

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Docket No. 2008-0897

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

MEMORANDUM IN SUPPORT OF OBJECTION
TO “ASSENTED-TO” MOTION FOR LEAVE TO FILE
AMICUS CURIAE AND
MOTION TO STRIKE AMICUS CURIAE BRIEF

NOW COMES Public Service Company of New Hampshire (“PSNH”), by and through its attorneys, McLane, Graf, Raulerson & Middleton, Professional Association, and submits this memorandum of law in support of both its Objection to the “Assented-To Motion For Leave to File *Amicus Curiae* Brief” filed by the Conservation Law Foundation, Campaign for Ratepayers’ Rights, Clean Water Action, Resident’s Environmental Action Committee for Health, New Hampshire Sierra Club, and Union of Concerned Scientists (the “*Amici*”) and its Motion to Strike their *Amicus Curiae* Brief (the “*Amici* Brief”).

I. INTRODUCTION

On March 23, 2009, the *Amici* filed a motion for leave to file a brief in this matter that purported to be assented. As set forth in more detail below, PSNH did not assent to the relief requested in that motion as presented. Specifically, PSNH’s assent was limited only to the participation of the Conservation Law Foundation, which actually sought the assent of PSNH, and not to the other five *Amici*, none of which sought the assent of

PSNH. Because the five other *Amici* parties did not timely seek PSNH's assent, and since the deadline for doing so has passed, this Court should strike their participation in the *Amici* Brief and preclude their participation in this appellate proceeding.

Regardless of the number of *amici* parties, this Court should strike the *Amici* Brief because it does not comport with this Court's Rules and is in violation of New Hampshire law. The *Amici* Brief does not address the issues on appeal in this case, but instead impermissibly seeks to use this appeal as a vehicle to present extra record information, funded in substantial part by the Appellants in this case, and to advocate for the shut down of PSNH's Merrimack Station Plant. The *Amici* Brief presents issues well beyond the merits of this case, contains arguments which were not preserved for appeal and introduces evidence that was not part of the record of the underlying proceedings before the Public Utilities Commission (the "PUC"). Accordingly, the *Amici* Brief should be stricken.

II. FACTUAL BACKGROUND

A. Procedural History

This is an appeal under RSA 541:6 from the Public Utilities Commission's Order Number 24,898, dated September 19, 2008 (the "Order"). The Order correctly found that the PUC lacks present authority over the mandate placed on PSNH by 2006 N.H. Laws Chapter 105 to install scrubber technology to reduce sulfur dioxide and mercury emissions at its Merrimack Station. On October 17, 2008, Stonyfield Farm, Inc., H & L Instruments, LLC, and Great American Dining, Inc. (the "Appellants") moved for a rehearing on the Order, which was denied by the PUC on November 12, 2008. The Appellants filed this appeal on December 11, 2008.

On March 23, 2009, the *Amici* filed a pleading captioned “Assented-To Motion For Leave to File *Amicus Curiae* Brief” (the “Motion”) with the Court in this proceeding. Per Supreme Court Rule 30, the *Amici* Brief accompanied that filing. The Motion, in paragraph 7, represents to the Court that “Counsel of record for the Petitioners/Appellants, Attorney Edward A. Haffer, and and (sic) counsel of record for Appellee Public Service Company of New Hampshire, Attorney Robert Bersak, indicate their clients assent to this motion.”

Moreover, on page 26 of the *Amici* Brief, in the *Amici*’s “Certificate of Consent to *Amici* Brief,” counsel for Conservation Law Foundation (“CLF”) represents: “We hereby certify that, pursuant to Supreme Court Rule 30, we have obtained the consent of the parties to this action to file the instant *amici* brief.” As set forth below, both these representations to this Court are not correct because the other five *Amici* did not seek PSNH’s assent and thus PSNH did not assent to their participation.

B. PSNH’s “Assent” to the Motion

At 3:55 p.m. on Friday, March 20, one business day before the March 23, 2009 deadline for the filing of the Appellants’ brief, Robert Bersak, Esquire, Assistant Secretary and Assistant General Counsel for PSNH received a call from counsel for CLF. See the attached Affidavit of Robert A. Bersak (“Bersak Affidavit”) attached hereto as Exhibit 1, ¶ 2. CLF’s counsel informed Attorney Bersak of CLF’s intent to participate in this appeal in support of Appellants’ position as *amicus curiae*. Id. Based on CLF’s participation in the PUC proceedings below, Attorney Bersak assented to CLF’s request for *amicus* status. Id. at ¶ 3.

Contrary to the implication contained in the Motion, counsel for PSNH was only informed of the desire of Conservation Law Foundation to participate as *amicus curiae*. See the attached Affidavit of Robert A. Bersak (“Bersak Affidavit”) attached hereto as Exhibit 1, ¶ 2. Counsel for CLF did not ask for PSNH’s assent on behalf of any other parties to participate as *amicus curiae* and none of the other prospective *Amici* contacted PSNH indicating any intent to participate or seeking assent to participate. Moreover, counsel for PSNH was never informed of the desire to participate of the other *Amici* - Campaign for Ratepayers’ Rights, Clean Water Action, Resident’s Environmental Action Committee for Health, New Hampshire Sierra Club, and Union of Concerned Scientists – **either by those *Amici* directly or by CLF**, and therefore, consent for their participation in this appeal was never sought from, nor granted by, PSNH. *Id.* at ¶¶ 2-6.

C. Impermissible Contents of the *Amicus Curiae* Brief

The “Appendix Table of Contents” to the *Amici* Brief (*Amici* Brief at A-1) lists eight documents - - not one of them was presented to the Public Utilities Commission nor included in that agency’s record of this proceeding. As such, they are not part of the record for this appeal. The table of contents to the appendix of the *Amici* Brief lists the following documents:

1. PSNH Responses to Tech Session Questions During the February 3, 2009 Technical Session (February 20, 2009);
2. Letter from William H. Smagula, Director-Generation, PSNH, to Robert R. Scott, Director Air Resources Division, DES (June 7, 2006);
3. Letter from William H. Smagula, Director-Generation, PSNH, to Robert R. Scott, Director Air Resources Division, DES (January 31, 2008);
4. Kenneth A. Colburn, Compendium of Concerns Regarding the Proposed Installation of a Scrubber at PSNH’s Merrimack Station in Bow, NH (January 5, 2009);

5. Commission Order No. 24,945, PSNH Least Cost Integrated Resource Plan Docket, Docket DE 07-108 (February 27, 2009);
6. ISTEPS Power Plants Emissions Data (2007 inventory);
7. ISO-New England, "Interconnection Requests to the Administered Transmission System" (January 31, 2009); and
8. 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)

Not only were none of these documents part of the record in the PUC proceedings below, of these eight documents, more than half of them did not even exist at the time the PUC made either its initial decision or its decision on rehearing.

More disturbing, however, is the fact that after-the-fact items 4 and 8 of the *Amici* Brief Appendix -- the "Compendium of Concerns" and the "Initial Report to the New Hampshire Senate" were created on behalf of and paid for by the Appellants to this proceeding. The cover sheet of item 4 "Compendium of Concerns" (*Amici* Brief, at page A-17) expressly states that it was "Prepared for the Commercial Ratepayers Group." The appellants - Stonyfield Farm, Inc., H&L Instruments, LLC, and Great American Dining, Inc. -- are the founders of the so-called Commercial Ratepayers Group.

Appellant Stonyfield Farm expressly takes credit for the creation of this "Compendium of Concerns." On the Stonyfield Farm website, a news release entitled "Preliminary Study: PSNH Merrimack Scrubber Project's Potential Impact on Ratepayers Could Reach Billions," the "Compendium of Concerns," and a "Merrimack Station Coal Plant Update" are all posted. The news release issued by Appellant Stonyfield Farm on December 11, 2008 (one month after the Public Utilities Commission's rehearing order and the date the Appellants filed this appeal) states, "An ad hoc commercial ratepayer

group convened by Stonyfield Farm President Gary Hirshberg commissioned the study by Symbiotic Strategies LLC, and unveiled the study's findings in a press conference today in Concord.” See news release issued by Appellant Stonyfield Farm on December 11, 2008 attached hereto as Exhibit 2.

The Stonyfield Farm web posting entitled “Merrimack Station Coal Plant Update” reports that, “The New Hampshire Supreme Court in late January agreed to hear oral arguments on the appeal filed by the ad hoc corporate ratepayers group that includes Stonyfield Farm. The group filed the appeal in response to its denied motion to the state Public Utilities Commission (PUC).” See Stonyfield Farm web posting entitled “Merrimack Station Coal Plant Update” attached hereto as Exhibit 3. At the bottom of Exhibit 3, appellant Stonyfield Farm includes references and links to its news release regarding the “Compendium of Concerns” and to the “Compendium of Concerns” itself.

Similarly, beginning on *Amici* Brief page A-75 is a 15-page report prepared by Synapse Energy Economics, Inc. dated March 20, 2009, entitled “Initial Report to the New Hampshire Senate Energy, Environment and Economic Development Committee on PSNH’s Merrimack Station Scrubber Project.” This report – dated one business day before Appellants’ and associated *amici curiae* briefs were due to be filed in this proceeding – was also paid for by the Appellants. On February 19, 2009, the *Union-Leader* reported that Stonyfield Farm President Gary Hirshberg “helped found the Commercial Ratepayers Group (CRG), which is asking the Legislature to reexamine its 2006 mandate requiring upgrades to the 440-megawatt coal-fired Merrimack Station in Bow.” Further, the *Union-Leader* reported that Mr. Hirshberg “said yesterday afternoon the group has commissioned a \$100,000 study by Synapse Energy Economics Inc. of

both the scrubber costs and alternatives for Merrimack Station. He said he hopes the cost analysis will be finished in time for a March 13 hearing on Janeway's bill and the alternative aspect about a month later.”

III. ARGUMENT

A. The Motion For Leave To File *Amicus Curiae* Brief Should Be Denied Because PSNH Did Not Consent To The Participation Of The *Amici Curiae* In This Appeal.

The *Amici*'s indication that Motion For Leave to File *Amicus Curiae* Brief is “assented-to” is inaccurate. PSNH did not, and does not, consent to the participation of Campaign for Ratepayers' Rights, Clean Water Action, Resident's Environmental Action Committee for Health, New Hampshire Sierra Club, and Union of Concerned Scientists as *amicus curiae* in this appeal. See Bersak Affidavit at ¶¶ 2-6. PSNH's consent was limited to the participation of Conservation Law Foundation as *amicus curiae*. Id. at 2. The other *Amici* never sought PSNH's consent to participate in this appeal. Without consent, a prospective *amicus curiae* is required to file a motion for leave to file.

Absent the consent of PSNH, it was incumbent upon the non-assented to *Amici* to file a motion for leave to appeal and a supporting brief by the March 23, 2009 deadline. See Sup. Ct. R. 30(2). In addition, the non-assented to *Amici*'s Motion needed to demonstrate their interest in this case and the reasons they believe that relevant facts or issues will not be adequately presented by the parties. The five non-assented *Amici* failed to make any such showing. Supreme Court Rule 30 states that a party who files a motion for leave to file an *amicus curiae* brief must "concisely state the nature of the movant's interest, the facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of

the case." Id. In its Motion, the five non-assented *Amici* have not provided any basis for believing that the issues have not been, or will not be, adequately presented by the current parties. In fact, as set forth below, the *Amici* Brief does not even address the issues properly on appeal in this case. The *Amici*'s motion fails to demonstrate the compelling and important need for their participation required by Supreme Court Rule 30(2) and their Motion for Leave to File should be denied with respect to the five non-assented *Amici*.

B. The *Amici Curiae* Brief Should Be Stricken Because It Impermissibly Argues Issues Not Presented By The Parties Or Properly Preserved For Appeal.

Regardless of the number of *Amici*, the *Amici* Brief should be stricken because it does not address the issues presented by the parties in this Appeal. Here, the *Amici* Brief contains arguments which go well beyond the merits of this specific case, were not preserved for appeal as required by RSA 541:4 and Supreme Court Rule 10(1)(i), nor were they included as "Questions Presented for Review" by the Appellants in their Rule 10 appeal. Because the parties to this appeal have raised none of these issues, they may not be included in an *amicus* brief. This precise issue faced the Court in a prior case involving PSNH, Appeal of Town of Hampton Falls, 126 NH 805 (1985). In that case, the Court held:

Finally, the Town of Hampton, as *amicus curiae*, argues that the WSPCC violated the due process rights of the town and that the record lacks specific evidence to support the WSPCC's ruling. Neither issue has been raised by the parties to this appeal. Although an *amicus curiae* is permitted to make useful suggestions to the court on matters of law which may escape the court's attention, *Blanchard v. Railroad*, 86 N.H. 263, 266, 167 A. 158, 159-60 (1933), an *amicus curiae* is bound by the issues presented by the parties. *See Cerri v. Russell*, 31 Colo. App. 525, 530, 506 P.2d 748, 751 (1973), *aff'd*, 184 Colo. 282, 519 P.2d 1189 (1974); *see also Endress v. Brookdale Community College*, 144 N.J. Super. 109, 123

n.6, 364 A.2d 1080, 1087 n.6 (1976). Thus, we decline to consider the additional issues raised by the Town of Hampton.

Id. at 814; see Thomas Tool Services v. Town of Croydon, 145 N.H. 218, 221 (2000) (noting that “an *amicus curiae* is bound by the issues presented by the parties” and declining to consider *amicus curiae*’s arguments which were not raised by the parties to the appeal, holding that such matters were not properly before the Court) (quoting Appeal of Town of Hampton Falls, 126 N.H. at 814); see also Lane v. First Nat’l Bank, 871 F.2d 166, 175 (1st Cir. 1989) (declining to expand the scope of the appeal and consider arguments presented by *amici* which were not set forth by the parties, stating that an *amicus* may not “interject into a case issues which the litigants, whatever their reasons might be, have chosen to ignore”); U.S. v. Sturm, Ruger & Co., Inc., 84 F.3d 1, 6 (1st Cir. 1996) (stating that “[w]hile *amicus* briefs are helpful in assessing litigants’ positions, an *amicus* cannot introduce a new argument into the case”).

The matters presented in the *Amici* Brief discussed above are outside of the agency’s record and are used to support issues neither presented by the Appellants nor properly preserved for appeal. The *Amici* Brief ignores the substance of the underlying PUC proceeding and the specific issues on appeal in this case, and instead seeks to use this appeal as a platform to further the various groups’ agenda to shut down PSNH’s Merrimack Station. The *Amici* Brief does not present any issues “relevan[t] to the disposition of the case.” Sup. Ct. R. 30(2). As in the Hampton Falls case, the Court should decline to consider the additional issues raised by the *Amici*, deny the Motion for Leave to File, and strike the *Amici* Brief.

C. The *Amici Curiae* Brief Also Should Be Stricken Because It Contains Evidence Not Part of the Record In Violation Of New Hampshire Law And The Supreme Court Rules.

Contrary to New Hampshire law, the *Amici* Brief is founded almost entirely on evidence that is not part of the record of the PUC proceedings. The *Amici* are not permitted to introduce evidence on appeal to this Court in addition to the administrative record. RSA 541:14 (“No new or additional evidence shall be introduced in the supreme court...”). Evidence that was not introduced in the agency proceedings may not be relied on in the Supreme Court's review. Appeal of Granite State Elec. Co., 121 N.H. 787, 792 (1981) (discounting evidence not in the PUC record and noting that had the documents been identified in the proceeding below it would have given the opportunity for the PUC or other parties to respond to them); Appeal of Boucher, 120 N.H. 38, 41 (1980) (refusing to consider further evidence of a surveyor's qualifications when such evidence was not offered to the New Hampshire Board of Registration for Land Surveyors in the individual's request below for a rehearing).¹

In addition, Supreme Court Rule 13(1) specifies that the record on appeal consists of the “papers and exhibits filed and considered in the proceedings in the trial court or administrative agency, the transcript of proceedings, if any, and the docket entries of the trial court or administrative agency shall be the record in all cases entered in the supreme court.” The record also includes, in an appeal under RSA Chapter 541, the administrative

¹ The treatment of the Agency record is similar to this Court's pronouncements about the trial court record. This Court has held “[o]n appeal, we consider only evidence and documents presented to the trial court. See SUP. CT. R. 13.” Lake v. Sullivan, 145 N.H. 713, 717 (2001) (New Hampshire Supreme Court declined to consider additional evidence presented on appeal that were not part of the record presented to the trial court at the time of its ruling on the motion for summary judgment); see also Flaherty v. Dixey, ___ N.H. ___ (decided February 19, 2009) (granting motion to strike the deposition not in the record as well as the portions of the brief relying on it, noting “to the extent either party relies upon documents or evidence not presented to the trial court, we do not consider them.”); In re Morrill, 147 N.H. 116, 119-20 (2001) (declining to address issue which was not raised in underlying proceedings).

agency's "order or decision" and the "findings of fact and rulings of law" on which the order was based. Sup. Ct. R. 10(2). Thus, any documents or evidence not part of the PUC proceedings below are not properly before this Court and should not be considered in this appeal.

Every one of the documents (constituting eighty-nine pages of material) included in the Amici Brief Appendix was not part of the PUC proceedings below, and therefore is not properly before this Court on appeal. Because none of the documents included in the Amici Brief Appendix are part of the record of this proceeding, under Supreme Court Rules this Court should not consider such evidence and documents. Furthermore, to permit the Amici to present to this Court documentary and factual references to matters that were not presented to the Public Utilities Commission as part of its agency proceeding would amount to the consideration of evidence outside of the record and would violate New Hampshire law. RSA 541:14. This Court's standard for appeal of an administrative agency's decision is to determine if the agency's decision was unreasonable or unlawful based on the evidence and matters that were presented below. RSA 541:13, :14. If submission of new evidence is allowed, this Court will be asked to determine if the PUC's decision was reasonable based on evidence and matters that were not brought to the PUC's attention below.

The arguments set forth in the Amici Brief are wholly intertwined with these improper documents, as each of their arguments references this material. Even if the Amici Brief addressed the issues properly presented in this appeal, because the improper information contained in their appendix and referenced in their brief cannot be separated out, it must be struck in its entirety.

D. The *Amici Curiae* Brief Also Should Be Stricken Because It fails to Comply With Supreme Court Rule 16(6)

Likewise, the *Amici* Brief fails to comply with Supreme Court rule 16(6) because it argues issues that are wholly irrelevant to the issues presented on appeal, includes information not properly before the Court, and will cause PSNH to go to unnecessary, burdensome, and costly lengths to reply. Requiring PSNH to divert its resources to a response to the *Amici* Brief, which is substantially unrelated to the issues on appeal, is unfair and prejudicial to PSNH.

Supreme Court Rule 16(6) provides:

Briefs must be compact, logically arranged with proper headings, concise and *free from burdensome, irrelevant and immaterial matter*. Briefs not complying with this section may be disregarded and stricken by the Supreme Court.

(emphasis added).

The *Amici* Brief raises issues neither presented by the Appellants nor preserved for appeal. Further, the *Amici* Brief presents matters outside of the PUC's record and not part of this Appeal. As a consequence, all of the arguments made by the *Amici* Brief beyond its adoption of the Appellants' positions are burdensome, irrelevant and immaterial, and so violate Supreme Court Rule 16(6). Accordingly, the *Amici* Brief should be stricken. Mahmoud v. Irving Oil Corp., 155 N.H. 405, 406-07 (2007) (brief stricken where party failed to comply with requirements of Supreme Court Rule 16).

The *Amici* Brief is replete with documentary and factual references to matters that were not presented to the Public Utilities Commission as part of its agency proceeding. Indeed, the facts in the instant case are extreme, given that a substantial portion of the *Amici* Brief Appendix materials were not only outside of the record of the administrative

agency, but were commissioned by and paid for by the Appellants to this proceeding, subsequent to the agency proceeding below, and were intended to be presented to the Legislature to influence the outcome of consideration of pending Senate Bill 152, “AN ACT relative to an investigation by the public utilities commission to determine whether the scrubber installation at the Merrimack station is in the public interest of retail customers.” The CLF’s attempt to get before this Court extra-record studies commissioned and paid for by the Appellants subsequent to the agency action, below, is simply a backdoor effort to expand the issues before Court.² Such inclusion of burdensome, irrelevant and immaterial material is a clear violation of Supreme Court Rule 16(6).

E. The Request Of The *Amici Curiae* For Oral Argument Should be Denied.

In addition, because of the matters set forth above, and because the *Amici* have nothing further to add to the issues before this Court on appeal, their request for oral argument should be denied.

IV. CONCLUSION

The Motion for Leave to File *Amicus Curiae* Brief should be denied because PSNH’s assent was limited only to the participation of CLF, which actually sought assent. The other five prospective *Amici* failed to seek such consent, and the five non-assented *Amici* failed to demonstrate a compelling and important need for their participation, both of which are required under Supreme Court Rule 30.

Moreover, regardless of the number of *Amici*, the *Amici* Brief does not address the issues on appeal in this case, is founded almost entirely on documents that were never

² Notably, the outcome of this legislation, whether passed or defeated, would appear to effectively moot the issue under consideration by the Court in this appeal.

presented to the PUC and are not part of the record, and introduces issues that were not preserved for appeal.

Accordingly, the *Amici* Brief violates both New Hampshire law and Supreme Court Rules, and, therefore, this Court should strike the *Amici* Brief.

Respectfully submitted,

PUBLIC SERVICE COMPANY
OF NEW HAMPSHIRE

By Its Attorneys,

McLANE, GRAF, RAULERSON & MIDDLETON,
PROFESSIONAL ASSOCIATION

Date: 3/31/09

By: Mark C. Rouvalis

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Certificate of Service

I hereby certify that on March 31, 2009, I served the foregoing Memorandum of Law by mailing by first class mail, postage prepaid, copies and notice thereof to those listed on the attached service list.

Mark C. Rouvalis
Mark C. Rouvalis

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Docket No. 2008-0897

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

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EXHIBIT 1

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Docket No. 2008-0897

APPEAL OF STONYFIELD FARM, INC., H & L INSTRUMENTS, LLC, AND
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AFFIDAVIT OF ATTORNEY ROBERT A. BERSAK

I, Robert A. Bersk, being first sworn and put upon oath, do hereby state:

1. My name is Robert A. Bersak. I am an attorney, admitted to practice in New Hampshire, with Bar No. 10488. I am employed by Northeast Utilities Service Company. My title is Assistant Secretary and Assistant General Counsel for Public Service Company of New Hampshire.

2. On Friday, March 20, 2009, at 3:55 p.m., I received a call from counsel for the Conservation Law Foundation. I was informed that CLF desired to participate in the *Stonyfield* appeal before the New Hampshire Supreme Court as *amicus curiae*, and I was asked whether PSNH would assent to such status.

3. Based on CLF's involvement in NHPUC Docket No. 08-103, the agency action from which the court appeal was taken, I felt that it would not be productive to object to CLF's request. Hence, on behalf of PSNH I assented to CLF's desire for *amicus* status.

4. Briefs for Stonyfield and allied parties were due to be filed by Monday, March 23, 2009. By U.S. mail, on March 24, 2009, PSNH received copies of briefs filed with the Court by the Appellants (Stonyfield, et al.), TransCanada Hydro, Office of Consumer Advocate, - - and, an *amicus* brief and a pleading captioned “Assented to Motion for Leave to File *Amicus Curiae* Brief” filed by not just CLF, but also:

Campaign for Ratepayers’ Rights
Clean Water Action
New Hampshire Sierra Club
Union of Concerned Scientists
Resident’s Environmental Action Committee for Health

5. I was unaware of these other five parties seeking *amicus* standing. None of these other parties ever contacted me. During the Friday, March 20 call, CLF’s counsel did not mention any other parties seeking *amicus* standing; the call related solely to CLF.

6. Therefore, on behalf of PSNH, I could not and did not assent to *amicus curiae* participation in the *Stonyfield* case by Campaign for Ratepayers’ Rights, Clean Water Action, New Hampshire Sierra Club, Union of Concerned Scientists, or Resident’s Environmental Action Committee for Health.

7. It is my belief that the “Compendium of Concerns” contained in the appendix to the *Amici* Brief beginning at page A-17 was created on behalf of and paid for by the Appellants. This belief is founded upon the express notation on the cover page of that document that it was “Prepared for the Commercial Ratepayers Group” identified on page 8 of the Appellants’ December 11, 2008 Rule 10 Appeal filed with this Court. On March 25, 2009, I visited the web site of Appellant Stonyfield Farm, Inc. and printed the

web postings attached to the Memorandum of Law as Exhibits 2 and 3, which further support my belief.

8. In addition, I read the February 19, 2009 *Union Leader* article reporting that Stonyfield Farm President Gary Hirshberg helped found the Commerical Ratepayers Group and commissioned the study by Synapse Energy Economics Inc. which is contained in the appendix to the Amici Brief beginning at page A-75. The quotations contained in the Memorandum of Law are accurate to the best of my knowledge.

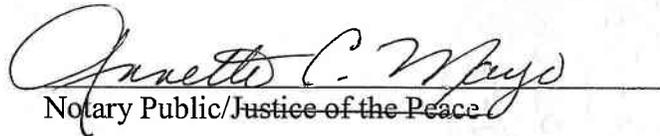
Dated: March 31, 2009



Robert A. Bersak

STATE OF NEW HAMPSHIRE
COUNTY OF HILLSBOROUGH

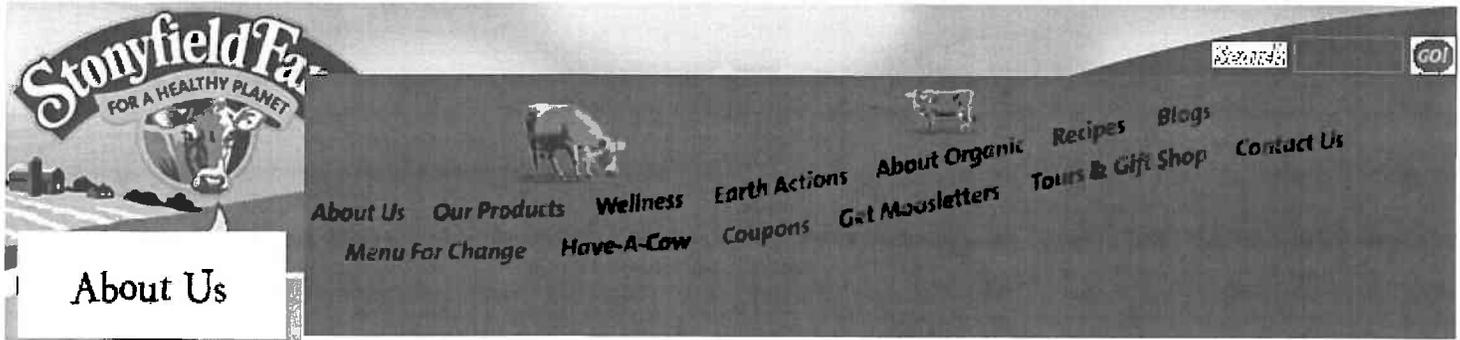
The above Robert A. Bersak personally appeared before me and swore that the foregoing is true and accurate to the best of his knowledge and belief.



Annette C. Mayo
Notary Public/Justice of the Peace

My Commission Expires August 31, 2011

EXHIBIT 2



Our Story
Company Scrapbook
Profits for the Planet
Moos from the Farm
Moos from the Farm Archive
Yogurt Works
Community Events
Our Main Moovers
Career Opportunities
Moos Releases
In The News
Our Partnership with Groupe Danone
Our Sister Brands Abroad
Stonyfield Farm and Brown Cow
HOME



[Find an event near you!](#)

Preliminary Study: PSNH Merrimack Scrubber Project's Potential Impact on Ratepayers Could Reach Billions

[Back to "Moos"](#)

CONCORD, NH - December 11, 2008 - A preliminary study analyzing Public Service Company of New Hampshire's ("PSNH") planned upgrades to its coal-fired Merrimack Station finds that ratepayers could wind up paying as much as several billion dollars in excess of the \$457 million construction costs estimated by the utility.

An ad hoc commercial ratepayer group convened by Stonyfield Farm President Gary Hirshberg commissioned the study by Symbiotic Strategies LLC, and unveiled the study's findings in a press conference today in Concord.

The study shows that the present value cost estimates for compliance with anticipated greenhouse gas reduction requirements, a possible closed-loop cooling system, and potential further mercury reductions range between \$864 million to \$2.5 billion in addition to the \$457 million PSNH has estimated for the scrubber systems construction costs.

If these figures are confirmed by a more thorough investigation, total costs of this project to be borne by ratepayers will range from \$1.3 billion to \$3 billion. Such costs suggest potential rate impacts **3 to 6 times higher** than PSNH's estimate of 0.33¢ per kWh.

The commercial ratepayer group initially petitioned the NH Public Utilities Commission ("PUC") to reconsider allowing the project to go forward to allow further analysis and ratepayer input when PSNH announced that the construction costs had increased from its initial 2006 estimate of \$250 million to the current \$457 million figure. When the PUC denied this request, the group commissioned the study.

"Our ratepayer group does not believe that the NH Legislature intended to approve the scrubber no matter what the cost," said Hirshberg. "This was probably the right decision back in 2006 when the estimate was \$250 million, but much has changed. We're now talking about hundreds of millions, if not billions of dollars of potential liability, and we are certain that our representatives will agree that the ratepayers and citizens deserve a thorough cost analysis as well as a hard look at the many alternatives in terms of jobs and economic development, as well as environmental impact."

In releasing the study, the ratepayer group is asking the Legislature to compel the PUC to conduct a comprehensive examination of the present and future costs, risks and alternatives.

"No one disagrees that if the Bow Merrimack Station is to continue operating, the scrubbers must be installed, and we certainly would rather not add to delays in this project. But in light of these revised cost estimates, the citizens and ratepayers deserve to know if installing the scrubber system and continuing to operate Merrimack Station for 15 to 20 more years represents the best path forward for our state," Hirshberg concluded. "This plant has been emitting mercury for 40 years, and we feel that taking an additional 6 months to conduct an investigation that could lead to a conclusion that the citizens could be far better served by alternative paths is a small price to pay."

Study results

Hirshberg and Ken Colburn, of Symbiotic Strategies LLC, presented a review of the potential costs of the project and argued that more study is definitely needed.

Hirshberg agreed that something must be done to make Merrimack Station more environmentally viable, acknowledging mercury is a potent neurotoxin that bioaccumulates in the food chain and can endanger developing human fetuses.

"Reducing mercury emissions is essential for public health and the environment," said Hirshberg in advance of today's press event, "but does this project represent the best and most economical path to accomplish that reduction?"

In 2006, the New Hampshire Legislature mandated that PSNH install wet flue gas desulphurization ("scrubber") technology at Merrimack Station to reduce mercury emissions by 80%. The scrubber's cost was represented to be \$250 million.

"At that cost and given what we knew then, the Legislature made the right decision," said Hirshberg, who added that much has changed since then, notably:

- PSNH now estimates that the scrubber installation will cost \$457 million - almost double the cost estimate that the legislative decision was based upon. The scrubber will also require ~5-7% of the electricity Merrimack Station now generates.
- The US Environmental Protection Agency will soon issue stringent, plant-by-plant emission reduction requirements for mercury that may require greater reductions than the scrubber can deliver. If this occurs, PSNH will have to install - and

ratepayers will have to pay for - further mercury control technology at Merrimack Station. Mercury controls could cost approximately \$5 million to \$30 million to install with annual operating costs of \$1 million to \$3 million and would require additional electricity.

- Federal air emissions and water discharge permits for Merrimack Station are currently pending. Like other power plants in the region, Merrimack Station may be required to install a closed-loop cooling system (e.g., cooling towers). Such a system could cost an additional \$50 million to \$100 million to install plus annual operating costs of about \$5 million to \$10 million and again, would require additional electricity.
- In 2007, Merrimack Station emitted over 3.7 million tons of carbon dioxide (CO₂), more than 47% of the state's CO₂ emissions from the electric sector. The scrubber will not reduce these emissions. Increasing appreciation of the need to act urgently on global warming, several recent judicial decisions, and the results of November's presidential election indicate that significant new federal greenhouse gas (GHG) emission reduction requirements - far exceeding the modest requirements of the Regional Greenhouse Gas Initiative (RGGI) - are likely to be adopted in the next few years. Indeed, President-Elect Obama has publicly committed to reducing US GHG emissions to 1990 levels by 2020 and by an additional 80% by 2050. Analysts believe CO₂ allowances will soon cost \$15-\$45 per ton. If so, Merrimack Station's cost would be about \$50-\$150 million per year, or between \$710 million-\$2.2 billion (2013 present value) through 2030.
- Construction costs have escalated dramatically in recent years due to rising global demand. Construction cost increases and/or delays have slowed and even stopped many power plant proposals. The current recession may mitigate, but is unlikely to eliminate, the risk of increased construction costs and delays.
- PSNH currently spends about \$150 million per year on coal. Coal prices have nearly doubled in the last year due to rising global demand. The recession may temper, but not eliminate, this trend. Disproportionate increases in fuel costs will be passed on to ratepayers.
- PSNH proposes to finance over half the cost of the scrubber. Current turmoil in US financial markets and reduced credit availability is likely to increase the cost of debt service that ratepayers will have to cover.

"At this time, neither the NH Public Utilities Commission nor any third party has performed an analysis of PSNH's dramatically increased cost estimate (\$457 million) for the scrubber installation, nor has any consideration been given to the additional costs or to alternative electricity supply and/or demand alternatives that may exist," said Hirshberg.

On September 19th, the PUC declined to review PSNH's increased cost estimate for the scrubber, finding the Legislature had already sanctioned it. The CRG asked the NHPUC to reconsider this decision and was denied by the NHPUC on November 12th. As a result, the petitioners now must appeal to the New Hampshire Supreme Court in order to obtain a review of the significant cost increases. A decision as to whether to proceed with the appeal is forthcoming.

For more information, contact Carmelle Druchniak, Stonyfield Farm, at 603-437-4040, ext. 2203 or email cdpruchniak@stonyfield.com

EXHIBIT 3

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Earth Actions



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Merrimack Station Coal Plant Update

UPDATE

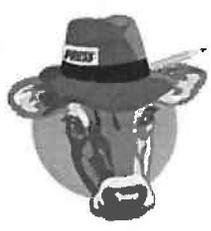
The New Hampshire Supreme Court in late January agreed to hear oral arguments on the appeal filed by the ad hoc corporate ratepayers group that includes Stonyfield Farm.

The group filed the appeal in response to its denied motion to the state Public Utilities Commission (PUC).

The group's original Oct. 17 motion to the PUC had asked the Commission to reconsider its decision allowing Public Service Company of New Hampshire's \$457 million Merrimack Station coal plant scrubber project to go forward without any review of the doubling of the original project cost. The ratepayers motion argued that the project as mandated by the state Legislature in 2006 carried a price tag of \$250 million, but the doubling in cost has not been addressed by the PUC, and no public hearings have been held on the project.

In other news, the New Hampshire legislature is scheduled to consider a bill asking that that lawmakers require that a study be conducted of the project cost.

Also in January, the ratepayers group received a public show of support in the form of editorials in two major daily newspapers, the Keene Sentinel and the Concord Monitor, and in the New Hampshire Business Review.



Moos Release
December 11, 2008

[Preliminary Study: PSNH Merrimack Scrubber Project's Potential Impact on Ratepayers Could Reach Billions](#)



[Compendium of Concerns Regarding the Proposed Installation of a Scrubber at PSNH's Merrimack Station in Bow, NH](#)

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