



CONSERVATION LAW FOUNDATION

April 13, 2009

HAND-DELIVERED

The Honorable Eileen Fox, Clerk
New Hampshire Supreme Court
Supreme Court Building
One Charles Doe Drive
Concord, New Hampshire 03301

RE: Appeal of Stonyfield Farm, Inc., H & L Instruments, LLC, and Great American Dining, Inc. Under RSA 541:6 and RSA 365:21 From Order of the Public Utilities Commission

Dear Clerk Fox:

Enclosed for filing in the above-referenced matter, please find an original plus seven copies of the following:

- (1) Objection of Campaign for Ratepayers' Rights, Clean Water Action, Conservation Law Foundation, New Hampshire Sierra Club, Union of Concerned Scientists, and Resident's Environmental Action Committee for Health to Motion to Strike *Amicus Curiae* Brief;
- (2) Motion of Campaign for Ratepayers' Rights, Clean Water Action, Conservation Law Foundation, New Hampshire Sierra Club, Union of Concerned Scientists, and Resident's Environmental Action Committee for Health for Permission to File a Reply to Objection to Assented-To Motion for Leave to File *Amicus Curiae* Brief; and
- (3) Memorandum in Support of Objection to Motion to Strike *Amicus Curiae* Brief and Motion for Permission to File a Reply to Objection to Assented-To Motion for Leave to File *Amicus Curiae* Brief.

Thank you for your assistance in this matter.

Very truly yours,

Kristine E. Kraushaar, Esq.
Staff Attorney

KEK/dl

Encls.

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THE STATE OF NEW HAMPSHIRE
SUPREME COURT

APPEAL OF STONYFIELD FARM, INC., H & L INSTRUMENTS, LLC, AND
GREAT AMERICAN DINING, INC. UNDER RSA 541:6 AND RSA 365:21 FROM
ORDER OF PUBLIC UTILITIES COMMISSION

DOCKET NO. 2008-0897

OBJECTION OF CAMPAIGN FOR RATEPAYERS' RIGHTS, CLEAN WATER
ACTION, CONSERVATION LAW FOUNDATION, NEW HAMPSHIRE SIERRA
CLUB, UNION OF CONCERNED SCIENTISTS, AND RESIDENT'S
ENVIRONMENTAL ACTION COMMITTEE FOR HEALTH TO MOTION TO
STRIKE *AMICUS CURIAE* BRIEF

Pursuant to New Hampshire Supreme Court Rule 21(3), Campaign for Ratepayers' Rights ("CRR"), Clean Water Action ("CWA"), Conservation Law Foundation ("CLF"), New Hampshire Sierra Club ("Sierra Club"), Union of Concerned Scientists ("UCS"), and Resident's Environmental Action Committee for Health ("REACH") (collectively "*Amici*" or "Parties"), hereby object to Public Service Company of New Hampshire's ("PSNH") Motion to Strike *Amicus Curiae* Brief ("Brief"). In support of this Objection, *Amici* state as follows:

1. The Brief properly sets forth relevant information and argument to aid the Court in its deliberations on the questions presented by this appeal.
2. The argument and information contained in the Brief and materials appended thereto reflect *Amici*'s unique perspective on the issues and illuminate matters important to the disposition of the case that would not otherwise be brought to the Court's attention.
3. Accordingly, and as set forth in the accompanying Memorandum of Law, the Brief complies with both New Hampshire law and Supreme Court

Rules. Therefore, PSNH's Motion to Strike *Amicus Curiae* Brief should be denied.

4. In addition, *Amici's* request for oral argument should be granted.
5. For reasons also set forth in the Memorandum of Law, *Amici* have filed an accompanying Motion for Permission to File a Reply to PSNH's Objection to Assented-To Motion For Leave to File *Amicus Curiae* Brief.

WHEREFORE, *Amici* respectfully request this Honorable Court:

- A. Deny PSNH's Motion to Strike *Amicus Curiae* Brief;
- B. Grant *Amici's* request to participate at oral argument; and
- C. Grant such other and further relief as the Court deems just and equitable.

Dated: April 13, 2009

Respectfully submitted,

CAMPAIGN FOR RATEPAYERS' RIGHTS

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RESIDENT'S ENVIRONMENTAL ACTION
COMMITTEE FOR HEALTH

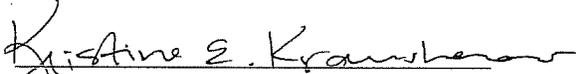
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Certificate of Service

I hereby certify that on April 13, 2009, I served the foregoing Objection Of Campaign For Ratepayers' Rights, Clean Water Action, Conservation Law Foundation, New Hampshire Sierra Club, Union Of Concerned Scientists, And Resident's Environmental Action Committee For Health To Motion To Strike *Amicus Curiae* Brief by first class mail, postage prepaid, copies and notice thereof to the parties on the attached service list.

Respectfully submitted,


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THE STATE OF NEW HAMPSHIRE
SUPREME COURT

APPEAL OF STONYFIELD FARM, INC., H & L INSTRUMENTS, LLC, AND
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| Wilbur A. Glahn, Esq. Mark C. Rouvalis, Esq. Steven J. Dutton, Esq. McLane, Graf, Raulerson & Middleton, PA 900 Elm Street, P.O. Box 326 Manchester, NH 03105 | Anne Ross, General Counsel N.H. Public Utilities Commission 21 South Fruit Street, Suite 10 Concord, NH 03301-2429 |
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THE STATE OF NEW HAMPSHIRE
SUPREME COURT

APPEAL OF STONYFIELD FARM, INC., H & L INSTRUMENTS, LLC, AND
GREAT AMERICAN DINING, INC. UNDER RSA 541:6 AND RSA 365:21 FROM
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DOCKET NO. 2008-0897

MOTION OF CAMPAIGN FOR RATEPAYERS' RIGHTS, CLEAN WATER
ACTION, CONSERVATION LAW FOUNDATION, NEW HAMPSHIRE SIERRA
CLUB, UNION OF CONCERNED SCIENTISTS, AND RESIDENT'S
ENVIRONMENTAL ACTION COMMITTEE FOR HEALTH FOR PERMISSION
TO FILE A REPLY TO OBJECTION TO ASSENTED-TO MOTION FOR
LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to New Hampshire Supreme Court Rule 21(3-A), Campaign for Ratepayers' Rights ("CRR"), Clean Water Action ("CWA"), Conservation Law Foundation ("CLF"), New Hampshire Sierra Club ("Sierra Club"), Union of Concerned Scientists ("UCS"), and Resident's Environmental Action Committee for Health ("REACH") (collectively "*Amici*" or "Parties"), hereby move for permission to file a reply to Public Service Company of New Hampshire's ("PSNH") Objection to the Parties' Assented-To Motion For Leave to File *Amicus Curiae* Brief. In support of this Motion, *Amici* state as follows:

1. On March 20, 2009, PSNH assented to CLF's participation in the Stonyfield Appeal as *amicus curiae*. PSNH does not dispute that it assented to CLF's request. See Affidavit of Attorney Robert A. Bersak at ¶ 3, Exhibit 1 to PSNH's Memorandum in Support of Objection to "Assented-To" Motion for Leave to File *Amicus Curiae* and Motion to Strike *Amicus Curiae* Brief.

2. On March 23, 2009, the Parties filed Brief of *Amici Curiae*, Campaign for Ratepayers' Rights, Clean Water Action, Conservation Law Foundation, Resident's

Environmental Action Committee For Health, New Hampshire Sierra Club, Union Of Concerned Scientists (“Brief”).

3. *Amici* submitted with the Brief an Assented-To Motion for Leave to File *Amicus Curiae* Brief.

4. On April 1, 2009, PSNH filed an objection to the Parties’ Assented-To Motion For Leave to File *Amicus Curiae* Brief. CLF acknowledges that, during the March 20, 2009, telephone call with counsel for PSNH, counsel for CLF inadvertently referred only to CLF by name when seeking assent to participate in the Stonyfield Appeal as *amicus curiae*. It was counsel’s good faith intent to identify all Parties.

5. The Parties have expertise relevant to the questions presented in this appeal, as demonstrated by the descriptions of the individual organizations, set forth in the Brief, pp. 2-4, and the accompanying motion for leave to file same.

6. Accordingly, and as set forth in the accompanying Memorandum of Law, *Amici’s* Motion for Permission to File a Reply to PSNH’s Objection to Motion for Leave to File *Amicus Curiae* Brief should be granted.

7. In addition, *Amici’s* request for oral argument should be granted.

8. For reasons also set forth in the Memorandum of Law, *Amici* have filed an accompanying Objection to PSNH’s Motion to Strike *Amicus Curiae* Brief.

WHEREFORE, *Amici* respectfully request this Honorable Court:

- A. Grant *Amici's* Motion for Permission to File a Reply to PSNH's Objection to Motion for Leave to File *Amicus Curiae* Brief;
- B. Grant *Amici's* request to participate at oral argument; and
- C. Grant such other relief as the Court deems just and equitable.

Dated: April 13, 2009

Respectfully submitted,

CAMPAIGN FOR RATEPAYERS' RIGHTS

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RESIDENT'S ENVIRONMENTAL ACTION
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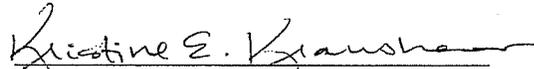
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Certificate of Service

I hereby certify that on April 13, 2009, I served the foregoing Motion of Campaign For Ratepayers' Rights, Clean Water Action, Conservation Law Foundation, New Hampshire Sierra Club, Union Of Concerned Scientists, And Resident's Environmental Action Committee For Health For Permission To File A Reply To Objection To Assented-To Motion For Leave To File *Amicus Curiae* Brief by first class mail, postage prepaid, copies and notice thereof to the parties listed on the attached service list.

Respectfully submitted,



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THE STATE OF NEW HAMPSHIRE
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MEMORANDUM IN SUPPORT OF OBJECTION TO MOTION TO STRIKE
AMICUS CURIAE BRIEF AND MOTION FOR PERMISSION TO FILE A
REPLY TO OBJECTION TO ASSENTED-TO MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF

Pursuant to New Hampshire Supreme Court Rules 21(2) and 21(3), Campaign for Ratepayers' Rights ("CRR"), Clean Water Action ("CWA"), Conservation Law Foundation ("CLF"), New Hampshire Sierra Club ("Sierra Club"), Union of Concerned Scientists ("UCS"), and Resident's Environmental Action Committee for Health ("REACH") (collectively "*Amici*" or "Parties"), hereby submit this memorandum of law in support of both their Objection to Motion to Strike *Amicus Curiae* Brief ("Brief") and their Motion for Permission to File a Reply to Objection to Assented-To Motion for Leave to File *Amicus Curiae* Brief.

I. INTRODUCTION

At every turn, Public Service Company of New Hampshire ("PSNH") has fought to prevent any light from being shed on the facts surrounding these two simple questions: why has the price of the wet flue gas desulphurization system installation ("Scrubber Project") nearly doubled to \$457 million? And, with nearly a half billion now projected to be spent on the Scrubber Project, what are the other costs necessary to continue operating Merrimack Station? PSNH's ceaseless effort to obscure information necessary for informed decision making in connection with the Scrubber Project—including now its

attempt to prevent the Parties from participating as *amici*—strikes at the heart of this appeal. PSNH seeks to avoid a fully informed review of the issue by the Court, just as it opposed a transparent and thorough review of Scrubber Project costs by the New Hampshire Public Utilities Commission (“Commission”).

Amici seek to assist the Court in obtaining a fair and fully informed result by bringing relevant information and argument to the Court’s attention through the Brief, the materials appended thereto, and the opportunity for participation in oral argument before the Court.

II. FACTUAL BACKGROUND

On September 12, 2008, CLF submitted a letter to the Commission Secretary urging the Commission to publicly notice Docket No. DE 08-103 and provide the normal procedural vehicles for ensuring public participation. See Brief of Stonyfield Farm *et al.*, p.5 & n.2. CLF stated in that letter that, because its members’ “rights, duties, privileges, immunities or other substantial interests may be affected by the proceeding,” it would meet the Commission’s standard for intervention pursuant to RSA 541-A:32.I(b). Despite substantial public interest, see id., and the important energy, economic, and environmental implications of the questions posed by the Commission in Docket No. DE-103, the Commission nevertheless declined to publicly notice the docket, thereby precluding CLF’s—and others’—meaningful participation.¹ On September 19, 2008, the Commission issued an order finding it lacked authority to review the Scrubber Project.

¹ CRR also submitted a letter requesting the matter be docketed for full public participation. See Brief of Transcanada Hydro Northeast Inc. *Amicus Curiae* at 8 (citing to *Stonyfield Appeal* at 15).

On January 23, 2009, the Court accepted the appeal of Stonyfield Farm, Inc., H & L Instruments, LLC, and Great American Dining, Inc. (“Appellants”) from that order, agreeing to reconsider the Commission’s determination that it lacked authority to review the Scrubber Project. In support of Appellants, on March 23, 2009, *Amici* submitted the Brief, as well as a motion for leave to file the Brief. *Amici* adopted the questions presented by Appellants (as well as Appellants’ Factual and Procedural Background), and presented, in both the Brief and the materials appended thereto, information and argument vital and relevant to those questions.

III. ARGUMENT

A. *Amici* Properly Present Relevant Argument And Information To Assist The Court Regarding The Questions Presented On Appeal.

Amicus curiae means friend of the court. “[T]he role of an amicus is to assist the court “in cases of general public interest by making suggestions to the court, by providing supplementary assistance to existing counsel, and by insuring a complete and plenary presentation of difficult issues so that the court may reach a proper decision.” Sierra Club v. Wagner, 581 F.Supp.2d 246, 250 (D.N.H. 2008) (citing Newark Branch, N.A.A.C.P. v. Harrison, 940 F.2d 792, 808 (3d Cir. 1991)). Because an *amicus curiae*, as a nonparty, has a different perspective from the principal litigants, it performs a valuable role for the judiciary, broadening the court’s perspective on the issues raised and facilitating consideration of a wide variety of information and points of view. *See*, 4 Am. Jur. 2d *Amicus Curiae* § 1 (2008) (citing Connerly v. State Personnel Bd., 129 P. 3d 1 (Cal. 2006)). Indeed, “a court is usually delighted to hear additional argument from able

amici that will help the court toward right answers.” Mass. Food Ass’n v. Mass. Alcoholic Beverages Control Comm’n, 197 F.3d 560, 567 (1st Cir. 1999).

Amici seek to bring precisely such information to the Court’s attention—relevant information and argument that will illuminate the issues at hand. The Brief explicitly adopts questions presented by Appellants. The content of the Brief, as well as the materials appended thereto, directly address those questions in an attempt to help the Court decide whether the Commission had authority to review the Scrubber Project, and, if so, what the scope of such review should be. Specifically, Appellants’ sixth question presented states:

In 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?

Appellants’ Brief at 2 (citing App. 154). Accordingly, the Brief is directly on point in addressing those costs and presenting argument as to why the Commission’s review of such costs is warranted. The Brief provides information on the scientific consensus now leading to development of federal carbon dioxide regulations and anticipated compliance costs for Merrimack Station; pending federal mercury regulations that will be more stringent, and more costly, than compliance with the Scrubber Law; likely costs associated with Merrimack Station’s pending Clean Water Act permit renewal; and feasible potential alternatives to Merrimack Station.

Contrary to PSNH's characterization of the information set forth in the Brief as "burdensome, irrelevant, and immaterial," see PSNH's Memorandum In Support Of Objection to "Assented-To" Motion For Leave To File *Amicus Curiae* And Motion to Strike *Amicus Curiae* Brief, at 12, the Brief (1) identifies complementary legal authority for the Commission's review of the Scrubber Project; (2) identifies for the Court similar recent utility commission action in other states; and, (3) focuses on an area of collective *Amici* expertise, the reasonably anticipated future environmental compliance costs—in addition to the nearly half billion projected Scrubber Project costs—associated with continued Merrimack Station operations. Those costs underscore the adverse economic and environmental impacts that would flow from an affirmance by this Court of the Commission's determination that it lacks authority to review the nearly doubled Scrubber Project and related costs. The general arguments on these points presented in the Brief stand on their own without support from, or reference to, the materials appended to the *Amici* Brief. *Amici* have, nevertheless, cited in the Brief, and appended for the Court's benefit, more specific information, including two documents regarding the estimated future costs of continued Merrimack Station operations and potential alternatives. See Kenneth A. Colburn, Compendium of Concerns Regarding the Proposed Installation of a Scrubber at PSNH's Merrimack Station in Bow, NH (January 5, 2009) and Synapse Energy Economics, Inc., Initial Report to the New Hampshire Senate Energy, Environment and Economic Development Committee on PSNH's Merrimack Station Scrubber Project (March 20, 2009).

B. Critically Important Facts Relevant To This Court's Determination Will Not Be Considered If The Brief Is Struck.

“[I]n its ordinary use, [the term *amicus curiae*] implies the friendly intervention of counsel to remind the court of some matter of law which has escaped its notice, and in regard to which it appears to be in danger of going wrong.” Blanchard v. Boston, 86 N.H. 263, 167 A. 158, 160 (1933), citing Taft v. N. Transp. Co., 56 N.H. 414, 416 (1876). As such, an *amicus curiae*'s function is to “make useful suggestions to the court.” Id., at 160. The Parties' argument, included in the Brief, that the Commission's review of the Scrubber Project would be consistent with the Commission's authority pursuant to RSA 378:39 is exactly this sort of suggestion. Furthermore, the New Hampshire Supreme Court rules provide some direction that the role of an *amicus curiae* is to include relevant facts or questions of law that have not been, or there is reason to believe will not adequately be, presented by the parties. See, Sup. Ct. R. 30(2).

This function is particularly important here, where PSNH has made every effort to prevent review of its activities in connection with the Scrubber Project by claiming the protection of RSA 125-O. PSNH opposed review by the Commission of Scrubber Project cost increases in Commission Docket DE 08-103. PSNH currently is opposing, in Commission Docket DE 08-145, review of the \$11.4 million in costs to modify Merrimack Unit 2, claiming that work to increase power output to meet the scrubber's power requirements need not be reviewed pursuant to 369:B-3-a. And, PSNH is also currently opposing, in Commission Docket DE 09-033, review of the financing for the Scrubber Project and other generation capital expenditures at Merrimack Station.

1. Relevant Publically Available DES and ISO Records, a Commission Order, and PSNH's Own Regulatory Submissions Regarding the Scrubber Project Should Not Be Stricken.

The information PSNH seeks to strike includes pollution emissions data provided by the New Hampshire Department of Environmental Services;² ISO-New England's record of interconnection requests;³ an Order from the Commission requiring PSNH to study whether Merrimack Station should be retired;⁴ and, most remarkably, PSNH's own submissions to New Hampshire state regulatory agencies in connection with the Scrubber Project.⁵

The Commission's Order, DES's published emissions data for New Hampshire sources, and ISO's record of recent interconnection requests are the types of materials that could be judicially noticed. That the Commission recently issued an order in the Least Cost Integrated Resource Planning ("LCIRP") docket requiring PSNH to perform in the future a study to determine whether Merrimack Station should be retired is beyond debate—and highly relevant. And, PSNH does not—because it cannot—dispute the authenticity of its own regulatory submissions, or the fact that the submissions were made. The Court should not strike these materials, or any reference to them.

² ISTEPS Power Plants Emissions Data (2007 inventory), attached to *Amici* Brief at A-63.

³ ISO-New England, "Interconnection Requests to the Administered Transmission System" (January 31, 2009), attached to *Amici* Brief at A-70.

⁴ Commission Order No. 24,945, PSNH Least Cost Integrated Resource Plan Docket, Docket DE 07-108 (February 27, 2009).

⁵ PSNH Responses to Tech Session Questions Posed During the February 3, 2009 Technical Session (February 20, 2009); Letter from William H. Smagula, Director-Generation, PSNH, to Robert R. Scott, Director Air Resources Division, DES (June 7, 2006); and, Letter from William H. Smagula, Director-Generation, PSNH, to Robert R. Scott, Director Air Resources Division, DES (January 31, 2008), attached to *Amici* Brief at A-1, A-9 and A-13 respectively.

C. The Court Should Permit The Parties An Opportunity To Reply To PSNH's Objection Regarding Leave To File Brief.

Pursuant to New Hampshire Supreme Court Rule 21(3-A), the Parties must move to reply to PSNH's objection regarding *Amici's* Assented-To Motion for Leave to File *Amicus Curiae* Brief.

On March 20, 2009, PSNH assented to CLF's participation in the Stonyfield Appeal as *amicus curiae*. PSNH does not dispute that it assented to CLF's request. See Affidavit of Attorney Robert A. Bersak at ¶ 3, Exhibit 1 to PSNH's Memorandum in Support of Objection to "Assented-To" Motion for Leave to File *Amicus Curiae* and Motion to Strike *Amicus Curiae* Brief. On April 1, 2009, PSNH filed an objection to the Parties' Assented-To Motion For Leave to File *Amicus Curiae* Brief. CLF acknowledges that, during the March 20, 2009, telephone call with counsel for PSNH, counsel for CLF inadvertently referred only to CLF by name when seeking assent to participate in the Stonyfield Appeal as *amicus curiae*. It was counsel's good faith intent to identify all parties.

The case at hand implicates nothing less than New Hampshire's energy and environmental future. Participation by New Hampshire's non-governmental environmental and rate-payer organizations—key stakeholders—in such a matter is important. CRR, CWA, Sierra Club, UCS, and REACH have relevant expertise, as demonstrated by the descriptions of the individual organizations included in the Brief, pp.2-4, and *Amici's* motion for leave to file the *Amici* Brief.

The Court should grant the Parties' Assented-To Motion For Leave To File *Amicus Curiae* Brief.

IV. CONCLUSION

For the foregoing reasons, the Court should deny PSNH's motion to strike the *Amici* Brief and permit the Parties to reply to PSNH's objection to the Parties' Assented-To Motion for Leave to File *Amicus Curiae* Brief.

Respectfully submitted,

Dated: April 13, 2009

CAMPAIGN FOR RATEPAYERS' RIGHTS

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CLEAN WATER ACTION
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RESIDENT'S ENVIRONMENTAL ACTION
COMMITTEE FOR HEALTH

Ronald J. Lajoie ^{KSK}

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Certificate of Service

I hereby certify that on April 13, 2009, I served the foregoing Memorandum of Law by first class mail, postage prepaid, copies and notice thereof to the parties listed on the attached service list.

Respectfully submitted,



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