

**THE STATE OF NEW HAMPSHIRE
BEFORE THE
NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 11-250

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Investigation of Merrimack Station Scrubber Project and Cost Recovery

**Motion to Compel Public Service Company of New Hampshire
to Respond to Data Requests**

NOW COMES TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast Inc. (together, “TransCanada”), an intervenor in this docket, and moves this Honorable Commission, pursuant to Admin. Rule Puc 203.09(i), to compel Public Service Company of New Hampshire (“PSNH”) to respond to certain data requests TransCanada made of PSNH, the responses to which were supplied on June 29 and July 3, 2012, as described in more detail below. In support of this Motion TransCanada states as follows:

1. The Commission noted in the Order of Notice in this docket that this docket raises “issues related to whether the costs of the Scrubber Project were prudently incurred consistent with the requirements of RSA 125-O:11 et seq. and are eligible for recovery through default service rates as provided by RSA 125-O:18” and “whether the resulting rates are just and reasonable pursuant to RSA 378:5 and 8.” As noted below, this is the prudence docket anticipated in the Commission order in DE 08-103 and the Supreme Court decision on the appeal of that Commission order. *Re Investigation of*

PSNH's Installation of Scrubber Technology at Merrimack Station, 93 NH PUC 564 (2008); *Appeal of Stonyfield Farm, Inc. & a.*, 159 N.H. 227 (2009)

2. As the Commission has stated, one of the critical prudence considerations in evaluating actions and decisions is to “consider the actions in light of the conditions and circumstances as they existed at the time they were taken”, which is similar to “the duty of care in a case of negligence at common law, namely, what would a reasonable person do at the time the decision was made.” *Re Public Service Company of New Hampshire*, 87 NH PUC 876, 886 (2002). Applying this standard to the prudence review in this docket requires an analysis of what a reasonable person (in this case “person” having the body corporate meaning) would have done before beginning to incur the dramatically increased expenses of the scrubber project, giving full consideration to the provisions of RSA 125-O:11-18. As set forth in greater detail below, RSA 125-O:17 provides PSNH with authority to potentially avoid the need to install scrubber technology by requesting a variance and the Commission explicitly determined, in 2008, that the statutory variance provision is germane to its prudency review considering the increased costs of the scrubber project. In other words, considering the circumstances at the time when the costs of the scrubber project doubled, the question is whether a reasonable power company would have reevaluated the expenses and the technology involved to ensure that the project still made technological and economic sense and sought all reasonably available statutory relief from the requirements of RSA 125-O:11 et seq.

3. In accordance with the procedural schedule in this docket on December 30, 2011 TransCanada submitted data requests to PSNH in the temporary rate phase of this proceeding. By agreement some of those data requests were deferred to the

permanent rate phase. On July 3, 2012 PSNH provided responses to these data requests. A copy of this set of responses is attached to this Motion as Attachment A. TransCanada also submitted data requests to PSNH on June 18, 2012 and PSNH responded to those data requests on June 29, 2012. A copy of this set of responses is attached to this Motion as Attachment B.

4. TransCanada's data requests TC 1-1 through 1-5, 1-12, and 1-14 through 1-16, sought PSNH's economic analyses related to the installation of the wet flue gas desulphurization system and to ascertain whether PSNH considered seeking a variance from the requirements of the emission reduction requirement in the scrubber law. These data requests sought information that is relevant to the determination of whether the Scrubber Project costs were prudently incurred, and the Commission should require PSNH to answer them completely.

5. The standard for discovery in Commission proceedings is broad and extends to information that is relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence. *Re Investigation into Whether Certain Calls are Local*, 86 NH PUC 167, 168 (2001). The Commission will typically allow "wide-ranging discovery" and will deny discovery requests only when it "can perceive of no circumstance in which the requested data would be relevant." *Re Lower Bartlett Water Precinct*, 85 NH PUC 371, 372 (2000). A party in a legal proceeding in New Hampshire is entitled to "be fully informed and have access to all evidence favorable to his side of the issue. This is true whether the issue is one which has been raised by him or by his opponent, and whether the evidence is in the possession of his opponent or someone else." *Scontsas v. Citizens Insurance Co.*, 109 N.H. 386, 388 (1969).

6. PSNH's unresponsive or incomplete responses appear to be based on an argument that the law mandates the use of this particular system and that PSNH could not get out from under this requirement, therefore it does not need to respond to these questions.¹ See the responses to questions about economic analyses and fuel forecasts, in particular to TC 1-4:

Question: Please provide all fuel price forecasts available to PSNH at the time of development of Gary A. Long's letter dated September 2, 2008 to Ms. Debra A. Howland Re: Docket No. DE 08-103.

Response:

PSNH objects to this question because the information requested is irrelevant to the subject of this proceeding.

This argument ignores the ability, and from a prudence perspective the responsibility, that PSNH had to consider seeking a variance pursuant to RSA 125-O:17, which includes technological or economic infeasibility as the basis for a request for a variance. The PSNH responses also suggest that PSNH views this prudence review by the Commission as having an extremely limited scope.

7. RSA 125-O:17 Variances provides:

The owner may request a variance from the mercury emissions reduction requirements of this subdivision by submitting a written request to the department. The request shall provide sufficient information concerning the conditions or special circumstances on which the variance request is based to demonstrate to the satisfaction of the department that variance from the applicable requirements is necessary.

¹ It is interesting to compare PSNH's responses to data requests in this docket concerning economic analyses and price forecasts with what it provided to the Commission in the September 2, 2008 report, pages 14-16, in docket DE 08-103. PSNH began this section of the report with the following statement: "PSNH has assured the cost of energy produced by Merrimack Station will remain lower cost for customers than reasonable potential alternatives, even when the costs of the Clean Air Project are included." The report goes on to describe an analysis consisting of a detailed net present value of revenue requirements and sensitivity analyses that were conducted to test the impact of changes to each of the key assumptions: capital cost, coal cost and equivalent CO2 allowance cost. The report also describes a review of energy trade press and publications to determine estimates of newly proposed coal and natural gas combined cycle generating facilities and an examination of the forward market for natural gas delivered to New England.

Paragraph II of this section of the law provides:

Where an alternative reduction requirement is sought, the owner shall submit information to substantiate 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*. The department, after consultation with the public utilities commission, shall grant or deny the requested variance. If requested by the owner, the department shall provide the owner with an opportunity for a hearing on the request. (emphasis added)

Under the plain language of the statute, PSNH had the ability and responsibility to seek a variance if and when the project became uneconomic or if the technology designated in the law, what in 2006 was “the best known commercially available technology”, i.e. “a wet flue gas desulphurization system”, became uneconomic or not the least expensive or most efficient way of achieving the emissions reductions required by the law.

8. PSNH’s responses to TransCanada’s data requests suggest that it believes that it had no duty or ability to even look into the variance possibility, as evidenced by the following request and response to TC 1-14:

Question: Did PSNH give any consideration to whether to seek a variance from the mercury emission reduction requirements of RSA 125-0 as authorized under RSA 125-0:17 ?

Response: PSNH objects to this question, as it is based upon a faulty and erroneous interpretation of the law. Notwithstanding this objection, PSNH responds as follows:

There was no need for PSNH to seek any variance from NHDES under either RSA 125-O:17 sections I or II, because, I. the scrubber was successfully placed into service prior to the statutorily mandated date of July 1, 2013 (RSA 125-O:13, I); and, II. an alternative reduction requirement was not necessary as the scrubber meets all of the statutorily mandated emissions reduction requirements set forth in RSA 125-O:13.

PSNH’s response to TC 1-14 does not answer the question (i.e., whether PSNH considered a variance). This response begs the question of whether the cost of the project was totally irrelevant or instead whether PSNH had a duty to seek a variance when the cost reached a certain level and if so, what was that level? PSNH’s response suggests

that it felt it had no such duty regardless of the cost or any changes in technology. Similarly, PSNH did not answer questions about economic analyses and fuel price forecasts, instead arguing that the questions are based on a “faulty premise”.² Because the Commission is tasked in this proceeding with evaluating the prudence of the Scrubber costs and PSNH’s decisions before and during the course of the Scrubber construction, responses to these questions are relevant to this evaluation or will lead to the discovery of admissible evidence. Therefore, the Commission should direct PSNH to respond to the questions.

9. PSNH also overlooks the plain language of the statutory requirement and the Commission’s enabling authority establishing a parameter for cost recovery. Under RSA 125-O:18, the Commission may only authorize cost recovery “via [PSNH’s] default energy service charge.” Thus, the Commission’s prudence review may consider the extent to which it was reasonable to believe that the costs of the project could feasibly be recovered through PSNH’s default service charge. As we are in the discovery phase of the docket, TransCanada is not pre-judging the outcome of this review (unlike PSNH in its response). Rather, we are seeking to gain information that under the statute has bearing on whether such costs were prudently incurred. See, *Re Public Service Company of New Hampshire*, 2004 N.H. PUC 226, 229 (2004) (stating that discovery requests should be denied only when the Commission “can perceive of no circumstance in which the requested data will be relevant” citing *Public Service Company of New Hampshire*, 86 NH PUC 730, 731-32 (2001)).

10. The Commission itself has already recognized the significance of the variance language in the statute. Specifically, when the Commission was confronted with

² See, for example, PSNH’s response to TC 1-2 included above.

questions about the continued viability of this project in 2008 and determined that it could not independently evaluate whether the project was in the public interest given the Legislature's public interest finding in RSA 125-O, it went on to say that:

RSA 125-O:17 does, however, provide a basis for the Commission to consider, in the context of a later prudence review, arguments as to whether PSNH had been prudent in proceeding with installation of scrubber technology in light of increased cost estimates and additional costs from other reasonably foreseeable regulatory requirements... *Re Investigation of PSNH's Installation of Scrubber Technology at Merrimack Station*, 93 NH PUC 564, 572 (2008).

PSNH was thus put on notice in 2008 that the variance issues would be part of the review in this docket. It is also worth noting that the New Hampshire Supreme Court, in dismissing an appeal of the Commission's order in this 2008 docket for lack of standing, specifically said that "any potential injury the petitioners may suffer would arise only in a subsequent rate setting proceeding." The Court cited to RSA 125-O:18, which provides that PSNH "shall be allowed to recover all prudent costs...in a manner approved by the [Commission]". *Appeal of Stonyfield Farm*, 159 N.H. 227, 231 (2009). As noted above, this is the later prudence review and proceeding anticipated by the Commission and the Supreme Court in these orders.

11. PSNH also refused to completely answer questions about its involvement in the political process related to the passage of RSA 125-O et seq. TransCanada submits that answers to these questions may reveal significant effort and expense incurred by PSNH, on behalf its shareholders, to pass the law that, according to PSNH, "mandated" the scrubber installation in 2006 and then to defend the law against those who suggested that it should be changed because the project had become too expensive in 2009. The extent to which PSNH engaged in such political activities contemporaneous with making investment decisions about the scrubber is an essential relationship, relevant to the

reasonableness and prudence of these investment decisions. Consequently, this information should be available to TransCanada and the other parties in discovery. PSNH's reliance on the fact that this law was a mandate pure and simple suggests a benign indifference on its part as to whether it was or was not "mandated" to install this project, when in fact it is clear that PSNH put forth an extreme and presumably expensive effort to first get the law passed in 2006 and then to prevent it from being changed in 2009.

12. TC 1-6 through TC 1-11 sought copies of correspondence with government officials and lobbying expenses related to legislative efforts in 2006 and 2009. However, PSNH failed to provide complete responses to these questions, appearing to contend instead that these questions are irrelevant because lobbying expenses are not recovered from ratepayers. For example, here is the request and response to TC 1-8:

Question: Please provide detail about how much PSNH spent on outside lobbyists who assisted PSNH during the 2006 legislative session.

Response: PSNH objects to this response as the information requested is not relevant to the subject of this proceeding. Moreover, any lobbying costs incurred by PSNH are recovered "below the line" and thus are not included as part of the costs sought to be recovered by PSNH in this proceeding.

13. The fact that lobbying costs are not recovered from PSNH's ratepayers is not dispositive of whether the information sought by TransCanada in this and other data requests is relevant or will lead to the discovery of admissible evidence in this proceeding. The cost incurred by PSNH in lobbying for RSA 125-O et seq. is a critical topic for discovery in this proceeding because PSNH contends that it had no choice but to invest nearly half a billion dollars in public utility rate base, a significant portion of which is now being recovered from default service ratepayers on a temporary rate basis, and on

which PSNH earns a healthy return for its shareholders. It is axiomatic that the economic return to PSNH investors on the scrubber investment is to the detriment of PSNH's default service customers. Therefore, understanding the extent to which PSNH engaged in efforts and spent money to support the scrubber "mandate" will elucidate whether and how this lobbying may have influenced PSNH's contemporaneous investment decisions for the scrubber. TransCanada therefore submits that what PSNH spent on lobbyists should be discoverable, consistent with the Commission's traditional standard for discovery cited below. Contrary to PSNH's allegation that it was "mandated" by the Legislature to this course of action, a convincing counter would be that PSNH was very successful in promoting a legislative policy initiative with the expectation of benefit to its investors and then preventing that policy from being changed. Due to its involvement with this political process, PSNH's decisions about investment in the scrubber may have been unreasonably influenced by this agenda, and imprudent and disadvantageous in terms of its ratepayers.

14. Attachment C to this Motion is a copy of the letter of then Department of Environmental Services ("DES") Commissioner Michael Nolin to the Legislature in 2006 in support of the legislation to mandate the installation of the scrubber. This letter indicates that: "Based on data shared by PSNH, the total capital cost for this full redesign will not exceed \$250 million dollars (2013\$) or \$197 million (2005\$), a cost that will be fully mitigated by the savings in SO2 emission allowances." See page 2 of Attachment C.³ This statement clearly suggests that PSNH provided data to DES which became the basis for the statements that the cost of the project was not to exceed \$197 million in

³ The same language cited above from the January 2006 Nolin letter was also contained in a letter dated April 11, 2006 from Commissioner Nolin to the Senate, a copy of which is included as Attachment D.

2005 dollars and that the cost would be fully mitigated by the savings in SO2 emission allowances. These statements raise a number of issues related to the Commission's prudence inquiry. For instance, if, as the Nolin letter indicates, PSNH shared data with DES and the Legislature in 2005 or 2006 that suggested that savings on SO2 emission allowances would more than pay for the scrubber project and at some later point that became no longer true, does PSNH's failure to bring this to the attention of DES and the Commission constitute imprudence? Did PSNH have an affirmative obligation to ratepayers to bring the huge increase in expenses to the light of day and to put it before DES and the Commission for a final determination of whether it made sense to proceed with a project that had suddenly gone from \$197 million in 2005 to \$457 million in capital costs, excluding the return on equity and operating costs, through the variance process described above?

15. When TransCanada sought additional information about Commissioner Nolin's statement attributing PSNH as the source of data about scrubber costs and emission allowances, however, PSNH narrowly interpreted TransCanada's data requests to the point of avoidance and obfuscation. For example, the responses to TC 2-2 and TC 2-3 were as follows:

(TC 2-2) Question: Please provide copies of any and all correspondence that PSNH had with DES that pertains to question #1 above. [Question 1 referred to the estimate in the Nolin letter.]

Response: There is no correspondence between PSNH and NHDES on scrubber costs.

(TC 2-3) Question: Please provide copies of any and all documents that PSNH or any of its employees, officials, representatives, agents or lobbyists provided to DES, any legislator or any state official to support the statement in DES Commissioner Michael Nolin's January 12, 2006 letter to the House Science, Technology & Energy Committee in support of HB 1673 to the effect that the

costs of the scrubber will be fully mitigated by the savings in SO2 emission allowances.

Response: PSNH has never claimed that the cost of the scrubber will be fully mitigated by the savings avoided in the purchase of SO2 emissions allowances.

16. It is beyond any reasonable interpretation (and contrary to the plain language of his letters) that Commissioner Nolin somehow unilaterally expected or fabricated the not-to-exceed cost of the scrubber or that SO2 allowances would offset and mitigate the cost of the scrubber without some level of documentation or evidence from PSNH. Moreover, if the Commissioner's representation in his January 2006 letter about basing the not-to-exceed cost for the project and the fact that the cost would be fully mitigated by savings in SO2 emission allowances on data shared by PSNH was somehow incorrect or inaccurate, shouldn't PSNH have corrected the record at that point in time? Counsel for TransCanada has found no such correction in the legislative history in either the House or the Senate. TransCanada requests that the Commission require PSNH to respond again and completely to these data requests and that PSNH provide accurate information about the circumstances referred to in Commissioner Nolin's letter.

17. Denying the parties to this docket and ultimately the Commission the responses to these questions is likely to limit the parties' and the Commission's ability to evaluate whether the expenses of the scrubber project were prudently incurred. Sustaining PSNH's objection to these data requests will also restrict TransCanada and other intervenors' ability to protect their "rights, duties, privileges, immunities or other substantial interests" that may be affected by this proceeding. See RSA 541-A:32; Admin. Rule Puc 203.17.

18. The Commission and the parties should have the responses to these questions because they are likely to provide information that is relevant to whether PSNH's unflagging determination to build the scrubber project at any cost was prudent. Taking an unnecessarily restrictive or limited view of discovery on these requests in this docket will serve no purpose other than to protect PSNH from the level of scrutiny that it must accept in return for the benefits and protections it receives from rate of return regulation. PSNH cannot continue to have it both ways: risk free decisions and frequent withholding of information that can help to evaluate the merit of those decisions.

19. Counsel to TransCanada has made a good faith effort to resolve these discovery issues informally with PSNH as required by Puc 203.09(i)(4), to no avail. Counsel for TransCanada has contacted the other parties to this docket and they take the following positions on this Motion: Staff takes no position; the Conservation Law Foundation, the Office of Consumer Advocate, and the Sierra Club support this Motion.

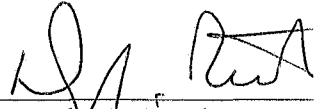
WHEREFORE, TransCanada respectfully requests that this honorable Commission:

- A. Compel PSNH to respond to data requests TC 1-1, 1-2, 1-3, 1-4, 1-5, 1-7, 1-8, 1-9, 1-10, 1-11, 1-13, 1-14, 1-15, 1-16 and TC 2-2, 2-3, 2-4, 2-5 and 2-6; and
- B. Grant such further relief as it deems appropriate.

Respectfully submitted,

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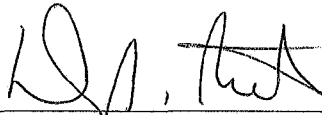


Douglas L. Patch

July 16, 2012

Certificate of Service

I hereby certify that on this 16th day of July, 2012 a copy of the foregoing motion was sent by electronic mail to the Service List.



Douglas L. Patch

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