STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DE 08-103

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

REPLY TO OBJECTION

New Hampshire Sierra Club [NHSC] hereby replies to the Objection of Public Service Company of New Hampshire [PSNH] to the Motion of NHSC to admit to the record the Burns & McDonnell, GZA and Sargent & Lundy studies.[1]

FACTS

On August 28, 2008, the Public Utilities Commission, by Secretarial letter, opened Docket DE 08-103 to review PSNH compliance with RSA 125-O:11-18, which required PSNH to install a wet flue gas desulphurization [scrubber] system at Merrimack station by July 1, 2013.[2]

RSA 125-O:13, I, requires that PSNH, as part of the installation of the scrubber, obtain all the necessary permits and approvals from all federal, state and local regulatory bodies.

RSA 125-O:13, IV, provides that if the net power output from Merrimack Station is reduced by the power consumption or operational inefficiencies due to the scrubber, PSNH may invest in capital improvements that increase net generating capacity provided that it is within the requirements and programs enforceable by the state and federal government, or both.

PSNH, on June 6, 2007, filed an application with New Hampshire Department of Environmental Services, Air Resources Division [NHDES-ARD] requesting permission to install and operate the scrubber system.

In late November, 2008, NHSC, pursuant to a RSA 91-A review of documents at NHDES-ARD, discovered that PSNH, in April-May, 2008, replaced the MK2 turbine without any public permitting process.

NHSC also, in the 91-A process, discovered a June 7, 2006, letter written to NHDES-ARD by William H. Smagula, Director-Generation, PSNH, that stated that the large investment in the scrubber necessitated the "continued operation of Merrimack Station Unit#2 [MK2] well beyond 2013", and that, to maintain generation output because of the "large power consumption" of the scrubber system, as much as 6-10 megawatts of additional generation capacity was needed. Mr.

[1] NHSC obtained the Burns & McDonnell and GZA reports via a Freedom of Information request served on Region 1, EPA. See NH Rules of Evidence, Rule 501. The Sargent & Lundy report was obtained pursuant to an Order of the NHDES-Air Resources Council.

[2] The opening of the docket was triggered by the large increase in projected costs of the project from $250,000,000 to $457,000,000 as revealed in a 10-Q filing with the Securities and Exchange Commission.

Smagula, in the letter, refers to the Sargent & Lundy study, stating that the study was done to evaluate the boiler, balance of plant equipment, turbine-generator systems and site work.

On March 9, 2009, NHDES-ARD issued Temporary Permit TP-0008 to PSNH for the installation of the scrubber.

On March 18, 2009, NHSC filed its Notice of Appeal to the issuance of TP-0008, to the NHDES-Air Resources Council [NHDES-ARC], Docket No.09-10, ARC, asserting, *inter alia*, that: PSNH failed to make application for and obtain the permits required by the Clean Air Act, including 42 USC 7475 and USC 7503. The gravamen of the NHSC appeal was directed at the failure of PSNH to include the April-May, 2008, MK2 turbine replacement and balance of plant projects in the public permitting process for TP-0008, notwithstanding the PSNH statement that the turbine project was "necessary to maintain the output of MK2" to comply with RSA 125: O:13, and, because of the "large power consumption" of the scrubber "vital to Merrimack Station's long term operation".[3] [Emphasis added]

On March 18, 2009, NHSC also requested that all members of the NHDES-ARC who had conflicts of interest recuse themselves from participating in the appeal. Six of the eleven members of the NHDES-ARC recused themselves from participating in the appeal.

On May 28, 2009, NHDES-ARC, accepted the NHSC appeal.

On October 13, 2009, NHSC discovered that NHDES-ARC Acting Presiding Officer Raymond Donald was a former employee of PSNH; and, that he had filed incomplete RSA 15-A disclosure forms with the Secretary of State. On October 19, NHSC renewed its Motion for Disqualification of Mr. Donald.[4]

In an October 23, 2009, filing NHSC reminded the PSNH attorneys of their ethical duty of candor to NHDES-ARC regarding Mr. Donald's employment history with PSNH.[5] It was only after this filing that PSNH finally revealed Mr. Donald's employment history. The NHSC Motion for Disqualification was again overruled.

On November 23, 2009, NHSC Chapter Director Catherine M. Corkery and NHSC attorney, Arthur B. Cunningham attended the merit hearing before the Public Utilities Commission in DE 09-091, PSNH Reconciliation of Energy Services and Stranded Costs. At the conclusion of the evidence, Attorney Cunningham addressed the Commission to express concerns about the pervasive PSNH confidentiality claims and to challenge the PSNH demand that the ratepayers pay the $13,200,000 purchased power costs caused by the foreign material damage to the replaced MK2 turbine. Shortly after the hearing, and after the Commissioners left the room, Robert A. Baumann, a

[3] PNSH made these statements in a January 31, 2008, William H. Smagula letter to NHDES-ARD, seeking "expedited review" of the MK2 turbine project. Mr. Smagula has, after the NHSC appeal challenging the failure to include the turbine replacement in the permitting process, repeatedly attempted to disavow his words regarding the relationship between the scrubber and the MK2 turbine replacement.

[4] Mr. Donald had repeatedly demonstrated bias in favor of PSNH by denying each and every NHSC request for documents based on PSNH claims of confidentiality. It was obvious that Mr. Donald was not even reading the NHSC filings. During the course of this pending appeal, NHSC has filed four Requests for Information, each of which was objected to by PSNH on confidentiality grounds.

[5] New Hampshire Rules of Professional Conduct, Rule 3.3, Candor Toward the Tribunal.

Northeast utilities executive who had testified at the hearing, approached NHSC Chapter Director Corkery and enquired what the "charter" of the NHSC was and whether NHSC received "government money". The Baumann enquiry was an implied threat to NHSC.

On December 22, 2009, almost 10 months after NHSC filed its Notice of Appeal with the NHDES-ARC seeking enforcement of the Clean Air Act; PSNH filed a Motion to Dismiss the NHSC appeal for want of standing. The PSNH Motion was based upon the organizational status of NHSC, the issue that Mr. Baumann used to threaten Director Corkery and her Sierra Club Chapter. The NHDES-ARC overruled the PSNH Motion to Dismiss.

On March 25, 2010, NHSC filed its Notice of Appeal, Docket No.10-06, to the issuance of the PSNH Merrimack Station, Proposed Title V Operating Permit FY 96-TV048, asserting *inter alia* that: the Title V Permit should be vacated because the NHDES-ARD administrative record is devoid of facts demonstrating that PSNH has complied with Clean Air Act, including 42 USC 7411, 42 USC 7475 and 42 USC 7503, the provisions requiring NSPS, NSR and PSD permitting, together with corresponding improvements in control technologies, for NOx and particulates[6]; that the Title V is legally flawed with respect to the hazardous air pollutant mercury [Hg] because it does not comply with Clean Air Act 42 USC 4212 and RSA 125-O:11-18; and, that the Final Regional Haze SIP and the Title V Permit does not contain appropriate BART emission limits.[7]

Both NHSC appeals are pending. The Clean Air Act and RSA 125-O:11-18 permitting issues have not been finally adjudicated.

MEMORANDUM

1.Relevance of the Burns & McDonnell, GZA and Sargent & Lundy Reports.

First, the recitation of Facts set forth above is important to properly respond to the PSNH Objection to the May 24, 2010, NHSC Motion to require that the Burns & McDonnell, GZA and Sargent & Lundy reports be admitted to the record in this case. The PSNH Objection is laced with pejorative adjectives challenging the legal basis of the NHSC Motion and the ethical conduct of the NHSC lawyer, e.g., that the Motion is "frivolous".[8] In its Objection, PSNH asks that the Commission punish NHSC for asking that studies that PSNH itself commissioned to examine generation upgrade and life extension projects with the attendant Clean Air Act implications, at substantial rate payer expense, be placed on the public record. In view of the improper conduct of PSNH in the NHDES-ARC litigation, the demand that NHSC be punished for asking that the reports be entered to the record is extreme, a hypocritical ploy, clearly calculated to chill any challenge to PSNH influence.

Second, the PSNH relevance argument is grounded on the "mandate" the New Hampshire Legislature placed on PSNH by 2006 N.H. Laws Chapter 105 to install a scrubber at Merrimack Station.

[6] If, as NHSC believes, that PSNH will have to upgrade its pollution controls for NOx in order to comply with the CAA, it will have very serious consequences for ratepayers.
[7] Merrimack Station is the largest single contributor to regional haze in New Hampshire.
[8] See Rules of Professional Conduct, Rule 3.1. Meritorious Claims and Contentions. The PSNH use of the frivolous filing allegation is the last refuge of an argument with no merit whatever, itself a frivolous claim.

What PSNH chooses to ignore is that the legislature also required that PSNH obtain all the regulatory approvals for the project. It has not done so.

The legislature provided, in RSA 125-O:13, IV, that PSNH could, if the net power output from Merrimack Station is reduced by the power consumption or operational inefficiencies due to the scrubber, invest in capital improvements that increase net generating capacity provided that it is within the requirements and programs enforceable by the state and federal government, or both.

RSA 125-O: 13, IV is the predicate for the NHSC Motion. This statutory language demonstrates the critical relevance of the Burns & McDonnell, GZA and Sargent & Lundy studies. The studies were an investigation of plant generation upgrades and the Clean Air Act permitting consequences. The Burns & McDonnell report explored replacement of the MK2 boiler. The exhaustive Sargent & Lundy study[9] examined, in detail, the balance of plant projects that may permit MK2 to produce up to an additional 20 MW of generation. The GZA report noted that a "cursory review of the MK2 annual current emission rates shows that a very small increase in actual emissions (less than 1%) is all that would be needed to exceed NSR significant emission levels". Any plant project that increases emissions carries with it serious Clean Air Act implications. PSNH replaced the MK2 turbine without any permitting process; the reports suggest other plant projects that demand investigation.

The legislative "mandate", that PSNH repeatedly asserts in defense of its conduct, includes adherence to all of the provisions of RSA 125-O:11-18.

2. Standing.

NHSC has standing to file the Motion demanding that the Burns & McDonnell, GZA and Sargent & Lundy reports be admitted to the record in this case. In NHDES-ARC Docket No.09-10 ARC, the NHDES-ARC accepted the NHSC appeal challenging the Clean Air Act compliance of the turbine replacement; and, overruled the belated, ill motivated PSNH challenge to NHSC standing. The issue in this Docket, the enforcement of RSA 125-O:13, IV, regarding plant projects that may increase plant generating capacity that exceed significant emission levels under the Clean Air Act, is identical to the issues pending before NHDES-ARC. Therefore, the decision of NHDES-ARC allowing NHSC to pursue the Clean Air Act compliance issues, binds PSNH, by virtue of the doctrine of collateral estoppel, from claiming NHSC does not have standing in this case. The purpose of collateral estoppel is to promote efficiency and to protect the parties from the burden and expense of repetitive litigation. Cook v. Sullivan, 149 N.H.774 [2003]. The Supreme Court has stated that "the doctrine of collateral estoppel serves the dual purpose of 'promoting judicial economy and preventing inconsistent judgments'". In re Case of Bruzga, 142 N.H.743 [1998]. For collateral estoppel to apply, three conditions must be satisfied: 1] the issue must be identical; 2] the first action must have resolved the issue finally on the merits; and, 3] the party to be estopped must have appeared as a party in the first action. *Id.* PSNH had a full opportunity, and did, litigate the standing issue before NHDES-ARC. *Id.*

3. This Docket is Not an Adjudicative Docket.

[9] The copy produced by PSNH pursuant to NHDES-ARC Order was the 4th, heavily redacted version. All un-redacted versions of the study should be produced.

NHSC is cognizant that this docket is not an adjudicative docket; that it is an informational docket established by the Commission to examine PSNH compliance with RSA 125-O:11-18. What is quite astonishing is the unbounded PSNH arrogance that only PSNH is entitled to offer information relevant to this docket. The reports offered by NHSC prove that PSNH engaged in comprehensive life extension and generation upgrade projects of the very type contemplated by the legislature in RSA 125-O:13, IV, and as described in the Smagula correspondence of June 7, 2006, and January 31, 2008, to NHDES-ARD. PSNH itself should have offered the reports and fully explained what, if any, of the projects it has undertaken and what the Clean Air Act permitting consequences are. PSNH insistence in its Objection, that an after the fact "prudence" review, supervised by the Commission expert consultant, who had the Burns & McDonnell report in its possession as early as June, 2006, does not inspire confidence that PSNH will timely comply with RSA 125-O:13, IV regarding its federal and state regulatory responsibilities.[10]

Conclusion

NHSC respectfully demands that the Burns & McDonnell, GZA and Sargent & Lundy reports be admitted to the public record of this case; that the Commission promptly, using its plenary authority under RSA 365:19, examine full PSNH compliance with RSA 125-O: 11-18, particularly RSA 125-O:13, IV as it relates to the projects suggested by the reports; that the Commission fashion a rule patterned after Federal Rule of Civil Procedure 26 (c) that provides for the protection of proper trade secrets and confidential research, development or commercial information while ensuring the integrity of the regulatory process and appeal record; and, for whatever other relief appropriate in the premises.

Respectfully submitted,

June 4, 2010

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Certificate of Service

I hereby certify that service was made in accordance with PUC 203.02 and

[10] NHSC, must again, reiterate its disappointment that PUC staff, which had the Burns & McDonnell report and, at least knew about the Sargent & Lundy report, did not bring them forward when this docket was opened and sequestered them when filed by NHSC.

203.11 this 4th day of June, 2010.

Arthur B. Cunningham