THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. 2008-0897

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

BRIEF OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

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STATEMENT OF FACTS

On June 8, 2006, "AN ACT relative to the reduction of mercury emissions," 2006 N.H. Laws 105 (the "Scrubber Law"), took effect. By that law, the General Court imposed an unmistakable legislative mandate for Public Service Company of New Hampshire ("PSNH") to install and have operational scrubber technology to control mercury emissions at its Merrimack Generating Station in Bow no later than July 1, 2013. RSA 125-O:13, I.

The Scrubber Law, codified at RSA 125-O:11 through 125-O:18, is clear, straightforward, and unambiguous in its mandate. This unequivocal mandate was expressed in the law's Statement of Purpose and Findings:

> I. ***It is in the public interest to achieve significant reductions in mercury emissions at the coal-burning electric power plants in the state as soon as possible.*** The requirements of this subdivision will prevent, at a minimum, 80 percent of the aggregated mercury content of the coal burned at these plants from being emitted into the air by no later than the year 2013. ***To accomplish this objective, the best known commercially available technology shall be installed at Merrimack Station no later than July 1, 2013.***
>
> II. ***The department of environmental services has determined that the best known commercially available technology is a wet flue gas desulphurization system,***

hereafter "scrubber technology," as it best balances the procurement, installation, operation, and plant efficiency costs with the projected reductions in mercury and other pollutants from the flue gas streams of Merrimack Units 1 and 2. Scrubber technology achieves significant emissions reduction benefits, including but not limited to, cost effective reductions in sulfur dioxide, sulfur trioxide, small particulate matter, and improved visibility (regional haze).

III. ***After scrubber technology is installed at Merrimack Station,*** and after a period of operation has reliably established a consistent level of mercury removal at or greater than 80 percent, the department will ensure through monitoring that that level of mercury removal is sustained, consistent with the proven operational capability of the system at Merrimack Station.

IV. To ensure that an ongoing and steadfast effort is made to implement practicable technological or operational solutions to achieve significant mercury reductions prior to the construction and operation of the scrubber technology at Merrimack Station, the owner of the affected coal-burning sources shall work to bring about such early reductions and shall be provided incentives to do so.

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.***

VI. ***The installation of such technology is in the public interest of the citizens of New Hampshire and the customers of the affected sources.***

VII. Notwithstanding the provisions of RSA 125-O:1, VI, the purchase of mercury credits or allowances to comply with the mercury reduction requirements of this subdivision or the sale of mercury credits or allowances earned under this subdivision is not in the public interest.

VIII. ***The mercury reduction requirements set forth in this subdivision represent a careful, thoughtful balancing of cost, benefits, and technological feasibility and therefore the requirements shall be viewed as an integrated strategy of non-severable components.***

RSA 125-O:11 (emphases added).

In order to meet this legislative mandate to reduce emissions of mercury "as soon as possible" *see also* RSA 125-O:17, I, upon passage of the Scrubber Law in the spring of 2006 PSNH immediately began efforts to design, permit, procure, and install the scrubber technology specified in the law.

The events leading to this Appeal began in August 2008 when Northeast Utilities, the corporate parent of PSNH, filed a Form 10-Q quarterly report with the Securities and Exchange Commission disclosing that the cost of installing the scrubber technology had increased from an original estimate of $250 million to $457 million. PUC Directive, August 22, 2008. (A.36).[1] As a result of this reported cost increase, on August 22, 2008, the New Hampshire Public Utilities Commission (the "PUC" or "Commission") opened an investigation pursuant to its powers under RSA 365:5 and 19. Noting that RSA 125-O:11 *et seq.* requires PSNH to install scrubber technology at Merrimack Station (the "Scrubber Project" or the "Project"), the PUC directed PSNH to file a "comprehensive status report on its installation plans" by September 12, 2008, including "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 effect on energy service rates if Merrimack Station were not in the mix of fossil and hydro facilities operated by PSNH." *Id.* (A.36).

Notwithstanding this directive, the PUC also recognized that its authority to review the Scrubber Project under RSA 369-B:3-a might be limited.[2] *Id.* In particular, the PUC Directive states that RSA 125-O:11 "requires PSNH to install new scrubber technology" and includes a legislative finding that "[t]he installation of such [scrubber] technology is in the public interest of the citizens of New Hampshire and the customers of [the] affected sources." *Id.* By contrast, if RSA 369-B:3-a was applicable to the Project, PSNH would be permitted to proceed with the mandated installation of scrubber technology only after the PUC made a finding "that it is in the public interest of retail customers of PSNH to do so." *Id.* (A.37). Noting "a potential conflict

[1] References to the Appendix to Appellants' Brief are cited as "A.__" with the appropriate page citation. References to the Supplemental Appendix of PSNH are cited as "S.A.__." References to the Orders, which are in the Addendum to Appellants' Brief, are cited as "Add."

[2] Three years prior to the Scrubber Law, in 2003 N.H. Laws 21:4, the Legislature had enacted RSA 369-B:3-a. RSA 369-B:3-a authorizes PSNH to modify its generation assets upon a finding that such modifications are "in the public interest of retail customers of PSNH to do so." (A.22).

between these statutory provisions," the PUC ordered PSNH to file "a memorandum of law addressing the nature and extent of the Commission's authority relative to the Merrimack Station scrubber project." *Id.*

Per the PUC's direction, PSNH filed its status report (the "Report") and legal memorandum on September 2, 2008.[3] That Report described the background of the Project and the legislative mandate that the Project proceed on an accelerated basis, and also included detailed timelines of activities performed since 2006, when the Project began, and specific, updated cost estimates. Report (A.38-79). PSNH also informed the PUC that even at the increased cost, the Project cost estimate remained "in-line with recently published information on other multiple unit scrubber installations occurring elsewhere in the country." *Id.* (A.50). The Report emphasized that adherence to construction schedules and competitive bidding processes was critical to the timely completion of the Project. *Id.* (A.40).

PSNH's legal memorandum accompanying the Report asserted that because a specific finding had been made in RSA 125-O:11, VI, that the Project was in the public interest of the citizens of New Hampshire and the customers of PSNH, no review by the PUC to determine whether the Project was "in the public interest of retail customers of PSNH" was either necessary or appropriate under RSA 369-B:3-a. Memorandum, S.A.13. In brief, PSNH argued that whereas RSA 369-B:3-a was a general statute permitting PSNH to modify *any* of its generating assets if the PUC found that it was in the public interest of retail customers of PSNH to do so, and provided for cost recovery for the modification, the later enacted RSA 125-O:11-18 was a specific statute *mandating* that PSNH modify a particular facility (Merrimack Station) *as soon as*

[3] PSNH's legal memorandum, filed as part of the PUC's certified copy of the record, is included in the Supplemental Appendix of PSNH (S.A.1).

possible, in a particular way, no later than a particular date, with specific findings that this modification was in the public interest and that the Company "shall be allowed" to recover the prudent costs of complying with that mandate. Thus, any conflict between the mandates established by RSA Ch. 125-O and the general requirements of RSA Ch. 369-B was resolved by the plain language of the later and more specific statute. In sum, PSNH asserted that the adoption of the Scrubber Law divested the PUC of jurisdiction to consider this particular modification under RSA 369-B:3-a.

The Office of the Consumer Advocate ("OCA") also filed a memorandum of law at the PUC. The OCA concluded that review of the Project was necessary and within the PUC's jurisdiction because the mandate in the Scrubber Law was dependent on a finding of "reasonable costs," and that the substantial increase in estimated costs after the passage of the Law required a complete review by the PUC of the public interest findings in RSA Ch. 125-O.[4]

After considering these legal arguments, the PUC issued Order No. 24,898 dated September 19, 2008 (the "Order"), finding that it had no jurisdiction to review the Project under RSA 369-B:3-a. The PUC found a conflict to exist between the two statutes since the mandated installation of the scrubber was a "modification" under RSA 369-B:3-a and because both statutes included references to the same "public interest" standard. Order at 7-8 (Add.26-27). It reconciled this conflict by finding that the Legislature was aware of RSA Ch. 369-B when it passed RSA 125-O:11-18, and intended that the more specific, later statute prevail:

> We do not find it reasonable to conclude that the Legislature would have made a specific finding in 2006 that the installation of scrubber technology at the Merrimack Station is in the public interest, set rigorous timelines and incentives for early completion, and provided for progress reports to the Legislature while simultaneously expecting the Commission to undertake its own review, conceivably arrive at a different conclusion, and certainly add significant time to the process. If

[4] The PUC requested that the OCA participate in the proceeding below. The OCA did not appeal the PUC's orders in this case.

> we concluded otherwise, we would be nullifying the Legislature's public interest finding and rendering it meaningless.

Id. (Add.28). Reading RSA Ch. 125-O "as a whole," the PUC found that the Legislature did not intend PSNH to seek its approval under RSA 369-B:3-a "for a modification that the Legislature has required and found to be in the public interest." *Id.* (Add.29). This conclusion was found to be "supported by the overall statutory scheme of RSA 125-O:11 *et seq.* as well as its legislative history." *Id.*

The Order also addressed two arguments made by the OCA and now made by Appellants in this appeal. First, the OCA had argued that RSA 125-O:11 did not impose a complete mandate to construct the scrubber because under RSA 125-O:13, I, the installation requirement was contingent upon obtaining "all necessary permits and approvals from federal, state and local regulatory agencies" and the PUC was such an agency. The PUC concluded that since the Legislature had "presumptively determined the scrubber to be in the public interest," an RSA 369-B:3-a proceeding was "obviated by the Legislature's findings in RSA 125-O:11." *Id.* at 10 (Add.29). PUC approval under RSA 369-B:3-a was therefore not a "necessary" approval under RSA 125-O:13, I. *Id.* (Add.30).

Second, the PUC rejected the OCA's argument that because cost estimates for the Project had increased, it was necessary to reconsider all cost issues relating to the Project at the "pre-installation" stage under RSA 369-B:3-a. The PUC ruled that the cost increases reported did not alone constitute a grant of jurisdiction to review the Project given the "unconditional determination that the scrubber project is in the public interest," the Legislature's failure to include any alternative means of compliance with the law, and its failure to set any cap on costs or rates. *Id.* RSA 125-O:18 calls for review of the "prudence" of the Project costs, but only after completion. The PUC also found that language in Section 18 "bolsters our finding that the

Legislature intended to rescind the Commission's authority to pre-approve the scrubber installation under RSA 369-B:3-a." *Id.* at 12 (Add.31). Section 18 provides a specific methodology for the recovery of costs of the Project during PSNH's continued ownership and operation of Merrimack Station, and calls for the application of RSA 369-B:3-a only in the event that PSNH divests itself of that asset. The PUC concluded that this "special notice" that RSA 369-B:3-a would apply only in the event of divestiture was necessary only if the Legislature "intended that 369-B:3-a not apply absent divestiture [*i.e.*, to modification] which is the case before us." *Id.* (Add.31). In short, by specifying applicability in the case of divestiture, but not modification, the Legislature demonstrated its intent that RSA 369-B:3-a did not apply to review of modifications under RSA 125-O:11-18. The only modification covered by RSA 125-O:11-18 is the Scrubber Project.

Based on all these findings, the PUC concluded that:

> [A]s a result of the Legislature's mandate that the owner of Merrimack Station install scrubber technology by a date certain, and its finding pursuant to RSA 125-O:11 that such installation of scrubber technology at PSNH's Merrimack Station is in the public interest of citizens of New Hampshire and the customers of the station, 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.

Id. at 13 (Add.32).

Following the Order, Stonyfield Farm, Inc., H & L Instruments, LLC and Great American Dining, Inc., who allege that they are commercial-rate customers of PSNH (the "Appellants"), together with TransCanada Hydro Northeast Inc. ("TransCanada") (an *amicus* in this Court), and an individual, Edward M.B. Rolfe, a purported PSNH residential customer, moved for rehearing contending that they had been denied an opportunity to participate before the PUC in contravention of RSA 541-A:31 and RSA 365:19 and in violation of their right to due process under the New Hampshire Constitution. These parties largely repeated the

arguments of the OCA prior to the Order, contending that the increased costs of the Project required review under RSA 369-B:3-a. In particular, they contended that the finding in RSA 125-O:11 that the Project was in the public interest was entirely dependent upon the estimated costs set out during the hearings on HB 1672 (which became RSA 125-O:11-18) and that any significant change in those costs (which they argue were fixed costs) required a reassessment of the public interest finding. A.156-57. Because RSA 125-O:11 made achievement of the required installation "contingent upon obtaining all necessary permits and approvals," they again argued that the Legislature did not intend to preclude PUC review under RSA 369-B:3-a. (A.158-59). PSNH challenged the participation of these parties for lack of standing and because the PUC's proceeding involved only conclusions of law and thus did not implicate factual issues requiring an adjudicatory hearing under RSA 365:19. (S.A.26-42).

On November 12, 2008, the PUC issued Order No. 24,914 (the "Rehearing Order") finding "that TransCanada, the Commercial Ratepayers and Mr. Rolfe each have stated a sufficient interest in this case to request rehearing pursuant to RSA 541:3." Rehearing Order at 9 (Add.42). However, the Rehearing Order rejected the request for a full adjudicative proceeding on the grounds that: (1) the proceedings did not disclose facts mandating a full adjudicative proceeding under RSA 365:19; and (2) the PUC investigation had been limited to legal issues, and any due process concerns had been "cured through the rehearing process," which allowed "an adequate opportunity to present legal arguments." *Id.* at 11 (Add.42-44).

The Rehearing Order re-affirmed the PUC's findings regarding the impact of the mandates in RSA 125-O:11-18 on the more general provisions of the earlier statute, RSA 369-B:3-a, and once again rejected the claim that the public interest findings in RSA 125-O:11-18 were predicated on specified costs. Repeating its prior ruling that because RSA 125-O:13, IX

directed PSNH to report annually to the Legislature on the progress and status of installing the scrubber technology, including any updated cost information, the PUC found that directive to evidence the Legislature's intent to retain for itself control of cost review, rather than delegating that function to the PUC under RSA 369-B:3-a. Order (Add.30). "The Legislature could have provided express cost limitations on the scrubber installation, but it did not." Rehearing Order (Add.45).

This appeal followed.[5]

SUMMARY OF ARGUMENT

This appeal raises a straightforward issue of statutory construction. Do RSA 125-O:11-18 supersede RSA 369-B:3-a regarding the installation of a mercury scrubber at PSNH's Merrimack Station?

In 2003, as part of a general restructuring of electric public utilities, the Legislature enacted RSA 369-B:3-a and granted authority to the PUC to review, under a public interest standard, modifications of the generating assets of PSNH, and provide for the cost recovery of such modifications, before construction. Three years later, following a cooperative effort of State agencies, PSNH, environmental groups, and a broad array of competing interests, the Legislature passed the Scrubber Law, RSA 125-O:11-18, as part of the "Multiple Pollutant Reduction Program" of RSA Ch. 125-O to require mercury emissions reductions. As the Legislature explicitly stated, the end result of these cooperative efforts "represent a careful, thoughtful balancing of cost, benefits, and technological feasibility and therefore the

[5] Only the Appellant Commercial Ratepayers filed an appeal with this Court pursuant to RSA 541:6. *Amicus* OCA did not seek rehearing of the PUC's initial Order; *amicus* TransCanada did not file an appeal of the Rehearing Order per RSA 541:6. Rolfe did not appeal.

requirements should be viewed as an integrated strategy of non-severable components." RSA 125-O:11, VIII.

The Scrubber Law divested the PUC of jurisdiction under RSA 369-B:3-a to review public interest and provide a cost recovery methodology for *one specific* modification of *one* of PSNH's generation assets, namely, the installation of the Scrubber at Merrimack Station. The General Court *required* that specific modification to be made, *required* that it be made in a particular way, and *required* that it be made as soon as possible and "no later than July 1, 2013." *See* RSA 125-O:11, II and 125-O:13, I. It also made specific findings that the installation of the Scrubber Project "is in the public interest of the citizens of New Hampshire and the customers [of PSNH]," RSA 125-O:11, VI, and mandated a specific cost recovery methodology, RSA 125-O:18.

Appellants, as commercial customers of PSNH, may never bear any of the costs of the Scrubber Project because they are not required to purchase power from PSNH. They have suffered no harm from construction of the Project to date because none of the costs of the Project have been included in PSNH's rates. Accordingly, they lack standing to challenge the PUC's Orders. Nevertheless, they ask this Court to undo the "careful balancing of costs, benefits and technological feasibility" in RSA 125-O:11-18 by overturning the PUC's thoughtful rulings declining to exercise jurisdiction to review the public interest or cost of the Project based on the clear statutory language removing its jurisdiction to do so. Rather than giving recognition to the non-severability of the statute's explicit findings, the Appellants asked the PUC, and now ask this Court, to focus solely on the increased costs of the Scrubber on the theory that the public interest findings of the Legislature were inextricably tied to a particular level of costs. The PUC rejected any such unraveling of these "non-severable components."

The explicit legislative findings that the Scrubber Project is in the public interest are unconditional as to those State agencies, including the PUC. As the PUC found, the later and more specific statute, RSA 125-O:11-18, takes precedence over the earlier and more general RSA 369-B:3-a. The PUC is an agency of limited jurisdiction with only those powers granted to it by the Legislature. Here, the Legislature's enactment of a statute mandating a specific modification to one of PSNH's generating assets is in plain conflict with the general grant of jurisdiction to the PUC for modifications of all assets. As a result, the Legislature made a public interest review by the PUC unnecessary. Moreover, although retaining the jurisdiction of the PUC to conduct a review of the prudence of the Scrubber's costs after construction, the Legislature retained for itself the review of cost during construction by requiring annual reporting of updated cost information. RSA 125-O:13, IX. Contrary to the Appellants' contentions, the Scrubber Law was not tied to a specific cost level, but even if it had been, review of that one element in the balancing test remains with the Legislature, at least until construction is complete.

The Appellants are well aware that the Legislature is the only forum for redress of their concerns. They raised all of the arguments now presented to this Court in the current legislative session in connection with two pieces of proposed legislation designed to require the PUC to consider both the public interest of the Scrubber Project and its costs. The Legislature soundly rejected their efforts. Having failed in those efforts, and in the PUC, the Appellants now ask this Court to reverse the PUC and to substitute the Appellants' judgment for that of the Legislature and the PUC. The PUC rejected that effort. This Court should uphold the PUC's correct interpretation of its own jurisdiction, affirm the PUC's Orders and reject the Appellants' efforts to undermine the careful balancing test of the statute.

ARGUMENT

I. The Appellants Lack Standing to Bring this Appeal; Moreover, any Claim is Not Ripe. Therefore, this Appeal Should be Dismissed.

This Court's precedent compels the dismissal of this appeal because the injury alleged by the Appellants[6] – future increased energy costs as a result of the Project – is entirely speculative and entirely avoidable.

Such an alleged injury is "neither immediate nor direct because any such potential injury would arise only through increased rates imposed during a subsequent ratesetting proceeding." *Appeal of Campaign for Ratepayers Rights*, 142 N.H. 629, 632 (1998) (standing denied where ratepayers did not suffer immediate or direct injury as a result of the PUC's decision to allow utility to enter into special contracts with some customers where no increased rates were imposed on ratepayers as part of the proceeding, and any such increase instead would occur, if at all, at a later ratesetting proceeding). By the same rationale, their claim is also not ripe because it "requires further factual development" and is not "sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage." *State v. Fischer*, 152 N.H. 205, 210 (2005) (citations and quotations omitted). PSNH will only recover its prudent costs of complying with RSA 125-O:11-18 through its default energy rate to the extent those costs are approved in a subsequent, separate proceeding. Until the Project is completed and put into service, PSNH is prohibited from even seeking to recover Project-related costs in its rates according to New Hampshire's anti-construction work in progress law, RSA 378:30-a. *See*

[6] The Appellants allege that "[a]s ratepayers for electricity generated by ... [PSNH], the[y] *will be* directly affected by the materially increased costs of installation of scrubber technology at Merrimack Station, and by the PUC's Order." Brief at 6 (emphasis added). Even the allegation contemplates future harm. PSNH challenged their standing, but the PUC found that they had sufficient standing to participate because they "*may be* affected financially by changes in PSNH's default energy service rate either as customers taking default energy service, or as customers of competitive electric suppliers." Rehearing Order at 9 (Add.42) (emphasis added).

Petition of Public Service Co. of New Hampshire, 130 N.H. 265, 274 (1988). Because the harm alleged by the Appellants is neither "immediate" nor "direct" and will be addressed during a subsequent ratesetting (*i.e.*, factual) proceeding, they do not have standing and their claim is not ripe for review.

Moreover, the Appellants have the right and the ability to entirely avoid PSNH's "default service charge" by choosing another supplier for their electric energy (such as *amicus* TransCanada Hydro) and can therefore avoid ever paying any costs of the Project.[7] The State's electric restructuring statute, RSA Ch. 374-F, allows electric consumers to exercise such choice of electricity supplier.[8] There are nearly two dozen such competitive suppliers registered with the PUC under N.H. Admin. Rule Puc Ch. 2000 and listed on the PUC's website, including TransCanada Hydro.[9] If the Appellants choose not to want to pay for the costs of this environmentally beneficial project once it is completed, they can purchase their energy from a competitive supplier and avoid the costs – and hence any "harm" – completely.[10]

For the foregoing reasons, PSNH requests that the Court dismiss this appeal because the Appellants do not have standing and, even if they did, their claim is not ripe.

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[7] RSA 125-O:18 mandates that the costs of the Scrubber Project "shall be recovered via the utility's default service charge." Customers such as the Appellants have the right and ability to completely avoid payment of the "default service charge" by selecting a competitive electricity supplier. See RSA Ch. 374-F. Per RSA 374-F:3, III, PSNH's rates have been "unbundled" and the energy service charge is separate and distinct from PSNH's other franchised delivery-related services. *See Re PSNH Proposed Restructuring Settlement*, 85 NH PUC 154 (2000) and 85 NH PUC 536 (2000).

[8] The Appellants have unequivocally admitted that they have the ability to buy their electricity elsewhere. During public hearings on HB 496 before the House Committee on Science, Technology and Energy on March 5, 2009, Rep. Rappaport had the following exchange with Attorney Brad Kuster, who represented the Appellant Commercial Ratepayers Group: "Q. Rep. Rappaport: Aren't you able to buy power on the open market where you wish? A. Mr. Kuster: Yes, but there are bigger issues." (S.A.184).

[9] See http://www.powerischoice.com/pages/supplier.html.

[10] The Appellants' argument that they have standing in this case is similar to consumers of Stonyfield yogurt suing Stonyfield over the cost of its installation of solar panels at Stonyfield's Londonderry plant and asserting standing because they will be "directly affected" by the increased costs of yogurt resulting from that installation. Although Stonyfield may pass on the cost of the solar installation to its customers, those customers can, if they so choose, avoid that cost by purchasing a different manufacturer's yogurt – just as the Appellants in this case can avoid the cost of the Project by purchasing their electric energy from a different supplier.

II. The PUC Correctly Concluded that the Legislative Mandates in RSA 125-O:11-18 Divest it of Jurisdiction to Review the Scrubber Project Under RSA 369-B:3-a.

In seeking to set aside the PUC's Orders, the Appellants have the burden of demonstrating that they are contrary to law or, by a clear preponderance of the evidence, are unjust or unreasonable. *Appeal of Pinetree Power,* 152 N.H. 92, 95 (2005); *Appeal of Campaign for Ratepayers Rights,* 145 N.H. 671, 674 (2001). Here, the PUC made no findings of fact because its decision was limited to a finding of law. As a matter of law, the PUC's rulings are correct, and the Appellants have not, and cannot, meet their burden of proof on appeal.

A. The Passage of RSA 125-O:11-18 Divested the PUC of Jurisdiction to Review the Scrubber Project to Determine Whether It Was In the Public Interest.

This case involves a narrow issue of PUC jurisdiction. That issue is whether, by enacting RSA 125-O:11-18 in 2006, the Legislature divested the PUC of jurisdiction to make a determination under RSA 369-B:3-a, a statute it enacted in 2003, of whether the Scrubber Project is in the public interest. This issue implicates the core question of the nature and extent of the PUC's authority. Since the PUC's authority to regulate the State's utilities is granted solely by the Legislature, that authority may also be subsequently limited, modified or revoked by the Legislature. That is precisely what the Legislature did when it enacted RSA 125-O:11-18.

As it correctly concedes in its Order, "[t]he Commission has only those powers delegated to it by the Legislature." Order (Add.32) (citing *Appeal of Public Service Company of N.H.*, 122 N.H. 1062, 1066 (1982)). The PUC was correct. The "nature and extent of the Commission's authority" has repeatedly been defined by this Court. *Petition of Boston & Maine Railroad*, 82 N.H. 116, 119-20 (1925); *State of New Hampshire v. New Hampshire Gas & Electric Co.*, 86 N.H. 16, 32-33 (1932); *H.P. Welch Co. v. State*, 89 N.H. 428, 437-38 (1938); *Blair and Savoie v. Manchester Water Works*, 103 N.H. 505, 507-08 (1961); *State v. New England Telephone &*

Telegraph Co., 103 N.H. 394, 398 (1961); *Appeal of Public Service Co.*, 122 N.H. at 1072; *Appeal of Richards,* 134 N.H. 148, 158 (1991). As early as 1925, this Court held:

> The public service commission is an agency of limited powers and authority. While the Legislature may delegate to such an agency certain of its own powers and authority, the exercise of such delegation does not extend beyond expressed enactment or its fairly implied inferences. The establishment of such an agency is of a special rather than general character, and power and authority not granted are withheld.

Boston & Maine Railroad, 82 N.H. at 116. The Court re-affirmed the PUC's limited authority in 1982 in *Appeal of Public Service Co.*:

> The PUC is a creation of the legislature and as such is endowed with only the powers and authority which are expressly granted or fairly implied by statute. Consequently, the authority of the PUC...is limited to that specifically delegated or fairly implied by the legislature and may not be derived from other generalized powers of supervision.

Appeal of Public Service Co., 122 N.H. at 1066 (citations omitted.)[11]

The limited nature of PUC jurisdiction is central to resolving the narrow issue of statutory construction now before this Court. Absent the enactment of RSA 369-B:3-a, the PUC had no jurisdiction to review a modification of Merrimack Station – or the costs of such a modification – prior to installation. Instead, its jurisdiction was confined to an assessment of the prudence of management decisions and of the costs of the modification, only after PSNH sought to include those costs in its rates.[12] In RSA 369-B:3-a,[13] the Legislature changed this paradigm, requiring

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[11] As stated in its Order, the PUC recognizes these restrictions on its power and authority. In *Re RCC Minnesota, Inc.*, 88 NH PUC 611, 615 (2003), the PUC noted that it "must look to its statutory authority to determine whether it has jurisdiction."

[12] The PUC does have plenary authority to regulate rates. *State v. N. E. Telephone & Telegraph Co.*, 103 N.H. 394, 397 (1961).

[13] RSA 369-B:3-a is part of a chapter of laws relating to electric industry restructuring. The Legislature initially embarked on a course of requiring the State's utilities to divest ownership of their generating stations. However, following the blackouts in California resulting from similar efforts at divestiture, the Legislature passed RSA 369-B:3-a. This statute required that PSNH continue to own its generating stations, with divestiture allowed only if the PUC determines that such an action is in the economic interest of PSNH's retail customers.

PSNH to obtain a preliminary public interest finding from the PUC regarding any generation asset modification, as well as a cost recovery methodology.

By enacting RSA 125-O:11-18, the Legislature specifically removed both these areas from PUC review under RSA 369-B:3-a for *one specific* modification of *one* of PSNH's generation assets, namely, the installation of the Scrubber at Merrimack Station. As to this specific modification, the General Court *required* that it be made, *required* that it be made in a particular way, and *required* that it be made as soon as possible but "no later than July 1, 2013." *See* RSA 125-O:11, II and 125-O:13, I. The Legislature thereby took away the jurisdiction it had granted just three years earlier by: (1) finding that the installation of the Scrubber Project "is in the public interest of the citizens of New Hampshire and the customers [of PSNH]," RSA 125-O:11,VI; and (2) mandating a specific cost recovery methodology, RSA 125-O:18. By addressing the only areas in which the PUC had *any* jurisdiction to review this specific modification, the Legislature completely divested the PUC of jurisdiction over the Scrubber Project until it was called upon to implement recovery of costs by PSNH after construction under RSA 125-O:18.

Given that RSA 125-O:11-18, as the later and more specific statute, deals with precisely the same subject matter as the earlier RSA 369-B:3-a, the PUC properly concluded that the two statutes were in conflict, and irreconcilable. Order (Add.25-28). Although the Appellants argued below and now argue to this Court (Brief at 13-15) that the statutes can be harmonized, their plain language contradicts this claim. As the PUC stated:

> [W]e cannot harmonize RSA 369-B:3-a and RSA 125-O:11. If we proceed under RSA 369-B:3-a, ... then we would be effectively ignoring the Legislature's finding that the installation of the scrubber is in the public interest. On the other hand, if we do not proceed under RSA 369-B:3-a, we would arguably be allowing PSNH to ignore the Legislature's directive to secure from the Commission a finding as to the

> public interest prior to modifying its generation asset. Thus, in our view, the Legislature has enacted incompatible provisions.

Order at 9 (Add. 28). Addressing this conflict, the PUC concluded that the Legislature "intended the more recent, more specific statute, RSA 125-O:11, to prevail." *Id.*

This conclusion adheres to this Court's principle of statutory construction that "when a conflict exists between two statutes, the later statute will control, especially when the later statute deals with a subject in a specific way and the earlier enactment treats that subject in a general fashion." *Board of Selectmen of Merrimack v. Planning Board of Merrimack,* 118 N.H. 150, 152 (1978) (citing 2A C. D. Sands, "Sutherland Statutes and Statutory Construction" § 51.05 (4th ed. 1973)). Although Appellants contend (Brief at 14) that implied repeal of statutes is disfavored, this Court has recognized that later, more specific statutes addressing the same subject matter are an exception to this rule. *In re New Hampshire Public Utilities Commission Statewide Electric Restructuring Plan,* 143 N.H. 233, 240-42 (1998) (holding later electric industry restructuring statute, RSA 374-F:2, to control dispute over stranded costs, not earlier statute RSA Ch. 362-C, which approved PSNH rate agreement with Northeast Utilities); *Petition of Public Serv. Co. of N.H.*, 130 N.H. 265, 283 (1988) (finding that, despite the PUC's general statutory authority to make rate orders it deemed in the public interest when a utility faced an emergency, the PUC had no authority to allow costs of construction of the Seabrook Station be included in the rate base when a later statute prevented that action); *see also Bel Air Associates v. Dept. of Health and Human Services,* 154 N.H. 228, 233 (2006) (finding later-enacted nursing home statute, not prior general statute, controlled nursing home reimbursement rates); *State v. Bell,* 125 N.H. 425, 432 (1984) (holding that subsequent, specific criminal statute controlled burden of proof requirements, not earlier, general criminal code). The Legislature plainly was aware of its grant of jurisdiction to the PUC to review a modification of PSNH's generating assets just three years

earlier. RSA 125-O:18 specifically references RSA 369-B:3-a, and two of the sponsors of the Scrubber Law (Senators Green and Odell) also sponsored 2003 N.H. Laws 21, the law creating RSA 369-B:3-a. Furthermore, by requiring PSNH to report annually to it on the costs of the Project, RSA 125-O:13, IX, the Legislature retained jurisdiction of a function that "it would otherwise expect the PUC to fulfill if RSA 369-B:3-a applied." Order (Add.30).

In summary, the Legislature granted authority to the PUC to decide whether modifications to all generation assets were in the public interest (including the reasonableness of their costs) and to provide for cost recovery of those modifications. Three years later, to effect a specific modification it deemed environmentally necessary, it divested the PUC of that authority and retained cost review for itself until the mandated construction was complete. Any doubt that the Legislature intended to divest the PUC of jurisdiction to review this specific modification is, as the PUC stated, dispelled by the plain language of RSA 125-O:11-18 and the legislative history of the statute, including recent efforts to amend it. Order (Add.29).

B. The Plain Language and History of RSA 125-O:11-18 Establish that the Public Interest Findings and Cost Recovery Provisions in the Statute are Dispositive as to the Scrubber Project.

It is noteworthy that Appellants posture the Scrubber Law as primarily a public utility statute. This view distorts the purpose of the statute, which is a carefully balanced environmental law designed to protect the environment and the citizens of this State by substantially reducing mercury, sulfur dioxide, and other emissions by the year 2013.[14] Indeed, RSA 125-O:11-18 enacts one of the most progressive and unique approaches to mercury

[14] RSA 125-O:11, I, "The requirements of this subdivision will prevent, at a minimum, 80 percent of the aggregated mercury content of the coal burned at these plants from being emitted into the air by no later than the year 2013"; and RSA 125-O:11, II "Scrubber technology achieves significant emissions reduction benefits, including but not limited to, cost effective reductions in sulfur dioxide, sulfur trioxide, small particulate matter, and improved visibility (regional haze)."

reduction yet adopted in the United States, by requiring the reduction of mercury emissions by 80%, *see* RSA 125-O:13, II, V, VII; RSA 125-O:14, and by imposing stringent penalties for the failure to meet those requirements by 2013, RSA 125-O:7; RSA 125-O:13, VIII. The statute is also unique in that it addresses only PSNH and *requires* the installation of a particular technology in one plant (Merrimack Station) by a date certain.

Contrary to the inference in Appellants' Brief, PSNH did not seek permission to modify Merrimack Station by the addition of the Scrubber Project. Instead, this modification was mandated by the Legislature.[15] At the same time, as with the conversion of one of its facilities from coal to wood, *see Appeal of Pinetree Power, supra,* and its previous modifications to Merrimack Station to reduce nitrous oxide emissions, PSNH willingly participated in the effort to reduce mercury and sulfur dioxide emissions to alleviate significant public health risks. As the Legislature explicitly states in the statute, the end result of these cooperative efforts to meet mercury reduction requirements "represent a careful, thoughtful balancing of cost, benefits, and technological feasibility and therefore the requirements should be viewed as an integrated strategy of non-severable components." RSA 125-O:11, VIII. By focusing only on one aspect of the Project – construction costs as first estimated in 2005 – the Appellants ask this Court to undo this "thoughtful balancing," and to direct the PUC to ignore the legislative efforts and findings that resulted in this carefully crafted initiative. The PUC rejected any such unraveling of these "non-severable components." This Court should similarly reject this attempt to substitute the judgment of the Appellants for that of the General Court.

[15] Indeed, *amicus* Conservation Law Foundation formally threatened to sue PSNH in 2005 under the citizen suit provision of the Clean Air Act for failing to control mercury emissions from Merrimack Station. CLF Notice of Intent to Sue, March 11, 2005. (S.A.43). Four years later, after enactment of the Scrubber Law, CLF has threatened to sue PSNH under the citizen suit provision of the Clean Air Act for installing such technology. CLF Notice of Intent to Sue, February 26, 2009. (S.A.47).

1. The Language of the Statute

The plain language of RSA 125-O:11-18 establishes the General Court's intent regarding the two-part PUC review of the public interest and review of costs under RSA 369-B:3-a for the Scrubber Project.

Section 11, entitled "Statement of Purpose and Findings," is set forth verbatim on page 1, *supra.* This highly unusual set of eight findings by the Legislature as to the specific property of PSNH is, as the language of Section 11 states, accompanied by the mandate that PSNH *shall* modify Merrimack Station by installing a specific technology within a specific time period, and by the explicit finding in subsection VI that the installation of "such technology is in the public interest."[16] RSA 125-O:13 implements this mandate by imposing requirements for compliance. In particular, RSA 125-O:13, I requires that: "The owner [PSNH] *shall install and have operational scrubber technology to control mercury emissions at Merrimack Units 1 and 2 no later than July 1, 2013.*" (Emphasis added.)[17] The Legislature also found that the costs of this technology were reasonable when balanced with the benefits of the Project and the feasibility of the technology. RSA 125-O:11, V and VIII. In so doing, it mandated these actions as a matter of law, thereby removing any jurisdiction of the PUC to make its own, potentially disparate,

[16] Lest there be any doubt that Sections 11-18 impose a mandate on PSNH, the Legislature used the word "shall" 60 times in the Scrubber Law. Section 11 includes four such references, as well as a finding that significant reduction of mercury is in the public interest (Section 11, I), the explicit finding that the installation of this particular technology is in the public interest (Section 11, VI), and the finding that continued purchase of mercury credits is not in the public interest (Section 11,VII).

[17] In addition to this mandate, Section 13 also requires that: (1) total mercury emissions shall be at least 80 percent less on an annual basis from defined baseline levels beginning on July 1, 2013, RSA 125-O:13, II; (2) PSNH shall test and implement mercury reduction control technologies to achieve early reductions and shall report the results of such testing to DES and shall submit a plan for DES approval, RSA 125-O:13, III; and (3) PSNH shall sustain the 80% mercury reduction levels achieved by the Scrubber technology "insofar as the proven operational technology capability of the system as installed allows," RSA 125-O:13, V. Failure to meet these requirements by the 2013 deadline, absent a plan for meeting them approved by DES, subjects PSNH to significant penalties. RSA 125-O:13, VIII, 125-O:7.

determinations. Thus, there is neither authority nor necessity for the PUC to make a public interest finding. The Legislature has already done so, and codified that finding.[18]

RSA 125-O:11-18 also addresses the second element of PUC jurisdiction under RSA 369-B:3-a, namely, the ability to determine a cost recovery methodology. RSA 125-O:18, entitled "Cost Recovery," specifies that PSNH, as the owner of Merrimack Station, "shall be allowed to recover all prudent costs of complying with the requirements of this subdivision, in a manner approved by the public utilities commission" and further dictates that "such costs shall be recovered via the utility's default service charge." Likewise, there is neither authority nor necessity for the PUC to consider whether to provide for cost recovery, but only to determine (after construction) which particular costs can be recovered from customers because they were prudently incurred by PSNH. *See also* RSA 378:30-a, the anti-CWIP statute.

The plain language of RSA 125-O:11, 13 and 18 is dispositive. The Legislature made explicit findings on the public interest of the modification of the Merrimack Station by the Scrubber Project and on the recovery of costs related to that modification. Those were the sole issues on which the PUC had the right to review this modification under RSA 369-B:3-a, a review granted by legislative action in 2003. The Legislature has the power to grant, and rescind, that authority.[19] As the Legislature rescinded such authority, the PUC has no remaining authority to act under RSA 369-B:3-a.

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[18] In RSA chapter 362-C, the General Court specifically delegated authority to the PUC to make a determination whether the cited agreement [relating to the bankruptcy reorganization of PSNH] "would be consistent with the public good." RSA 362-C:3. The Scrubber Law includes no such delegation of authority to the PUC; the General Court itself determined that installation of a scrubber "is in the public interest of the citizens of New Hampshire and the customers of the affected sources." RSA 125-O:11, I. Had the Legislature intended to delegate such authority to the PUC, it certainly knew how to do so, as it had done in RSA 362-C:3.

[19] This Court's jurisprudence regarding PSNH's history makes clear that the legislature knows how to grant or remove authority from the PUC to address specific matters. Compare *Appeal of Richards*, 134 N.H. 148, 152, 158 (1991) (addressing specific statute, RSA 362-C, requiring PUC to determine if rate agreement between PSNH and Northeast Utilities was consistent with the public good and whether the rates were just and reasonable, and noting that "the regulation of utilities . . . is a unique province of the legislature"); with *Appeal of Public Service Company*

2. The History of the Statute

The Scrubber Law was the result of a collaborative effort between the State, PSNH, and representatives of a broad range of environmental and public interests. *See* N.H.S. Jour. 935-38 (2006). Following an extensive evaluation by the Senate Committee on Energy and Economic Development, the House Committee on Science, Technology and Energy, the Governor's Office, the Governor's Office of Energy and Planning, PSNH, DES, environmental groups, and the Office of Consumer Advocate, HB 1673 was adopted in 2006 to deal with the specific issue of mercury reduction. *See* Hearings before the Senate Committee on Energy and Economic Development, April 11, 2006 ("Hearings") (A.81).

Although Appellants focus solely on testimony in the Hearings relating to the construction costs of the Project, the issue of cost was a secondary concern to the health benefits of mercury reduction and the need for reduction of emissions as soon as possible.[20] With so many competing interests in the process,[21] the bill was a "consensus building process" resulting

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of New Hampshire, 130 N.H. 265, 273-74 (1988) (legislature removed authority of PUC to include construction costs in rates before new plant was in service, even where general emergency ratemaking authority was at issue).

[20] *See* comments of Senator Maggie Hassan (A.91-92) and Rep. Naida Kaen (A.95). *See also* testimony of Jared Teutsch, Environmental Director N.H. Lakes Association (A.97); Joel Harrington, Vice-President of Policy, Audubon Society of N.H. (A.98-102) (Appellants included the hearing testimony of several individuals but not their written testimony, which is included in the Supplemental Appendix) (S.A.66); Michael Nolin, Commissioner of DES (A.111); Robert Scott, Director, Air Resources Division of DES (A.111-13) (S.A.81); Georgia Murray, Staff Scientist for the Appalachian Mountain Club (A.114-18) (S.A.81). As Commissioner Nolin indicated in prepared testimony, a successful mercury bill needed to "reduce emissions as quickly as possible," with "technology that achieved the greatest reduction technically feasible" "and in a manner that maintained "electrical reliability and affordability." *Id.* 151-153. The Commissioner stated that "HB 1673 meets these goals with the creative use of incentives and aggressive application of technology. .... Critical to the success of this bill is the requirement that wet scrubber technology be installed on Merrimack Units 1 and 2 by July 1, 2003." *Id.*

[21] Among the environmental groups supporting the legislation were the N.H. Lakes Association, N.H. Audubon Society, N.H. Loon Preservation Committee, N.H. Bass Federation, N.H. Timberland Owners Association, The Society for the Protection of New Hampshire Forests, The Environmental Responsibility Committee of the Episcopal Diocese and the New Hampshire Council of Trout Unlimited. (S.A.58-60). Their written testimony is excluded from the legislative history set forth in Appellants' Appendix.

in what one Senator called "an extraordinary compromise" to "extract from the air we breathe one of the most deadly toxins known to man." Comments of Senators Odell and Burling. N.H.S. Jour., *supra,* 935-37. The compromise included those who believed that there should be a greater reduction of emissions at an earlier date. *Id.* at 935.

The Legislature not only found that the final enactment was "a careful, thoughtful balancing of cost, benefits and technological feasibility," it took the unusual step of stating that because of that balancing "the requirements shall be viewed as an integrated strategy of non-severable components." RSA 125-O:11, VIII. In addition, two years after enactment of the Scrubber Law, in 2008, the Legislature enhanced its non-severability mandate and provided that:

> [N]o provision of RSA 125-O:1 through RSA 125-O:18 or this chapter shall be implemented in a manner inconsistent with the integrated, multi-pollutant strategy of RSA 125-O:1 through RSA 125-O:18 of this chapter, and to this end, the provisions of RSA 125-O:1 through RSA 125-O:18 of this chapter *are not severable.*

RSA 125-O:10, as amended by 2008 N.H. Laws 182:7 (emphasis added). The intent could not be clearer: the statute is to be read as an integrated whole.

Appellants' efforts to argue that a change in the construction costs of the Scrubber Project requires a reconsideration of the "public interest" findings of the Legislature would accomplish exactly what the Legislature prohibited. It would treat one component of the "careful, thoughtful balancing" as "severable." As the PUC stated, under Appellants' theory, it "would effectively be required to second guess the Legislature's public interest finding at any level above $250 Million." Order at 12 (A.45). The Appellants respond to the PUC's point by asserting that while a *de minimis* increase would not require a review of the public interest finding, a "substantial" increase would require such a review. Brief at 12. Appellants posit a hypothetical "crossover point" at which costs no longer become "reasonable." But the non-severability language of RSA 125-O:10 and 125-O:11, VIII allows no such wordsmithing. This "crossover point" analysis is

simply the Appellants' attempt to substitute their judgment of the proper balancing of "cost, benefit and technology," or to require the PUC to substitute its judgment for that of the Legislature. Moreover, if the PUC was now permitted to reconsider the "public interest" in light of increased costs, it also would have to reconsider all aspects of the Project, including its technological feasibility and the deadlines for compliance, the very elements considered by the Legislature as part of the "careful, thoughtful balancing" of these interests.[22]

Plainly, the cost of the Project was a consideration in this balancing of "cost, benefits and technological feasibility." However, contrary to Appellants' claims, the cost of $250 Million was not a guaranty, but rather was understood as an estimate. *See* Comments of Rep. Phinizy (extending the timeline for compliance could result in "far greater costs down the line" (A.88)); Comments of Rep. Anderson (project "estimated at about $270 Million" (A.94)); Comments of Robert Scott, Director, Air Resources Division (Scrubber will allow cost savings because PSNH will no longer have to purchase $20 Million per year in SO_2 credits (A.113)). Indeed, to the extent that Appellants rely on the testimony of DES Commissioner Nolin for their contention that the cost of the Project was "not to exceed $250 Million," that reliance is misplaced. Although the Commissioner's written testimony includes a statement that "based on data shared by PSNH, the total capital cost for this full redesign will not exceed $250 Million" (A.138-40 and 151-53), the attachment to his testimony indicates only that costs "*expected* not to exceed $250 Million," and the chart demonstrates that cost was only one element of the benefits achieved by mercury reductions. (*See* A.141) (emphasis added).

[22] One example may suffice. If the PUC were now to review costs and determine that the public interest mandates that no cost in excess of $250 Million may be incurred, would the mandate to construct the scrubber still be in place? Would the mandate still require the specific technology? Would it require that technology even if it could not be constructed at that cost? The answer to all these questions is "yes," as the PUC clearly has no ability to repeal RSA Ch. 125. This demonstrates why all of the Legislature's findings are "non-severable" and why it is the Legislature, not the PUC or with respect, not this Court, that should make these determinations.

C. The PUC Correctly Rejected Appellants' Claims that the Public Interest Finding in RSA 125-O:13 is Contingent on PUC Approval or that Any Increase in Project Costs Requires PUC Review of Those Costs Before the Scrubber is Built.

1. The Public Interest Finding in RSA 125-O:11-18 is Not Contingent on PUC Approval.

Relying on the express mandates of the Scrubber Law, the PUC concluded that it had no jurisdiction to reconsider the public interest finding of the Legislature in light of increased costs where "the Legislature has already made an unconditional determination that the [S]crubber [P]roject is in the public interest." Order (Add.31). Appellants claim that this conclusion and in particular, the use of the word "unconditional," is fundamentally flawed and thereby undermines the entire Order. They assert that the express language of RSA 125-O:13, I makes the Legislature's public interest findings other than "unconditional" because it is contingent upon the approval of federal, state and local regulatory agencies and that the "contingent reference alone is conclusive evidence that the Legislature did not intend that PSNH receive an 'automatic pass' on the issue of 'public interest.'" Brief at 9. This reading of the statute fails to give meaning to all words in RSA 125-O:13, I and ignores the common sense meaning of the sub-section when read as a whole. *See In the Matter of Martin,* 156 N.H. 818, 820 (2008).

RSA 125-O:13, I provides, in pertinent part, as follows:

> The owner [PSNH] shall install and have operational scrubber technology to control mercury emissions at Merrimack Units 1 and 2 no later than July 1, 2013. The achievement of this requirement is *contingent* upon obtaining all *necessary permits and approvals* from federal, state, and local regulatory agencies and bodies; however, all such 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.) As the italicized words state, achievement of the timeline for installation is contingent on obtaining all "necessary" approvals. The PUC properly concluded that because

the Legislature had already "presumptively determined the scrubber to be in the public interest, ... approval pursuant to RSA 369-B:3-a is not a *necessary* approval under RSA 125-O:13." Order (Add.30). A plain reading of the language of Section 13 is that for any state or local regulatory agency or body that must consider the "public interest," approval is not *necessary* because the Legislative findings on that issue are preemptive or, in the words of the PUC, "unconditional." For federal permits or approvals, the Legislature had no such power of preemption, and therefore requested that its finding that the Scrubber Project was in the public interest be given "due consideration." By focusing only on the word "contingent," the Appellants ignore the remaining language of that sentence that the finding is contingent only on necessary approvals.

Appellants also claim that because the statute requires only that agencies are "encouraged" but not required "to give due consideration" to the public interest finding, the finding is not unconditional and "regulatory bodies retain the authority to make a related decision." Brief at 10. But there is another and more reasonable reading of this language. The mandate of the statute is contingent on obtaining "necessary permits and approvals." Where such agencies are required to make the "related decision" as to whether the Project is in the "public interest," the Legislature's finding is preemptive or unconditional (except as to Federal agencies) because a similar finding by another agency is not "necessary." For other agencies, whose mandate of review does not consider the public interest standard,[23] approval is necessary, but the Legislature has requested that they take its finding into account. For example, when a

[23] Examples of the "necessary permits and approvals" required for the Scrubber Project include zoning approvals, building permits, Federal Aviation Administration approvals, environmental permits, and the like, all of which PSNH has obtained. The mandate to install a scrubber at Merrimack Station and the General Court's finding that such installation is in the public interest of PSNH's retail customers, does not dictate how the scrubber is installed, just that it must be installed. PSNH is still required to ensure that the scrubber design meets traditional safety, environmental, and other building standards.

zoning body considers the timing of its review – a review that might delay the Project – it is "encouraged" to give "due consideration" to the finding that constructing the scrubber on a specific timeline is in the public interest. This reading gives appropriate meaning to all words in the statute and is consistent with the mandate expressed by the Legislature.

The PUC correctly concluded that the installation of the scrubber is contingent only on necessary approvals, and that where the matter for approval has been explicitly made in advance by the Legislature, its approval is unnecessary.

2. Changes In Project Costs Do Not Vest the PUC With Jurisdiction to Review the Project

At the heart of the Appellants' argument is the claim that because the Legislature's findings include a statement that the installation of the Scrubber will reduce mercury emissions "with reasonable costs to consumers," more than a *de minimis* increase in those costs requires a pre-installation review of the entire Project by the PUC pursuant to RSA 369-B:3-a. *See* Brief at 9-13. Both in the PUC and in this Court, Appellants contend that the public interest findings in the Scrubber Law are inextricably tied to the reasonableness of costs to consumers at a specific level of investment ($250 million) and that "any departure from that level of investment by PSNH confers authority on the Commission" to review the Scrubber Project under RSA 369-B:3-a. Rehearing Order (Add.45). Unfortunately for the Appellants, the Legislature expressly precluded such review under RSA 369-B:3-a, and retained review of the costs of the Project. Moreover, as noted in Part B above, Appellants' attempt to undo the careful balancing test of the statute by focusing only on one element is fundamentally inconsistent with the non-severable statutory scheme of RSA 125-O:11-18.

RSA 125-O:18 provides that PSNH shall be entitled to recover "all prudent costs" of the Project. Prudence review by the PUC occurs at the end of the Project, when PSNH seeks recovery of the costs in its rates, not during construction. Because RSA 378:30-a precludes utilities from including construction charges in its rates until the plant is used and useful in the public service, a prudence review of construction costs cannot occur until the end of construction.

As the PUC ruled, the last sentence of RSA 125-O:18 demonstrates that the Legislature did not intend for it to review the costs of the Project under RSA 369-B:3-a. Order (Add.31). After expressly providing for the recovery of all prudent costs of the Project in the first two sentences of that Section, the Legislature stated that "[i]n the event of divestiture of affected sources ... such divestiture and recovery of costs shall be governed by the provisions of RSA 369-B:3-a." RSA 369-B:3-a allows the PUC to review pre-construction cost and cost recovery where PSNH seeks to modify or retire any of its generation assets. The PUC properly recognized that if the Legislature had intended for it to review costs of modification as well as divestiture under RSA 369-B:3-a, there would have been no need to "make special notice" of the applicability of that section only to divestiture. *Id.* Accordingly, RSA 125-O:18 precludes review of the cost of a modification of the Merrimack Station for the Scrubber Project under RSA 369-B:3-a.

Moreover, Appellants' claim that the Legislature intended the PUC to retain jurisdiction to review any cost increase is contradicted by other sections of the statute and its history. First, RSA 125-O:13, IX, provides that:

> The owner [PSNH] *shall* report by June 30, 2007 and annually thereafter to the legislative oversight committee on electric utility restructuring, established under RSA 374-F:5, and the chairpersons of the house science, technology and energy committee and the senate energy and economic development committee on the

> progress and status of complying with the requirements of paragraphs I and III, relative to achieving early reductions in mercury emissions and also installing and operating the scrubber technology *including any updated cost information.*

(Emphasis added.) This specific reservation of authority concerning the progress, status, and cost of complying with the Scrubber Law by the General Court is yet another clear indication of the law's intent to negate the need for a RSA 369-B:3-a proceeding in this matter. The review of "updated cost information" through legislative committees is entirely inconsistent with continued review of costs by the PUC. Second, RSA 125-O:17 permits PSNH to seek a variance from the requirements of the statute in the event of "economic infeasibility." But any request for a variance must be made to DES. DES is required to consult with the PUC on the variance, but jurisdiction for review rests with it, not the PUC. If the Legislature had intended to vest the PUC with this review prior to the completion of the project, it could – and would – have done so.

The problems created by continued review of the costs and technology were addressed during the Senate hearings on HB 1673. Robert R. Scott, Director of the Air Resources Division of DES pointed out that the reason the bill specified a particular technology was precisely to avoid a requirement that PSNH go back to the PUC each time technology changed or a better technology was said to be available with resultant delays in the Project (A.112). Continued review by the PUC of the cost of the technology chosen by the Legislature would be equally disruptive of the deadline for completion.

As the PUC recognized, if the Legislature had wanted it to review the cost of any change – substantial or otherwise – above the estimated $250 Million and to thereby change the balance of interests in the Legislation, it would have been simple to place a cap on the costs of the Project or to specifically vest such jurisdiction in the PUC. The fact that it did not do so, and expressly

retained jurisdiction over cost increases for itself, is compelling, and reason alone to reject the Appellants' claims.

3. The Legislature Recently has Rejected Appellants' Arguments Before this Court and Confirmed that the PUC has No Jurisdiction to Review Project Costs at this Time and that It Did Not Intend to Impose a Cap On Project Costs.

The Appellants' claims that the PUC is the proper forum to review increased costs of the Project and that the Legislature's public interest finding is tied to a specific level of costs have been rejected twice by the Legislature in its current session. Since this Court has held that "legislative intent" is what guides its statutory interpretation process,[24] the Legislature's reaffirmation of the Scrubber Law during the current session is significant. The Legislature's actions are entirely consistent with the plain language of RSA 125-O:11-18 and offer further evidence of its intent in enacting that law. *See Franklin v. Town of Newport*, 151 N.H. 508, 512 (2004) (subsequent legislative history of a statute may be considered as evidence when determining the intent of the statute's prior version); *see also Vector Mktg. v. Dept. of Rev.*, 156 N.H. 781, 785 (2008), *State v. Gallagher*, 157 N.H. 421, 425 (2008); *State v. Njogu*, 156 N.H. 551, 554 (2007).

SB 152 and HB 496, both introduced on January 8, 2009, were plainly designed to accomplish by legislation the arguments now advanced by the Appellants in this Court. SB 152 "Relative to an investigation by the PUC to determine whether the scrubber installation at the Merrimack station is in the public interest of retail consumers," had as its purpose a requirement that the PUC "investigate, in light of substantial cost increases now projected by [PSNH]

[24] "We are the final arbiters of the legislative intent as expressed in the words of the statute considered as a whole." *State v. Langill*, 157 N.H. 77, 84 (2008); *State v. Dansereau*, 157 N.H. 596, 598 (2008); *see also Ouellette v. Town of Kingston*, 157 N.H. 604, 609 (2008).

whether installation of the wet flue gas desulphurization system ('scrubber') at the Merrimack Station...as mandated by RSA 125-O:11 *et seq.* is in the public interest of retail customers of PSNH." S.A.95. The bill also would have required the PUC to review all "projected future operating and capital costs of Merrimack Station, including, but not limited to, costs associated with the Scrubber Project." (S.A.96). In short, the bill sought to restore jurisdiction to the PUC over the Project and would have mandated the very remedy the Appellants claim that the Scrubber Law already requires. The bill was voted "inexpedient to legislate" by a vote of 6-0 in the Senate Energy, Environment and Economic Development Committee, and was rejected by a vote of 21-1 on the Senate floor, with only the sponsor voting in favor. (S.A.97-99).

HB 496, "establishing a limit on the amount of cost recovery for emissions reduction equipment installed at Merrimack Station," also sought to effectuate a remedy similar to that sought in this Appeal. The bill proposed to amend RSA 125-O:18 to provide that "the owner shall be allowed to recover prudent costs up to $250,000,000 of complying with the requirements of this subdivision in a manner approved by the [PUC]." (S.A.171). This proposal would both have restored jurisdiction to the PUC and capped costs for the Project at $250 Million. The Majority Report of the House Science, Technology, and Energy Committee, noted as follows:

> In 2006, the Legislature had required the plant owner to proceed with the installation *without placing a specific limit on the cost.* The majority believes that to choose now to place an absolute cap on the cost at this time would pose significant problems. While the majority recognizes that the increase in projected costs is significant, it is the role of the PUC....to decide the amount of the funds to be recovered *after completion of the project* in a legal process known as a prudency review. This means that before the Company can be granted cost recovery it must provide justification for each expense before the PUC.
>
> The majority was also concerned that the passage of this bill would lead to a pause or cancellation of the project. This would not only have significant environmental ramifications, but would also lead to the loss of several hundred short and long term jobs associated with the Project.

N.H.H.R. Jour. 899 (2009) (emphases added). The bill failed in Committee by a vote of 15-4, and was deemed inexpedient to legislate by a unanimous voice vote of the House. (S.A.174).

The Appellants supported and spoke in favor of both of these bills. (S.A.131-69, 184).[25] They plainly knew the Legislature was the appropriate place to address the concerns they now ask this Court to address. Their actions in the Legislature belie their current claims that the Scrubber Law vests the PUC, not the Legislature, with jurisdiction to review Project costs pre-construction.

The nearly unanimous rejection of this effort in both houses of the Legislature is telling, and unequivocally evidences the legislative intent this Court seeks to determine. It demonstrates that the Legislature does not consider RSA 125-O:11-18 to impose any cap on the costs for the Project and did not intend to provide for a review of costs by the PUC before the prudence review.

III. The Appellants' Due Process Rights were Not Violated Because They Have No Legal Right to an Adjudicative Hearing and They Were Heard On The Matter by the PUC.

This Court should also reject the Appellants' claim that their due process rights have been violated because the PUC did not hold an adjudicatory hearing on whether the Scrubber Project is in the public interest. Under New Hampshire law, "there are three ways that a hearing can be 'required by law': (1) a statutory requirement, (2) an agency rule requirement, or (3) a due process constitutional requirement." *Petition of Support Enforcement Officers et al.*, 147 N.H. 1, 5 (2001).

[25] In PSNH's March 31, 2009, "Memorandum in Support of Objection to 'Assented-To' Motion for Leave to File *Amicus Curiae* and Motion to Strike *Amicus Curiae* Brief," it was noted that items 4 and 8 of the *Amici* Brief Appendix -- the "Compendium of Concerns" and the "Initial Report to the New Hampshire Senate" were created on behalf of and paid for by the Appellants to this proceeding in support of their Legislative lobbying efforts.

There is no statute or agency rule requiring a hearing in cases involving the PUC's legal ruling on the extent of its jurisdiction. RSA 365:19, which vests the PUC with investigative authority, requires hearings only when the PUC's investigation "shall disclose any facts which the PUC shall intend to consider in making any decision or order." Here, although the PUC directed PSNH to provide a report on the status, costs, and expected impact on rates of the Scrubber Project, it did not consider any of those facts in its Order; rather, it made a purely legal determination regarding the extent of the PUC's jurisdiction under RSA Chs. 369-B and 125-O.

Similarly, RSA 541-A provides no legal requirement for a hearing in this case. RSA 541-A:31, II, provides that "[a]n agency may commence an adjudicative proceeding at any time with respect to a matter within the agency's jurisdiction." For the reasons stated above, the PUC has no jurisdiction to determine whether the Scrubber Project is in the public interest; its jurisdiction is limited to a prudence review of the costs of the Project once PSNH seeks recovery of those costs through its rates. Furthermore, there was no "contested case" before the PUC because the matter did not involve the resolution of contested facts, and did not affect private rights different from those suffered by the general public. *Appeal of Toczko*, 136 N.H. 480, 485 (1992). Thus, neither RSA 541-A:31, I nor the New Hampshire Constitution mandate an adjudicatory hearing.

As the PUC has previously held, it considers proceedings adjudicative when "the Commission will be deciding who did what, where, when, how, why, with what motive or intent." *Re Generic Investigation Into Intralata Toll Competition*, 77 NH PUC 553, 556 (1992) (quotation omitted). While it may be the Appellants' desire that the PUC engage in a factual determination regarding the public interest associated with the Scrubber Project, that is not what the PUC did. *See Society for Protection of N.H. Forests v. Site Evaluation Committee*, 115 N.H.

163, 168 (1975) (no due process right to a hearing when matter does not involve the resolution of contested facts). Moreover, even if the Court were to find that the Appellants had some due process rights, the PUC provided the Appellants with an opportunity to be heard. They filed motions for rehearing which were considered and ruled on by the PUC. Thus, the Appellants have had "their day in court," and their claims of procedural prejudice should be denied.

CONCLUSION

This claim that the increased cost of the Scrubber Project requires immediate pre-construction review by the PUC is brought by the wrong parties, in the wrong forum, at the wrong time. Appellants have suffered no harm by the construction of the Scrubber Project or by any cost increases over those projected when RSA 125-O:11-18 was enacted. Indeed, they may never suffer any increased costs because they are not required to buy their electric energy from PSNH, and thus may totally avoid any costs of the Scrubber Project. Even if they could demonstrate future harm, their claim is premature.

The Appellants' efforts to obtain review by the PUC are expressly precluded by the provisions of RSA 125-O:11, 13 and 18. The Legislature mandated the Scrubber Project, its specific technology, and its completion date, made specific public interest determinations, directed a precise cost recovery methodology, and reserved oversight of the Project to itself. The PUC properly rejected the Appellants' attempt to reconsider legislative directives in that forum. The Appellants' attempt to second-guess that decision should be – and were –addressed to the Legislature, which overwhelmingly reaffirmed the Scrubber Law's mandates this session.

For these reasons, and those set forth above, the decision of the PUC should be affirmed.

REQUEST FOR ORAL ARGUMENT

PSNH respectfully requests oral argument not to exceed 15 minutes. Mr. Glahn will argue.

Respectfully submitted,

PUBLIC SERVICE COMPANY
OF NEW HAMPSHIRE

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Certificate of Service

I hereby certify that on May 6, 2009, I served the foregoing Brief of Public Service Company of New Hampshire by mailing two copies thereof by first class mail, postage prepaid, to each of those counsel listed on the attached service list.

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THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Docket No. 2008-0897

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

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