STATE OF NEW HAMPSHIRE
BEFORE THE
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

Docket No. DE 08-103

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

Motion for Reconsideration and Rehearing

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

Background

1. TransCanada owns approximately 567 MW of hydroelectric generation capacity on the Connecticut and Deerfield Rivers, which TransCanada purchased from USGen New England, Inc. in April of 2005, consisting of hydroelectric stations and associated reservoirs and dams located in New Hampshire, Vermont and Massachusetts.

2. On August 22, 2008 the Commission opened an investigation by Secretarial Letter ("the Letter") following a quarterly earnings report filed by Northeast Utilities with the Securities and Exchange Commission on August 7, 2008 that disclosed that the estimated cost of installing a wet flue gas desulphurization system, also referred to as scrubber technology, at Public Service Company of New Hampshire's ("PSNH") Merrimack Station, had increased by approximately 80 percent over the original

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

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

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

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

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

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

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

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

8. On September 19 , 2008, without seeking any further input from interested stakeholders, the Commission issued Order No. 24,898 in which it found that "the Commission lacks the authority to make a determination pursuant to RSA 369-B:3-a as to whether this particular modification is in the public interest." The Commission noted that it had the authority to determine the prudence of the costs at a later time.

Legal Standard for Rehearing

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

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

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

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

Discussion of Procedural Deficiencies

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

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

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

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

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

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

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

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

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

Discussion of Statutory Interpretation

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

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

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

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

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

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

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

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

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

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

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

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

the costs of the scrubber technology being "a reasonable cost to ratepayers". See House Science and Technology Committee Majority Report, House Calendar 22, February 17, 2006, page 1280. This basic premise of the costs to ratepayers being reasonable is also reflected in the language of the purpose section, RSA 125-O:11,V: "The installation of scrubber technology will not only reduce mercury emissions significantly but will do so without jeopardizing electric reliability and *with reasonable costs to consumers*." [Emphasis added.] The Legislative history, particularly the hearings before both the House and Senate Committees, is replete with references to the modifications costing $250 million in 2013 dollars ($197 million in 2005 dollars). PSNH representatives said this, as did the Department of Environmental Services ("DES"), and the New Hampshire Clean Power Coalition. DES even went so far as to say: "Based on data shared by PNSH, the total capital cost for this full redesign *will not exceed* $250 million dollars (2013$) or $197 million (2005$)". [Emphasis added.] See Letter from Michael P. Nolin to The Honorable Bob Odell, Chairman NH Senate Energy and Economic Development Committee, dated April 11, 2006. Clearly, given these representations to the Legislature, and the substantial increase from the figures quoted to them, currently at $457 million, these costs have become unreasonable. Thus, to the extent, if any, that the Commission is bound to the Legislature's public interest determination regarding the scrubbers, it is not appropriate to interpret that determination as applying to cost estimates that have dramatically increased from the figures provided since the statute was enacted.

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

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

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

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

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

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

Conclusion

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

WHEREFORE, TransCanada respectfully requests that the Commission:

A. Convene an adjudicative proceeding as provided in N.H. Admin. Rule Puc 2505.13 and RSA 541-A:31, I on the contested matters raised herein;

B. Take official notice of the record in Docket No. DE 07-108;

C. Provide all parties whose rights may be affected a reasonable opportunity to be heard on all of the issues in this docket;

D. Grant a rehearing of this matter under RSA 541:3; and

E. Grant such further relief as it deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

Date: October 17, 2008

Douglas L. Patch

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