STATE OF NEW HAMPSHIRE
BEFORE THE
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

Docket No. DE 08-103

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

MOTION FOR REHEARING BY CERTAIN COMMERCIAL RATEPAYERS

Pursuant to RSA 541:3 and 4 and RSA 541-A:31, I, Stonyfield Farm, Inc., (10 Burton Drive, Londonderry, NH 03053), H & L Instruments, LLC (PO Box 580, Hampton, NH 03862), and Great American Dining, Inc.[1] (PO Box 581, Ashland, NH 03217) (collectively, "Commercial Ratepayers") respectfully move for rehearing of the Commission's Order dated September 19, 2008 ("Order"). In support of this Motion, the Commercial Ratepayers say:

1. The Commercial Ratepayers have standing to file this Motion. As ratepayers for electricity generated by Public Service of New Hampshire ("PSNH"), the Commercial Ratepayers will be directly affected by the materially increased costs of installation of scrubber technology at Merrimack Station, and by the Commission's Order. RSA 541:3. *Appeal of Richards*, 134 N.H. 148 (1991). Moreover, the question of the public interest allegedly served by such installation is contested by the Commercial Ratepayers, requiring the Commission to commence an adjudicative proceeding under RSA 541-A:31, I.

2. The Commercial Ratepayers specify the following as grounds for rehearing (RSA 541:3 and 4):

2.1 Having properly invoked RSA 365:19 to conduct an inquiry into the installation costs of the scrubber technology and related issues, the Commission should have adhered to the

[1] Great American Dining, Inc. is the managing entity of the Common Man family of restaurants, at least 7 of which buy power from PSNH.

requirement of RSA 365:19 that "any party whose interests may be affected [such as the Commercial Ratepayers] **shall** be afforded a reasonable opportunity to be heard with reference thereto or in denial thereof." (Emphasis added.)

2.2 The Commission's decision that as a result of RSA 125-O it "lacks authority to pre-approve installation" (Order, at 12) effectively denies the Commercial Ratepayers due process on issues for which it will have to pay significant costs. N. H. Constitution, Pt. 1, Art. 12. Although the Commission's "retains its authority to determine prudence" of costs (Order, at 12), that post-installation determination is a belated, and therefore inadequate, opportunity for the Commercial Ratepayers to be heard.

2.3 In deciding that as a result of RSA 125-O it "lacks authority to pre-approve installation," the Commission observed that, were it to conclude otherwise, it "would be effectively ignoring the Legislature's finding that the installation of the scrubber is in the public interest." Order, at 9. Not only is the Commission incorrect (for the reasons set out in ¶2.4 below), but its decision violates constitutional principles of separation of powers. N. H. Constitution, Pt. 1, Art. 37. *See, e.g., McKay v. N.H. Compensation Appeals Bd.*, 143 N.H. 722 (1999). That is, the Commission's decision has the effect of ascribing to the Legislature a power that properly resides only in the Commission in the exercise of its executive powers and/or quasi-judicial powers.

2.4 In deciding that as a result of RSA 125-O it "lacks authority to pre-approve installation," the Commission has misconstrued RSA 125-O, particularly RSA 125-O:11, V and VI, which provide:

> 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. [Emphasis added.]

A. RSA 125-0:11 took effect on June 8, 2006.

B. As of June 8, 2006, the estimated cost of installation of the scrubber technology at Merrimack Station was **$250 million**. Commission letter of August 22, 2008 to PSNH, citing the 10-Q filed on August 7, 2008 with the United States Securities and Exchange Commission by Northeast Utilities (NU), PSNH's parent company. As stated in the Commission's August 22 letter, "In its 10-Q, NU identified an estimated project **cost of $457 million** [for installation of the scrubber technology at Merrimack Station], which represents approximately an **80 percent increase over the original estimate of $250 million**." (Emphasis added.) *See also, e.g.*: **(1)** PSNH's letter to the Commission of September 2, 2008, saying (at 3), "It should surprise no one that the **costs** of this project have **increased significantly over the original preliminary estimates made in late 2004-2005**." (Emphasis added.); **(2)** PSNH's Report to the Commission of September 2, 2008, saying (at 7), "**Initial engineering** was completed by Sargent and Lundy ("S&L") based upon information provided in **2005**.... **Budgetary quotes** and lead times were solicited from major scrubber vendors, also during **2005**." (Emphasis added.); **(3)** *Id.*, saying (at 11), "The **initial estimated cost** of the project was based on a Sargent & Lundy estimate performed in **2005**. There have been **significant increases in the cost of raw materials, steel, labor and energy, since this estimate was made**...." (Emphasis added.); and **(4)** *Id.*, saying (at 13), "PSNH, in conjunction with URS, has developed a **revised project**

estimate of $457 million." (Emphasis added.)

C. Consistent with the foregoing is the legislative history underlying the enactment of RSA 125-O:11, which was part of HB 1673. Terry Large of PSNH testified on HB 1673 before the Senate Committee on Energy and Economic Development on April 11, 2006, and indicated that the estimated cost of the scrubber technology would be **$250 million**. Further, on the same date and to the same Committee, the Department of Environmental Services reported as follows: "Based on data shared by PSNH, the total capital cost for this full redesign **will not exceed $250 million dollars (2013$) or $197 million (2005$)**." Letter of Michael P. Nolin to the Honorable Bob Odell, Chairman NH Senate Energy and Economic Development Committee, dated April 11, 2006 (emphasis added).

D. Hence, the "reasonable costs" to which RSA 125-O:11, V refers is **$250 million**. Necessarily, therefore, when the Legislature provided in RSA 125-0:11, VI that "The installation of **such** technology is in the public interest" (emphasis added), it was referring to a technology that had a cost of **only $250 million**. It was **not** referring to technology having a cost of **$457 million**. If a counterargument is advanced that the reference to "such technology" would include a cost as high as $457 million, then that same counterargument could be used to support a cost as high as $1 billion or even $10 billion. The result is absurd — and thus could not have been what the Legislature intended. *See, e.g., Soraghan v. Mt. Cranmore Ski Resort*, 152 N.N. 399 (2005).

E. Even if it could be plausibly argued that the Legislature has already determined that a cost of $250 million is "reasonable" for "such" technology

(RSA 125-O:11, V and VI), it **cannot** be plausibly argued that the Legislature has also already determined that a cost of $457 million is likewise "reasonable" for "such" technology.

F. As a result, the Commercial Ratepayers respectfully submit that the Commission erred in deciding that that as a result of RSA 125-O it "lacks authority to pre-approve installation."

G. Further support for this conclusion in embodied in RSA 125-O:13, I, which provides:

> I. The owner 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. The owner shall make appropriate initial filings with the department and the public utilities commission, if applicable, within one year of the effective date of this section, and with any other applicable regulatory agency or body in a timely manner.[2] [Emphasis added.]

This provision is strong evidence that the Legislature did not expect PSNH to receive an "automatic pass" on the issue of "public interest." By "encourag[ing]" regulatory bodies to give "due consideration" to the Legislature's finding of "public interest," the Legislature was making it clear that those regulatory bodies were **not** barred from making a related decision. Rather, they were merely required to take into account the Legislature's own finding. Furthermore, it would be fair to infer that the Legislature also contemplated that regulatory bodies

[2] The Commercial Ratepayers simply do not know whether PSNH has timely complied with the final sentence of this provision. If PSNH has not done so, the Commercial Ratepayers specify that failure as a further ground for this Motion for Rehearing.

would take into account the **circumstances** under which the Legislature made its finding — for example, the fact that at the time of the Legislature's finding (2006) the related costs were estimated not to exceed $250 million.

2.5 The Commission erred in concluding that as a result of RSA 125-O:18 it is "**limited** to determining at a **later time** the prudence of the costs of complying with the requirements of RSA 125-O:11-18." No such limitation appears on the face of RSA 125-O:18. Nor may any such limitation be reasonably inferred. *See* ¶2.4, above.

2.6 The Commission erred in concluding that RSA 125-O: 11 and RSA 369-B:3-a conflict, and that RSA 125-O:11, as "the more recent, more specific statute" (Order, at 9) "prevail[s]" (*id.*). RSA 369-B:3-a was enacted in 2003, 3 years earlier than the enactment of RSA 125-O:11. RSA 369-B:3 provides:

> The sale of PSNH fossil and hydro generation assets shall not take place before April 30, 2006. Notwithstanding RSA 374:30, subsequent to April 30, 2006, PSNH may divest its generation assets if the commission finds that it is in the economic interest of retail customers of PSNH to do so, and provides for the cost recovery of such divestiture. Prior to any divestiture of its generation assets, PSNH **may** modify or retire such generation assets **if the commission finds that it is in the public interest of retail customers of PSNH to do so**, and provides for the cost recovery of such modification or retirement. [Emphasis added.]

A. Again, for the reasons stated in 2.4, above, RSA 125-O:11 does **not** bar the Commission from making a determination of public interest.

B. Even apart from those reasons, the upshot of the Commission's decision is that, with respect to the scrubber technology at Merrimack Station, RSA 125-O:11 impliedly repeals RSA 369-B:3-a. It emphatically does not. "In this state the climate for repeal by implication is frosty and inhospitable. The law does not favor repeal by implication if any other reasonable construction may avoid it."

Opinion of the Justices, 107 N.H. 325, 328 (1966) (internal quotation marks omitted). Here, a reasonable construction does avoid repeal by implication; and that reasonable construction is set out in ¶2.4, above. RSA 125-O:11 and RSA 369-B:3-a may be rationally harmonized, and therefore must be. *Associated Press v. State of New Hampshire*, 153 N.H. 120 (2005). RSA 125-O:11 does **not bar** the Commission from making a determination on public interest; it merely "encourage[s]" the Commission to give "due consideration" to the Legislature's finding and, impliedly, the circumstances under which the Legislature made that finding. At the same time, RSA 369-B:3-a **requires** the Commission to make a determination on public interest. This, the Commission has failed to, and now must do. And it must do so after an adjudicative hearing that affords due process to the Commercial Ratepayers and other affected parties.

2.7 The Commercial Ratepayers are aggrieved by the Commission's failure to make a determination on public interest, as required by RSA 369-B:3-a. Any such determination, moreover, should not be confined to the issue of scrubber technology. The Commission should not undertake a fragmented analysis. Rather, in making a determination of public interest under RSA 369-B:3-a, the Commission should also take into account all other pertinent issues bearing on the proposed modification. These issues would include, but not be limited to, anticipated increased costs concerning: (A) compliance obligations under the Clean Air Act (Title V — 42 U.S.C. §7401 et seq.): (B) compliance obligations under the Clean Water Act (NPDES — 33 U.S.C. §1251 et seq.); and (C) reasonable alternatives — in terms of environmental protection, public health, costs, and long-term energy benefits.

2.8 As further grounds for this Motion for Reconsideration, the Commercial

Ratepayers incorporate by reference: (A) the points raised by the Office of the Consumer Advocate in its Memorandum of September 11, 2008; (B) the points raised by the Conservation Law Foundation in its letter to the Commission of September 12, 2008; and (C) the points raised by TransCanada Hydro Northeast Inc. in its Motion for Rehearing and Reconsideration of October 17, 2008.

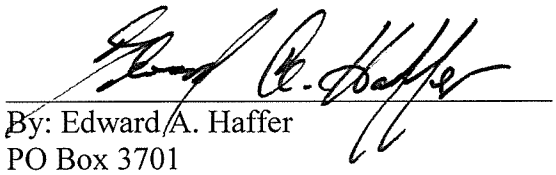
WHEREFORE, the Commercial Ratepayers respectfully request that the Commission enter and Order:

A. Granting this Motion; and

B. Granting the Commercial Ratepayers such other relief as is just.

Date: October 17, 2008

Respectfully submitted,
STONYFIELD FARM, INC., H & L INSTRUMENTS, LLC, and GREAT AMERICAN DINING, INC.
By their attorneys,
Sheehan Phinney Bass & Green, P.A.



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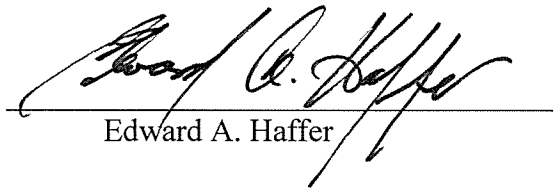

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