

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DE 11-250

Investigation of Scrubber Costs and Cost Recovery

DE 14-238

Determination Regarding PSNH's Generation Assets

**Terry Cronin Reply to the Public Service Company of New Hampshire Objection to Motion
for Reconsideration**

Public Service Company of New Hampshire (PSNH) has objected to the Motion for Reconsideration of the Commission Orders 25,831 and 25,837 limiting his participation in the captioned dockets. PSNH argues that Mr. Cronin's Motion for Reconsideration is grounded on a "litany of conspiracy theories alleging that PSNH used the installation of the scrubber at Merrimack Station as a smokescreen for 'generation upgrades and other projects beyond the scrubber itself'". PSNH notes that the Cronin Motion complains of "secrecy" in public dockets, dockets involving hundreds of millions of dollars that PSNH wants to off load onto rate payers while shedding itself of antiquated fossil fuel generating plants that have become too expensive to operate.

The "Litany of Conspiracy Theories"

PSNH, in support of its Objection, refers to litigation regarding the scrubber project and its cost over runs in two New Hampshire regulatory venues, the New Hampshire Department of Environmental Services, Air Resources Council (NHDES-ARC) and the New Hampshire Public Utilities Commission (NHPUC) as a "litany of conspiracy theories".

It is useful that PSNH has opened the door to Commission examination of these dockets.

The filings in each docket demonstrate that PSNH has engaged in a multi-year effort to conceal the facts of the scrubber project from public scrutiny.

1. NHDES-ARC 09-10, Appeal of Temporary Permit TP-0008.

In this docket, the appellant, New Hampshire Sierra Club (NHSC), challenged the issuance of a temporary scrubber construction permit to PSNH on the grounds that NHDES-Air Resources Division (NHDES-ARD), Robert R. Scott, Director, did not engage in an adequate analysis of the entire project, including not just the scrubber, but also related plant projects necessitated by the substantial parasitic power consumption of the scrubber. Case investigation had revealed that NHDES-ARD Director Scott had granted PSNH a waiver, without public process, on environmental permitting under the Clean Air Act (CAA). The CAA requires new source review and/or prevention of significant deterioration (NSR/PSD) permitting if plant projects increase emissions of regulated air pollutants.

NHSC filed four separate discovery requests in this docket asking for project information. The first request asked for the project engineering and contracts regarding plant projects that may increase emissions, thus triggering more stringent CAA permitting. The second request asked for detailed data regarding boiler parameters, turbine parameters, start up data regarding boiler steam output, boiler efficiency, coal flow, turbine main steam or reheat steam throughput, data after initial startup regarding steam flow from the boiler, data regarding the capability (gross and/or net) of the unit, data regarding heat rate, characteristics of expected future or past changes in plant characteristics regarding net capability, forced outage rates, heat rate at various loads and similar data necessary to

determine if increased generating capacity was being built into the plant.¹ PSNH, represented by Barry Needleman of the McLane law firm, objected to each discovery request. NHDES-ARC Presiding Officer Raymond Donald denied each discovery request.² During the course of the appeal, it was discovered that Presiding Officer Donald was a PSNH retiree, a fact he did not disclose when members of NHDES-ARC were asked to disqualify themselves for conflicts of interest. A search of New Hampshire financial disclosure filings did not reveal Mr. Donald's conflict. It was only after a reminder to PSNH counsel that a duty of candor was owed to the tribunal that Mr. Donald's employment history was disclosed. Mr. Donald refused to recuse himself for the balance of the proceedings.

2. NHDES-ARC 10-06, Appeal of Proposed Title V Operating Permit, PSNH-Merrimack Station. In this docket, NHSC filed two discovery requests.³ The first request sought the NHDES-ARD administrative record that NHDES-ARD was required to file in the appeal in support of the proposed Title V Permit. The second discovery request sought information from NHDES-ARD about what investigation was done by NHDES-ARD to determine if the plant modifications during the scrubber project required new source review (NSR) permitting under the CAA. PSNH objected to the production of this information. NHDES-ARD did not produce any of the requested information. NHSC filed a motion requesting the issuance of subpoenas of NHDES-ARD employees responsible for the Title V Permit. NHDES-ARD was represented by Assistant Attorney General⁴ Evan Mulholland who refused to produce the witnesses. At the merit hearing of the appeal,

¹ The NHSC discovery requests regarding plant characteristics and data were developed by experts in coal fired power plants.

² Presiding Officer Donald did order PSNH to produce the Sargent & Lundy study on the unarguable grounds that it was used in a Commission docket although marked privileged and confidential.

³ Mr. Donald again refused to recuse himself in this docket, but he did not serve as Presiding Officer.

⁴ The then Attorney General was Michael Delaney. Mr. Delaney ignored several written pleas by NHSC to oversee the lack of process in the ARC.

Mr. Mulholland refused to allow the NHDES-ARD witnesses to testify notwithstanding that they prepared the Title V and some were in the hearing room.

3. NHPUC 08-103, Investigation of PSNH'S Installation of Scrubber Technology at Merrimack Station.

In this docket, NHSC offered into the record the November 2004, Burns & McDonnell, Merrimack Station Unit 2 Boiler Replacement Feasibility Study; the February 1, 2007, Sargent & Lundy Merrimack Boiler Study; and, the July 26, 2005, GZA Geo Environmental, Inc. Preliminary Permit Plan Analysis-Critical Path Issues, Multi-Pollutant Control Strategy Options.⁵ The purpose of the study offer was to provide information to assist NHPUC in understanding why the cost of the project had ballooned to \$457,000,000. NHPUC staff did not post the studies to the docket and sequestered them as "confidential".

On April 15, 2010, NHSC asked in writing that the studies be posted to the docket for public scrutiny. On May 10, NHSC filed a motion asking that the studies be posted to the docket. (Tab 41). On June 14, 2010, PSNH represented by Attorney Bersak objected to the NHSC motion. (Tab 42) The Bersak Objection was strident, an attack on me professionally. The Objection offered little that was helpful to understand why PSNH did not want the studies posted to the public record.

The tone of the Bersak Objection to the Cronin Motion for Reconsideration in the instant dockets is similar to his DE 08-103 filing. Its tone does not provide an understanding why PSNH has demanded secrecy in each and every regulatory docket involving the scrubber project.

⁵ The Burns & McDonnell study and the GZA study were produced by Region 1, United States Environmental Protection Agency pursuant to a NHSC FOIA request. The Sargent & Lundy study was discover in NHDES-ARC 09-10. Each of the studies was commissioned by PSNH.

In the end, the studies were not made publically available on the NHPUC website in DE 08-103. On March 15, 2012, Staff Attorney Suzanne G. Amidon, in a letter filed in both DE 08-103 and DE 11-250, instructed that the studies not be filed in DE 11-250 for public view but that the Commission make them available for inspection by the parties to DE 11-250 consistent with the Commission's directive in the June 25, 2010, secretarial letter in DE 08-103.

The Bersak arguments in his Objection to the Cronin Motion for Reconsideration bring the concern about the secrecy shrouding the scrubber project full circle.⁶

The secrecy that has pervaded the project from its inception has continued. Beginning with the PSNH discovery obstruction in the NHDES-ARC dockets ARC 09-10 and ARC 10-06 to docket DE 08-103 to DE 11-250 and DE 14-238, the project engineering and construction details have been secret.

In his June 14, 2010, Objection in DE 08-103, Mr. Bersak reminded the Commission that the scrubber project will be subject to prudence review. He argued that the Commission had engaged an expert consultant (Jacobs Consultancy) to assist with the prudence review process. He argued that it "is quite unlikely that PSNH would be able to camouflage the allegedly undisclosed life-extension and generation upgrade projects so that they are not discovered by the Commission or its expert consultant...." (Tab 42, pages 4-5).

⁶ Contrary to Mr. Bersak's argument, none of the orders resulting from NHDES-ARC have preclusive effect on the current Commission dockets DE 11-250 and DE 14-238. The NHDES-ARC dockets involved CAA permitting issues. The common theme in all dockets, both ARC and Commission is PSNH secrecy about the details of the project.

Unsurprisingly, the work of the expert that Mr. Bersak assured the Commission would identify any impermissible generation upgrades or life extension projects, the Jacobs Consultancy, turned out to be secret.

On January 20, 2012, PSNH moved that the Jacobs Consultancy work be confidential. (DE 08-103, Tab 57)

After the merger of dockets DE 08-103 and DE 11-250, upon Staff recommendation (DE 08-103, Tab 66), the Commission issued Order 25,332. That Order required that the Jacobs Consultancy Report be filed with the Commission, but in only in redacted form. The confidential Report was not made available for public review.

In DE 11-250, PSNH objected to the disclosure of the Jacobs Data Requests to the public or any party. PSNH stated that it had entered a confidentiality agreement with Jacobs that contained limitations on Jacob's authority to disclose information obtained from PSNH. The agreement included a provision that the documents forming the basis of Jacob's conclusions not be provided to Commission staff.

The Commission ordered that the Jacobs Data Requests could be disclosed but did not order that the responses to the Data Requests be provided to Commission staff. Neither the PSNH responses to the Data Requests nor the identification of specific project documents relied on to reach the Data Request conclusions were provided to Commission staff.

On that basis alone, given the paucity of engineering and project details contained in the Jacob's Report, the Commission could not be properly informed about the prudence of the project or whether PSNH upgraded plant generating capacity or installed other life extension projects.⁷

Mr. Bersak also argues that staff and other interveners availed themselves of the opportunity to visit the room "housing tens of thousands of pages of Scrubber Project contract documents and engineering drawings". The problem, however, is that access to the "room" required the execution of a confidentiality agreement. The parties signatory to such an agreement ruined their ability to test the veracity of the Jacobs report or otherwise examine the project on the public record.

Conclusion

The gravamen of Mr. Cronin's intervention is that the Settlement Agreement has no binding effect on him as a residential rate payer; that the Commission must make the required prudence determination of the scrubber supported by an evidentiary record that examines management wisdom of continuing with the project when confronted with the large project cost over runs; that the prudence determination requires that the Commission identify when the plant became uneconomic to run in relation to the reality of those cost over runs; and, whether those cost over runs were the result of generation upgrade and life extension projects done beyond the ambit of RSA 125-O and RSA 369-B: 3a.

⁷ Mr. Bersak, in his Objection to the Cronin Motion for Reconsideration, argues that it would be "improper" for the responses to the Jacobs Data Requests be submitted to the Commission. Does he mean to say that staff, if privy to the Data Request responses, would not be permitted to inform the Commission about those responses?

Further, Mr. Cronin is entitled to the protections afforded him as a residential rate payer under the restructuring policy principles set forth in RSA 374-F: 3, XII (a). Those principles require that the Commission determine rates which are equitable, appropriate, and balanced. The RSA 374-F restructuring policy requires that PSNH satisfy the burden of proof required by RSA 374-F: 4, V before it can recover the scrubber costs as stranded costs. On the facts of the case at bar, given the genesis of the Settlement Agreement and its failure to include residential rate payers as settlement parties or protect their interests , the provisions of RSA 374-F must be carefully followed.

Wherefore

Intervener Cronin respectfully requests that the Commission vacate Orders 25,831 and 25,837; that his Motions to Compel be sustained; and, that PSNH be ordered to provide the discovery as requested.

11/17/15

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Certificate of Service

This motion was filed and served in accordance with Puc 203.11.

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