

THE STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

Docket No. DE 08-145

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE'S
MOTION TO DISMISS
THE PETITION
OF
FREEDOM LOGISTICS, LLC
AND
HALIFAX-AMERICAN ENERGY COMPANY, LLC

Pursuant to Rule Puc §203.07, Public Service Company of New Hampshire (hereinafter “PSNH” or “the Company”) hereby moves to dismiss the “Petition for the Commission to Determine Whether Certain Modifications to Merrimack Station are in the Public Interest” (the “Petition”) filed by Freedom Logistics, LLC and Halifax-American Energy Company, LLC (the “Petitioners.”) In support of this Motion, PSNH says the following:

I. INTRODUCTION

The Petitioners are two unregulated entities that assert involvement to varying degrees in the competitive New Hampshire electric market. (As discussed below, neither Petitioner has asserted any basis whatsoever for having standing to bring their Petition.) The Petitioners raise yet another attack on PSNH’s efforts to install and have operational a wet flue gas desulphurization system (“scrubber technology”) to control mercury emissions at Merrimack Units 1 and 2 no later than July 1, 2013, pursuant to 2006 N.H. Laws Chapter 105 (the “Scrubber Law”).¹

The Petition asks the Commission to open a proceeding under RSA 369-B:3-a to determine whether certain capital improvements at Merrimack Station intended to increase its net capability to offset power consumption requirements of the scrubber technology mandated by the Scrubber Law are in the public interest of retail customers of PSNH. Hence,

¹ The Commission has noted that the Scrubber Law is “a generally expansive statutory scheme adopted by the Legislature to bring about the installation of scrubber technology.” Rehearing Order, *slip op.* at fn 6.

this matter is directly related to the mandate placed on PSNH by the Scrubber Law to install scrubber technology at its Merrimack Station.

The Commission correctly found in Docket No. DE 08-103, Order No. 24,898, dated September 19, 2008, (the "Order"), that it "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." Order, slip op. at 13. The Commission's legal analysis leading to that conclusion was detailed and comprehensive. As a result, the Commission recently reaffirmed its decision in Order No. 24,914, dated November 12, 2008 (the "Rehearing Order.")

The Petitioners' interest in protecting "the public interest of retail customers of PSNH" (RSA 360-B:3-a) is very curious. As unregulated entities asserting involvement to varying degrees in the competitive New Hampshire electric market, a higher price for PSNH's default energy service would benefit the Petitioners, not harm them. The Petitioners' are neither consumer advocates nor ombudsmen imbued with the public interest. PSNH is gratified that its actions at Merrimack Station in compliance with the Scrubber Law are drawing the concerns of unregulated competitive entities such as the Petitioners - - it can only mean that the interests of PSNH's retail customers are indeed being served by PSNH by installation of effective and economic improvements to Merrimack Station which will dramatically reduce emissions and continue to allow that plant to provide much-needed baseload electric power at the lowest price possible.

As in Docket No. DE 08-103, there is no basis for the Commission to assert authority in this matter in the manner requested by the Petitioners. Moreover, i) the Petitioners lack standing to receive the relief requested; ii) the issue presented for review in the Petition is moot as the subject capital investments have been completed and are presently used and useful in providing utility service to PSNH's retail customers; and, iii) regardless of the applicability of RSA 125-O: 13, IV, RSA 369-B:3-a does not apply to the actions of PSNH that are the subject of the Petition.

II. PROCEDURAL ISSUE

A. Standing

Neither of the Petitioners has standing to receive the relief requested. The Petition asks the Commission to open a proceeding under the authority of RSA 369-B:3-a. In particular, the Petitioners request "a determination by the Commission, as required by RSA 369-B:3-a, regarding whether it is in the public interest of retail customers of Public Service of New

Hampshire ('PSNH') for PSNH to modify Merrimack Station (the 'Station') by investing in capital improvements that increase the Station's net capability for the purpose of restoring the Station's net power output (as measured in megawatts) that will be reduced due to the power consumption requirements or operational inefficiencies of scrubber technology to control mercury emissions." Petition, Introductory Paragraph.

Freedom Logistics, LLC describes itself in the Petition as an entity that "specializes in providing high-end management services to large end-users that are Market Participant End-Users ('MPEU'). An MPEU is a member of NEPOOL and ISO-NE and purchases electricity directly from the ISO-NE hourly wholesale market." Petition, ¶14. Halifax-American Energy Company, LLC states that it "is the New England agent for South Jersey Energy Company, a subsidiary of South Jersey Industries. South Jersey Energy Company is a registered competitive electric power supplier in New Hampshire." *Id.*² Neither Petitioner demonstrates any basis whatsoever for having standing to bring their Petition. *See*, Rule Puc 102.10, RSA 541-A:1, XII.

Freedom Logistics, LLC does not represent that it is registered under the requirements of Chapter Puc 2000 of the Commission's rules as either a competitive electric power supplier or as an aggregator. The Petition contains nothing demonstrating that the rights, duties, privileges, immunities or other substantial interests of Freedom Logistics, LLC may be affected by the matter presented, nor that Freedom Logistics, LLC is qualified to file for the relief requested under any provision of law. RSA 541-A:32.

Similarly, the Petition contains no representations that Halifax-American Energy Company, LLC is engaged as a competitive electric power supplier in PSNH's franchise service territory.³ Per information posted on the Commission's website, South Jersey Energy Company, Halifax-American Energy Company, LLC's alleged principal, only offers service in New Hampshire in the franchise service territory of National Grid.⁴ The Petition contains nothing demonstrating that the rights, duties, privileges, immunities or other substantial interests of Halifax-American Energy Company, LLC may be affected by the matter

² Nowhere in the Petition does Halifax-American Energy Company, LLC assert that this Petition is being filed on behalf of South Jersey Energy Company.

³ It should be noted that Halifax-American Energy Company, LLC is a limited liability company formed under New Hampshire law. Petition at ¶14. It also is not registered under the requirements of Chapter Puc 2000 of the Commission's rules as either a competitive electric power supplier or as an aggregator. Halifax American Operating Company is a trade name held by South Jersey Energy Company. It appears that Halifax-American Energy Company, LLC and Halifax American Operating Company do not have common ownership or control.

⁴ *See*, <http://www.powerischoice.com/pages/supplier.html>.

presented, nor that Halifax-American Energy Company, LLC is qualified to file for the relief requested under any provision of law. RSA 541-A:32.

Even if the Petitioners were able to show that they were engaged in the competitive electric market in PSNH's service territory, such a showing would not give them adequate standing to receive the relief requested. Neither Petitioner has made any showing that it has been adversely affected or aggrieved by the matter presented. *Re Northeast Utilities/Public Service Company of New Hampshire*, 75 NH PUC 558 (1990). The Petition seeks a proceeding pursuant to RSA 369-B:3-a wherein the Commission would determine whether certain capital improvements at PSNH's Merrimack Station are in the public interest of PSNH's retail customers. RSA 369-B:3-a is expressly designed to protect the public interest of *retail customers*, not competitors. As noted earlier, the Petitioners' are neither consumer advocates nor ombudsmen imbued with the public interest. The Commission has held, "Special interest' is not enough to gain standing for appeal." *Id.*, citing to *Sierra Club v. Morton*, 405 N.H. 727, 734-735 (1972). The Petitioners do not gain standing to request relief under RSA 369-B:3-a merely because they allege potential harm to others. *Appeal of Richards*, 134 N.H. 148, 157 (1991), citing *Blanchard v. Railroad*, 86 N.H. 263, 264-266 (1933).

The relief sought by the Petitioners could be viewed as a request for a declaratory ruling regarding the applicability of RSA 369-B:3-a to capital improvements made by PSNH at Merrimack Station that increase its net capability to offset power consumption requirements of the scrubber technology mandated by that law. Such a request for declaratory ruling would be governed by Rule Puc §207.01, "Declaratory Rulings." Rule Puc §207.01(C) provides:

- (c) The commission shall dismiss a petition for declaratory ruling that:
 - (1) Fails to set forth factual allegations that are definite and concrete;
 - (2) Involves a hypothetical situation or otherwise seeks advice as to how the commission would decide a future case; or
 - (3) Does not implicate the legal rights or responsibilities of the petitioner.

The instant Petition fails to meet the requirements of Rule Puc §207.01(C)(3). The Petition clearly does not implicate the legal rights or responsibilities of the Petitioners. Since RSA 369-B:3-a involves the public interest of *retail customers* of PSNH and not of *competitors*, the legal rights or responsibilities of the Petitioners are not implicated. Rule Puc

§207.01(C)(3) expressly requires that “The commission *shall* dismiss a petition for declaratory ruling” in this instance.⁵

Neither Petitioner alleges any facts whatsoever that would give them standing to receive the relief requested. The Petition is completely silent regarding this basic jurisdictional requirement. Finally, the Petition does not implicate the legal rights or responsibilities of the Petitioners. As a result, PSNH urges the Commission to reject the Petition based upon lack of standing of the Petitioners.

III. SUBSTANTIVE ISSUES

A. The Scrubber Law eliminates any requirement for a preliminary public interest determination by the Commission under RSA 369-B:3-a for capital improvements made by PSNH at Merrimack Station that increase its net capability to offset power consumption requirements of the scrubber technology mandated by that law.

There is no basis for the Commission to assert the authority requested by the Petitioners. For the same reasons set forth in its Order and Rehearing Order in Docket No. DE 08-103, the Scrubber Law eliminates any requirement for a preliminary public interest determination by the Commission under RSA 369-B:3-a for capital improvements made by PSNH at Merrimack Station that increase its net capability to offset power consumption requirements of the scrubber technology mandated by that law.

RSA 125-O:13, IV (“Compliance”) provides that:

IV. If the net power output (as measured in megawatts) from Merrimack Station is reduced, due to the power consumption requirements or operational inefficiencies of the installed scrubber technology, the owner may invest in capital improvements at Merrimack Station that increase its net capability, within the requirements and regulations of programs enforceable by the state or federal government, or both.

This statute gives PSNH (“the owner”) authority to make certain capital improvements at Merrimack Station; i.e., those that increase net capability to mitigate the loss of net power output attributable to the scrubber. The Petition acknowledges that the scrubber will reduce the net power output of Merrimack station. Petition, ¶1. Exhibit 1 to the Petition, the National Petroleum Council report, at page 8 correctly notes that, “Scrubbers and SCR, like

⁵ If the Commission does deem the Petition to be a request for declaratory ruling, the Petition also fails to meet the requirements of Rule Puc §207.01(B) which requires that “Such a petition shall be verified under oath or affirmation by an authorized representative of the petitioner with knowledge of the relevant facts.”

any auxiliary equipment in a power plant, require electricity to run. This electricity is obtained from the generating unit that is being controlled. This power loss is known as parasitic load. Just as heat rate is a measure of efficiency by calculating the amount of fuel needed for each kWh of power, parasitic load is an efficiency loss because a certain number of kWhs generated must be used for internal power plant use and cannot be sent to the grid to meet consumer demand.”⁶ As the Legislature has expressly given PSNH permission to make capital improvements to mitigate the parasitic load of the scrubber, there is no need for a public interest determination under RSA 369-B:3-a.⁷ Instead, PSNH is subject to the traditional post-installation “prudent investment rule” determination.⁸

PSNH is not suggesting that it gets a “free pass” under RSA 125-O:13, IV allowing it to make any capital improvement it so desires at Merrimack Station without review. PSNH understands that in order for it to recover the cost of such investments in rates, those investments must pass the “prudent investment rule” tests: “Under this traditional approach, referred to as the “prudent investment rule,” cost recovery was available only on satisfaction of two conditions: costs were prudently incurred, and the project was “used and useful,” *i.e.*, providing actual benefits to the public.” *Id.* at 4.

The Petitioners’ assertion that PSNH must seek a public interest determination under RSA 369-B:3-a before making capital improvements at Merrimack Station that increase its net capability as allowed by RSA 125-O:13, IV is incorrect. If that assertion was accepted, it would render RSA 125-O:13, IV superfluous. The Supreme Court has stated that statutes

⁶ The Petition at ¶5 discusses the loss of net generation capacity as a result of the scrubber’s parasitic load. In that paragraph, the Petition states “According to information from ISO New England, Inc., PSNH submitted an interconnection request suggesting a possible reduction in capacity for the Station of approximately 95 MW. See, ISO New England Inc., Interconnection Request Queue (Spreadsheet), 10/17/08 (attached hereto as Exhibit 2). Cost estimates provided in the PSNH Report, however, indicate that the full pre-scrubber capacity of the Station will be restored as part of the project. PSNH Report at p. 13.” PSNH does not understand either of the statements made by Petitioners in paragraph 5 of their Petition. The referenced ISO-NE Interconnection Request Queue (Spreadsheet) attached as Exhibit 2 to the Petition does not reference a possible 95 MW reduction in capacity for Merrimack Station. PSNH is unaware of any information discussing a scrubber parasitic load of 95 MW, as that number has no basis in fact. Furthermore, PSNH is unaware of any references indicating that the full pre-scrubber capacity of Merrimack Station will be restored. The Petition’s reference to PSNH’s September 2, 2008, Report filed in Docket No. DE 08-103 does not support this contention.

⁷ The Petition refers to “...the plenary authority of the Commission to determine whether modifications to the Station are in the public/ratepayers’ interest...” Petition at ¶12. The Commission’s authority is not plenary, but is limited to that delegated to it by the Legislature. PSNH refers the Commission to its “Memorandum of Law” dated September 2, 2008 and “Objection to Motions for Rehearing of TransCanada Hydro Northeast, Inc. and Certain Commercial Ratepayers” dated October 23, 2008, filed in Docket No. DE 08-103 for a discussion of this topic.

⁸ See, “Pre-Approval Commitments: When and Under What Conditions Should Regulators Commit Ratepayer Dollars to Utility-Proposed Capital Projects?” S. Hempling, National Regulatory Research Institute, November 2008.

should not be interpreted in a manner that renders one meaningless or superfluous. *Silva v. Botsch*, 120 N.H. 600 (1980); *Appeal of Soucy*, 139 N.H. 110 (1994); *Appeal of Barry*, 142 N.H. 284 (1997); *N.H. Dep't of Res. & Econ. Dev. v. Dow*, 148 N.H. 60 (2002); *Robinson v. Robinson v. N.H. Real Estate Comm'n*, ___ N.H. ___ (October 10, 2008, *slip op.*).

Since the enactment of RSA 369-B:3-a in 2003, PSNH has had the ability to make modifications to its generation assets “if the commission finds that it is in the public interest of retail customers of PSNH to do so, and provides for the cost recovery of such modification or retirement.” Via RSA 125-O:13, IV, enacted in 2006, the Legislature granted PSNH special authority to make certain capital improvements related to the loss of net power output caused by the scrubber. To give RSA 125-O:13, IV affect and not render it superfluous, it must be interpreted as providing PSNH authority different than that found in RSA 369-B:3-a to make the identified capital improvements at Merrimack Station.⁹

Interpretation of this provision of the Scrubber Law is not difficult. Recently, the Supreme Court issued its most recent holdings on statutory interpretation:

We are the final arbiters of the legislature's intent as expressed in the words of the statute considered as a whole. *Blackthorne Group v. Pines of Newmarket*, 150 N.H. 804, 806, 848 A.2d 725 (2004). We first examine the language of the statute, and, where possible, ascribe the plain and ordinary meanings to the words used. *Id.* When a statute's language is plain and unambiguous, we need not look beyond it for further indication of legislative intent, and we refuse to consider what the legislature might have said or add language that the legislature did not see fit to incorporate in the statute. *Id.* Furthermore, we interpret statutes in the context of the overall statutory scheme and not in isolation. *Id.* By so doing, we are better able to discern the legislature's intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme. *Id.*

Robinson, supra, slip op. at 3. See also, *State v. Dansereau*, ___ N.H. ___ (August 15, 2008); *Oulette v. Town of Kingston*, ___ N.H. ___ (August 15, 2008, *slip op.*).

The “plain and ordinary meaning” of RSA 125-O:13, IV is clear, as is the overall statutory scheme. The Scrubber Law mandates the installation of scrubber technology at Merrimack Station, and it provides PSNH with the option and authority to make capital improvements that increase the station’s net capability to offset power consumption requirements of the scrubber.

⁹ In the Rehearing Order, the Commission noted, “...RSA 369-B:3-a does not constitute a necessary approval under RSA 125-O:13.” Rehearing Order, *slip op.* at 13.

B. The capital improvements made at Merrimack Station are allowed by RSA 125-O:13, IV, are already installed, and are already used and useful in the provision of utility service to PSNH's retail customers.

PSNH has completed all capital improvements it intends to make at Merrimack Station that could fall under RSA 125-O:13, IV to increase the station's net capability to offset power consumption requirements of the scrubber. Those capital improvements were made during the plant's maintenance outage earlier this year, and the plant is back in service.¹⁰ The capital improvements made are now used and useful in the provision of utility service to PSNH's retail customers.

PSNH has included the cost of all such improvements to Merrimack Station in its September 12, 2008 petition to establish its default energy service ("ES") rate for bills rendered on or after January 1, 2009, that is the subject of Docket No. DE 08-113. Those costs will later be included for review in PSNH's annual filing for reconciliation of revenues and costs associated with its ES charge and stranded cost recovery charge ("SCRC") for calendar year 2008.¹¹ As noted in the "Order of Notice" in this year's ES and SCRC reconciliation proceeding, Docket No. DE 08-066, the reconciliation proceeding will include a review of "the prudence and reasonableness of PSNH's incurred capital costs."

The Commission, and parties with appropriate standing, will have the opportunity to determine whether the RSA 125-O:13, IV improvements made by PSNH to Merrimack Station meet the "prudent investment rule" tests described earlier.

C. The capital improvements made to Merrimack Station which are not part of the Scrubber Project are routine maintenance activities, not "modifications" subject to RSA 369-B:3a.

PSNH has the responsibility to prudently operate its fossil/hydro generating assets.¹² As part of that responsibility, PSNH must periodically maintain those generating assets to ensure that they will continue to produce energy and capacity safely, reliably and economically. Capital projects that increase the efficiency of PSNH's generating assets and

¹⁰ Exhibit 2 to the Petition notes that the capital improvements in question had a projected commercial operation date of May 26, 2008.

¹¹ Per Order No. 24,125, Docket No. DE 02-127, dated February 14, 2003, PSNH's annual reconciliation filing is made on May 1 of each year. 88 NH PUC 65, 69 (2003).

¹² Agreement to Settle PSNH Restructuring, ¶IX, A, approved by the Commission in *PSNH Proposed Restructuring Settlement*, 85 NH PUC 154, 85 NH PUC 536 and 85 NH PUC 645 (2000).

which do not materially impact the capacity or footprint of the plant have been routinely performed as part of this obligation.

RSA 369-B:3-a cannot be reasonably interpreted to require pre-approval of capital projects at PSNH's generating stations which do not materially impact the capacity or footprint of the plant. Otherwise, such a requirement would mean that Commission pre-approval would be necessary for virtually every capital activity that occurs during plant maintenance outages – both scheduled and unscheduled. The costs and impacts of the time necessary for such regulatory approval of activities would clearly be contrary to the public interest of PSNH's retail customers. These maintenance-related capital activities are routinely the subject of Commission scrutiny under the traditional “prudent investment rule” standard, discussed earlier. For example, in 2006, PSNH replaced the runner at its Smith Hydro Station with a new more efficient runner, resulting in expected higher output opportunities, shorter planned outages, and higher reliability for future years. That capital improvement was reviewed and approved by the Commission in its reconciliation of the SCRC and ES in Docket No. DE 07-057.

The capital improvements made during Merrimack Station's maintenance outage earlier this year did not materially impact the capacity or footprint of the plant and thus were outside the scope of RSA 369-B:3-a. The Commission, and parties with appropriate standing, will have the opportunity to determine whether these improvements are consistent with the “prudent investment rule” in PSNH's annual filing for reconciliation of revenues and costs associated with its ES charge and stranded cost recovery charge (“SCRC”) for calendar year 2008.

IV. CONCLUSION

The Commission should dismiss the Petition due to: i) the Petitioners' lack of standing; ii) the inapplicability of RSA 369-B:3-a review for capital improvements made at Merrimack Station intended to increase the station's net capability to offset power consumption requirements of the scrubber pursuant to RSA 125-O:13, IV; iii) the fact that those RSA 125-O:13, IV improvements are already used and useful in the provision of utility service, are providing benefits to PSNH's retail customers, and will be the subject of a prudence review in the Company's next ES and SCRC reconciliation proceeding; and, iv) that notwithstanding the applicability of RSA 125-O:13, IV, the particular capital improvements made during

Merrimack Station's maintenance outage earlier this year are routine activities outside the scope of RSA 369-B:3-a.

Respectfully submitted this 24th day of November, 2008.

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

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CERTIFICATE OF SERVICE

I certify that on this date I caused the attached Motion to Dismiss to be served pursuant to N.H. Code Admin. Rule Puc 203.11.

November 24, 2008



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