requesting that this docket be noticed for public participation.

II. MEMORANDA OF LAW

A. Public Service Company of New Hampshire

PSNH contends that, because the Legislature found in RSA 125-O:11, VI that the installation of scrubber technology is in the public interest, it is not necessary for the Commission to make a determination pursuant to RSA 369-B:3-a as to whether the installation is in the public interest. The essence of PSNH's argument is that the Legislature unambiguously mandated that PSNH install scrubber technology as soon as possible. PSNH asserts as well that

there is no conflict between RSA 125-O:11 and RSA 369-B:3-a, but that, to the extent such a conflict did exist, the later, more specific statute controls, which in this case means that RSA 125-O:11 would control. As a result, according to PSNH, the Legislature's public interest finding would prevail and the Commission would lack the authority to make a public interest determination.

Coincident with this line of argument, PSNH also concludes that the requirement of RSA 125-O:13, I that PSNH obtain all necessary approvals does not include Commission approvals inasmuch as the Legislature has already determined that it is in the public interest to install scrubber technology. In other words, PSNH takes the position that it is not necessary for the Commission to approve anything in the first instance. PSNH contends that the Commission's authority is limited in accord with RSA 125-O:18 to an after-the-fact prudence review of PSNH's design and installation of the scrubber. Finally, PSNH argues that RSA 125-O:13, IX evidences the Legislature's intent to reserve the power and authority to oversee the installation of the scrubber to itself.

B. Office of Consumer Advocate

The OCA contends that, because the Legislature did not expressly repeal RSA 369-B:3-a, PSNH may not modify the Merrimack Station unless the Commission first determines that the modification is in the public interest. Therefore, the OCA asserts that Commission approval is a necessary approval consistent with RSA 125-O:13. In rebuttal to PSNH's argument that there is no need for a Commission determination under RSA 369-B:3-a, the OCA states that PSNH overlooks the fact that PSNH's cost estimates for the scrubber project have increased by 80 percent.

In addition, the OCA contends that PSNH cannot proceed without Commission approval, pursuant to RSA 369:1, of the long term financing that the OCA believes will be required to complete the scrubber project. It argues that with any PSNH financing the Commission must conduct an "Easton" review and consider whether the planned uses to which the loan proceeds would be applied, and the affect on rates, are consistent with the public good. *See, Appeal of Easton*, 125 N.H. 205, 211 (1984). Furthermore, the OCA opines that the Commission has the lawful authority to conduct this investigation.

III. COMMISSION ANALYSIS

The central question of law here concerns the interpretation of two statutory provisions, namely, RSA 369-B:3-a and RSA 125-0:11.

RSA 369-B:3-a, which was enacted in 2003, states:

> **Divestiture of PSNH Generation Assets.** The sale of PSNH fossil and hydro generation assets shall not take place before April 30, 2006. Notwithstanding RSA 374:30, subsequent to April 30, 2006, PSNH may divest its generation assets if the commission finds that it is in the economic interest of retail customers of PSNH to do so, and provides for the cost recovery of such divestiture. **Prior to any divestiture of its generation assets, PSNH may modify or retire such generation assets if the commission finds that it is in the public interest of retail customers of PSNH to do so, and provides for the cost recovery of such modification or retirement.** [Emphasis added.]

RSA 125-O:11, which was enacted in 2006, states:

> **Statement of Purpose and Findings.** The general court finds that:
>
> I. It is in the public interest to achieve significant reductions in mercury emissions at the coal-burning electric power plants in the state as soon as possible. The requirements of this subdivision will prevent, at a minimum, 80 percent of the aggregated mercury content of the coal burned at these plants from being emitted into the air by no later than the year 2013. To accomplish this objective, the best known commercially available technology shall be installed at Merrimack Station no later than July 1, 2013.
>
> II. The department of environmental services has determined that the best known commercially available technology is a wet flue gas desulphurization system, hereafter "scrubber technology," as it best balances the procurement, installation, operation, and

plant efficiency costs with the projected reductions in mercury and other pollutants from the flue gas streams of Merrimack Units I and II. Scrubber technology achieves significant emissions reduction benefits, including but not limited to, cost effective reductions in sulfur dioxide, sulfur trioxide, small particulate matter and improved visibility (regional haze).

III. After scrubber technology is installed at Merrimack Station, and after a period of operation has reliably established a consistent level of mercury removal at or greater than 80 percent, the department will ensure through monitoring that that level of mercury removal is sustained, consistent with the proven operational capability of the system at Merrimack Station.

IV. To ensure that an ongoing and steadfast effort is made to implement practicable technological or operational solutions to achieve significant mercury reductions prior to the construction and operation of the scrubber technology at Merrimack Station, the owner of the affected coal-burning sources shall work to bring about such early reductions and shall be provided incentives to do so.

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.

VI. The installation of such technology is in the public interest of the citizens of New Hampshire and the customers of the affected sources. [Emphasis added.]

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

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

It is often the case in disputes as to the interpretation of a statute or a contract that both sides to the dispute contend that the statutory or contractual language is clear on its face, yet they come to diametrically opposed conclusions about the meaning of the relevant provisions. That is the situation here.

PSNH contends that RSA 125-O:11 et seq. is "clear, straightforward, and unambiguous in its mandate." PSNH Memorandum, p.4. It states as well that interpretation of the statute is

"not difficult." *Id.*, p.7. It further contends that there is no conflict between RSA 125-O:11 and RSA 369-B:3-a because the Legislature has already made in RSA 125-O:11 the "precise finding" as to the public interest of the scrubber technology that would have been the subject of a proceeding under RSA 369-B:3-a. *Id.*, p. 12-13. Thus, PSNH asserts that the Legislature has superseded the Commission's authority to make a public interest finding inasmuch as the "finding has been made, and is clearly and definitively embodied in the law." *Id.*, p.14.

At the same time, the OCA contends that there is no conflict between RSA 369-B:3-a and RSA 125-O:11 and that the two statutes must be taken together. OCA Memorandum, p.7. It argues that PSNH may not proceed with the modifications required by RSA 125-O:11 "until it obtains the PUC approvals required by statutes including RSA 369-B:3-a and RSA 369." *Id.* The OCA further asserts that "the Legislature clearly contemplated and required review by the PUC." *Id.*, p.8.

Obviously, the arguments made by PSNH and the OCA as to the nature and extent of the Commission's authority with regard to the installation of scrubber technology are irreconcilable. PSNH says we do not have the authority to determine whether the scrubber project is in the public interest, while the OCA says that we do. We must decide which formulation is correct. In order to interpret the relevant statutory language we must first examine its plain and ordinary meaning. If the language of the statutes does not unambiguously yield a meaning, or if the relevant statutes conflict, then we look to the Legislature's intent as revealed through a reading of the overall statutory scheme, legislative history and recognized rules of statutory construction. *See, Appeal of Pinetree Power, Inc.*, 152 N.H. 92, 96 (2005); and *Petition of Public Service Co. of N.H.*, 130 N.H. 265, 282-83 (1988).

RSA 369-B:3-a states that prior to divestiture PSNH may modify a generation asset "if the commission finds that it is in the public interest of retail customers of PSNH to do so." RSA 125-O:11, VI states that the installation of scrubber technology by PSNH at the Merrimack Station "is in the public interest of the citizens of New Hampshire and the customers of the affected sources." It appears on their face that these two provisions are mutually exclusive and cannot logically co-exist. In the former, the Commission must make a determination of the public interest before PSNH can go forward with the scrubber project, while in the latter the Legislature has determined that the scrubber project is in the public interest and has directed PSNH to go forward with the project and have it operational no later than July 1, 2013. Accordingly, these provisions conflict inasmuch as one requires Commission approval and the other does not.

Nevertheless, there are two possible arguments which could lead to the conclusion that the statutes can co-exist. The first argument concerns whether "modification" and "installation" are equivalent concepts. If the concepts concerned different subject matter or activities, it could be argued that, despite the Legislature's finding that installation of scrubbers is in the public interest, PSNH also needs a Commission finding that a modification is in the public interest in order for PSNH to install scrubbers. The second argument concerns whether the "public interest of retail customers of PSNH" and the "public interest of the citizens of New Hampshire and the customers of the affected sources" are equivalent standards. If the standards concerned entirely distinct target populations, it could be argued that, despite the Legislature's finding that installation of scrubbers is in the public interest of the customers of affected sources, PSNH also needs a Commission finding regarding whether installation is in the public interest of PSNH's retail customers.

With respect to the first argument, we find that the installation of scrubber technology constitutes a modification to the Merrimack Station, and therefore the statutes concern the same subject matter or activities. This finding is consistent with our finding in *Public Service Company of New Hampshire*, 89 NH PUC 70, 90 (2004) Order No. 24,276 that the construction of a boiler at the Schiller Station to burn wood chips was a modification to the existing facility subject to the Commission's authority pursuant to RSA 369:3-a.

As for the second argument, we find that the "public interest of retail customers of PSNH" is the same as the "public interest of...the customers of the affected sources" because the customers of the affected sources are, in fact, PSNH retail customers. The standard or target population in RSA 369-B:3-a is a subset of the standard or target population in RSA 125-O:11, VI. Therefore, the Legislature's finding under RSA 125-O:11, VI subsumes any finding the Commission might make under RSA 369-B:3-a.

Having disposed of arguments that the provisions are reconcilable, the inquiry then shifts to which of the two conflicting statutes prevails. PSNH argues that RSA 125-O:11 prevails, while the OCA argues that RSA 369-B:3-a prevails. PSNH notes that when two statutes conflict, the more recent and specific statute controls over the older statute of general application. *See, Bel Air Associates. Dept. of Health and Human Services*, 154 N.H. 228, 233 (2006), *citing Petition of Public Serv. Co. of N.H.*, 130 N.H. 265, 283 (1988). PSNH states that RSA 369-B:3-a, enacted in 2003, deals with general, undefined potential modifications to its generation assets, while RSA 125-O:11, enacted in 2006, deals with a specific modification to a specific generating station, i.e., the installation of scrubbers at Merrimack Station.

The OCA observes that the Legislature "is not presumed to waste words or enact redundant provisions." OCA Memorandum, p. 7 *citing, Town of Amherst v. Gilroy*, 950 A.2d

193, 197, ___ N.H. ___ (2008). OCA further argues that the legislature is presumed to be "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." *Id.*, p.8, *citing, Presumptions in Aid of Construction,* 82 C.J.S. Statutes §310. Finally, the OCA states that if the "Legislature wanted to repeal or limit the effectiveness of RSA 369-B:3-a...it could have done so expressly." *Id.*

As noted above, we cannot harmonize RSA 369-B:3-a and RSA 125-O:11. If we proceed under RSA 369-B:3-a as the OCA proposes, then we would be effectively ignoring the Legislature's finding that the installation of the scrubber is in the public interest. On the other hand, if we do not proceed under RSA 369-B:3-a, we would arguably be allowing PSNH to ignore the Legislature's directive to secure from the Commission a finding as to the public interest prior to modifying its generation asset. Thus, in our view, the Legislature has enacted incompatible provisions.

We conclude 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. We do not find it reasonable to conclude that the Legislature would have made a specific finding in 2006 that the installation of scrubber technology at the Merrimack Station is in the public interest, set rigorous timelines and incentives for early completion, and provided for annual progress reports to the Legislature, while simultaneously expecting the Commission to undertake its own review, conceivably arrive at a different conclusion, and certainly add significant time to the process.[2] If we concluded otherwise, we would be nullifying the Legislature's public interest finding and rendering it meaningless.

[2] The OCA urges that we proceed expeditiously with a review pursuant to RSA 369-B:3-a. Such an undertaking would be an adjudicative proceeding allowing for the full range of due process requirements, including testimony by

Furthermore, RSA 369-B:3-a provides that "... PSNH ***may*** modify or retire such generation assets if the commission finds that it is in the public interest ..." (emphasis added). This permissive clause allows PSNH to propose and then undertake a modification of a generation asset if the Commission makes a finding that it is in the public interest. In this instance the Legislature has made the public interest determination and ***required*** the owner of the Merrimack Station, viz., PSNH, to install and have operational scrubber technology to control mercury emissions no later than July 1, 2013. Accordingly, based upon our reading of RSA 125-O as a whole, we find that the Legislature did not intend that PSNH be required to seek Commission approval pursuant to RSA 369-B:3-a for a modification that the Legislature has required and found to be in the public interest. Thus, we conclude that an RSA 369:3-a proceeding has been obviated by the Legislature's findings in RSA 125-O:11.

Our finding that the Legislature intended its findings in RSA 125-O:11 to foreclose a Commission proceeding pursuant to RSA 369-B:3-a is supported by the overall statutory scheme of RSA 125-O:11 et seq. as well as its legislative history. A review of the Senate Journal for April 20, 2006, at p. 935 et seq., shows that the members of the Senate Finance Committee were focused largely on the timing of installation and the prospect that PSNH could install the scrubber technology in advance of the July 1, 2013 deadline. The legislative history supports a conclusion that the Legislature viewed time to be of the essence. This conclusion is consistent with the economic performance incentives that PSNH can earn, pursuant to RSA 125-O:16, if the scrubber project comes on line prior to July 1, 2013. Finally, RSA 125-O:13, IX directs PSNH to report annually to the legislative oversight committee on electric utility restructuring the

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PSNH and other interested parties, discovery, cross-examination of witnesses, briefs, issuance of a decision, motions for rehearing and appeals. The only proceeding held pursuant to RSA 369-B:3-a took a year and a half. PSNH filed its petition to modify the Schiller Station on August 28, 2003. The Commission issued its decision on February 6, 2004. The Supreme Court issued its opinion upholding the Commission's decision on April 4, 2005.

progress and status of installing the scrubber technology including any updated cost information. This reporting requirement also suggests the Legislature's intent to retain for itself duties that it would otherwise expect the Commission to fulfill if RSA 369-B:3-a applied.

The OCA also makes a collateral argument based on RSA 125-O:13 that PSNH must obtain "all necessary permits and approvals from federal, state, and local regulatory agencies and bodies." It contends that the Commission is one such agency and that RSA 369-B:3-a is one such approval. In opposition, PSNH argues that an approval pursuant to RSA 369-B:3-a is not necessary because the Legislature has already made the public interest finding that would be the subject of such a proceeding. 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.

The OCA posits as well that Commission approval pursuant to RSA 369:1 of the financing needed to install the scrubber technology is a necessary approval required by RSA 125-O:13. OCA states that it "is not aware of the extent of PSNH's outstanding debt at this time, but it seems clear that with... [its] current debt limits, PSNH will require additional financing to complete the scrubber project." OCA Memorandum, p.4. The OCA also asserts that it would be prudent for PSNH to seek financing approval now and that it would be unfair to ratepayers to wait for a financing proceeding. We find that financing approval pursuant to RSA 369:1 is not necessary prior to the start of construction. We note that as a general matter public utilities are not required to seek pre-approval of financing before undertaking a construction project. The OCA does point out, however, the important issue of prudence, which we discuss further below. We observe here that the timing of obtaining financing and the resulting effects on rates, terms and conditions of such financing are issues that may fairly be raised in a prudence proceeding.

PSNH asserts that the nature and extent of the Commission's authority with respect to the installation of the scrubber project is described in RSA 125-O:18, which states:

> **Cost Recovery.** If the owner is a regulated utility, the owner shall be allowed to recover all prudent costs of complying with the requirements of this subdivision in a manner approved by the public utilities commission. During ownership and operation by the regulated utility, such costs shall be recovered via the utility's default service charge. In the event of divestiture of affected sources by the regulated utility, such divestiture and recovery of costs shall be governed by the provisions of RSA 369-B:3-a.

Consistent with our findings above, we conclude that the Commission lacks authority to pre-approve installation, but that it retains its authority to determine prudence. We also observe that the last sentence of this provision bolsters our finding that the Legislature intended to rescind the Commission's authority to pre-approve the scrubber installation under RSA 369-B:3-a. Specifically, the Legislature expressly provided that in the event of divestiture of Merrimack Station, such divestiture and recovery of costs would be governed by RSA 369-B:3-a. The Legislature would only need to make special notice that RSA 369-B:3-a would apply in the event of divestiture, if it intended that RSA 369-B:3-a not apply absent divestiture, which is the case before us.

We are sensitive to the OCA's point that the cost estimates for the scrubber project have increased approximately 80 percent from $250 million to $457 million in a relatively short time. In fact, that circumstance is what prompted us to open this investigation. However, a substantial increase in the cost estimate does not constitute a grant of Commission authority to determine whether the project is in the public interest. The Legislature has already made an unconditional determination that the scrubber project is in the public interest. Nowhere in RSA 125-O does the Legislature suggest that an alternative to installing scrubber technology as a means of mercury compliance may be considered, whether in the form of some other technology or retirement of the facility. Furthermore, RSA 125-O does not: (1) set any cap on costs or rates; (2) provide for

Commission review under any particular set of circumstances; or (3) establish some other alternative review mechanism. Therefore, we must accede to its findings.

IV. CONCLUSION

The Commission has only those powers delegated to it by the Legislature. *See, Appeal of Public Service Co. of N.H.*, 122 N.H. 1062, 1066 (1982). RSA 369-B:3-a delegated to the Commission, in 2003, the authority to determine whether to pre-approve modifications to PSNH's fossil and hydro generating plants. Subsequently, in 2006, the Legislature enacted RSA 125-O:11, overriding its grant of pre-approval authority for a specific modification to the Merrimack Station. Accordingly, the Commission's authority is limited to determining at a later time the prudence of the costs of complying with the requirements of RSA 125-O:11-18 and the manner of recovery for prudent costs. In order to meet our obligations in that regard, we will continue our review of the documents already provided by PSNH, require additional documentation as necessary, and keep this docket open to monitor PSNH's actions as it proceeds with installation of the scrubber technology.

Based upon the foregoing, it is hereby

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

By the Public Utilities Commission of New Hampshire this nineteenth day of September, 2008.

Thomas B. Getz Chairman	Graham J. Morrison Commissioner	Clifton C. Below Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary

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 Utilities[1] 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.

[1]Northeast 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 RSA125-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 Act[2] 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 REHARING

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. Rolf's motion until October 23, 2008. As a result, PSNH takes the position that the Commission may not consider Mr. Rolf'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. Rolfe[4] 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