STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DE 08-103

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

Order Denying Motions for Rehearing

ORDER NO. 24,914

November 12, 2008

I. BACKGROUND

This investigation was opened following a quarterly earnings report filed by Northeast Utilities[1] with the Securities and Exchange Commission on August 7, 2008. The earnings report disclosed that the cost of installing a wet flue gas desulphurization system, commonly referred to as scrubber technology, at Public Service Company of New Hampshire's (PSNH's) Merrimack Station had increased from an original estimate of $250 million to $457 million. RSA 125-O:11 et seq. requires PSNH to install the scrubber technology at Merrimack Station in order to reduce mercury emissions.

At the outset, the Commission identified a potential statutory conflict as to the nature and extent of its authority relative to the scrubber project. In particular, RSA 125-O:11, VI, which states that it is in the public interest for PSNH to install scrubber technology at the Merrimack Station, and RSA 369-B:3-a, which states that PSNH may modify its generation assets only if the Commission finds that it is in the public interest to do so, on their face create conflicting mandates. The Commission directed PSNH to file a memorandum of law on the issues by September 12, 2008, and also invited the Office of the Consumer Advocate (OCA) to file a memorandum of law by the same date.

[1]Northeast Utilities is the parent company of Public Service Company of New Hampshire.

On September 19, 2008, the Commission issued Order No. 24,898 (Order). In that Order, the Commission concluded that the Legislature intended that the more recent, more specific statute, RSA 125-O:11-18, prevail over RSA 369-B:3-a. Given the Legislature's specific finding in 2006 that the installation of scrubber technology at the Merrimack Station is in the public interest, the statute's rigorous timelines and incentives for early completion, and the statute's requirement of annual progress reports to the Legislature, the Commission found that the Legislature did not intend that the Commission undertake a separate review pursuant to RSA 369-B:3-a.

On October 17, 2008, TransCanada Hydro Northeast, Inc. (TransCanada), three commercial ratepayers, Stonyfield Farm, Inc., H&L Instruments, LLC and Great American Dining, Inc. (collectively, the Commercial Ratepayers) and Edward M. B. Rolfe filed motions for rehearing. On October 23, 2008, PSNH filed objections to all three motions for rehearing.

II. MOTIONS FOR REHEARING

A. Standing

1. TransCanada

TransCanada owns 567 MW of hydroelectric generating capacity on the Connecticut and Deerfield Rivers. As an owner of competitive generation facilities, TransCanada describes itself as a competitor of PSNH's Merrimack Station. According to TransCanada, allowing PSNH to add scrubber technology at ratepayer expense adversely impacts competitive generators like TransCanada, which must bear the risk of their own investment decisions. As a result, TransCanada alleges that it has sufficient interest in this matter to move for rehearing.

2. Commercial Ratepayers

The Commercial Ratepayers assert standing for their request for rehearing based upon rate impacts that they allege will occur as a result of increased costs for the installation of a scrubber at Merrimack Station.

3. Mr. Rolfe

Mr. Rolfe describes his interest in this docket as that of a PSNH ratepayer.

B. Procedural Issues

1. TransCanada

TransCanada claims that the Commission's failure to open the proceeding to all other interested parties deprived it of the opportunity to be heard on issues that may have "ramifications to competitors in the marketplace for electricity." TransCanada's Motion for Rehearing, p.7. Further, TransCanada asserts that the Commission should have commenced a full adjudicative proceeding, pursuant to RSA 541-A:1, IV and 541-A:31, I, and that failure to commence such a proceeding violated due process.

2. Commercial Ratepayers

The Commercial Ratepayers argue that the Commission should have commenced a proceeding under RSA 365:19 which included all potentially interested parties. They claim that failing to allow them to be heard in such a proceeding denies them due process "on issues for which [they] will have to pay significant costs." Commercial Ratepayers' Motion for Rehearing, p.2.

3. Mr. Rolfe

Mr. Rolfe claims that the Commission violated his right to due process by inviting only two parties, PSNH and the OCA, to be heard in this case.

C. Statutory Interpretation

1. TransCanada

TransCanada disagrees with the Commission's statutory analysis. It argues that the Commission has plenary authority over PSNH and that, based upon the requirement of necessary permits and approvals contained in RSA125-O:13, I, the Commission should have reviewed the scrubber prior to construction pursuant to RSA 369-B:3-a. According to TransCanada, the words requiring "due consideration" of the Legislature's public good finding do not evidence Legislative intent to usurp the Commission's review under RSA 369-B:3-a. Further, TransCanada points out that RSA 125-O does not expressly prohibit Commission review under RSA 369-B:3-a, or other statutes. TransCanada argues that, pursuant to RSA 363:17-a, the Commission has a duty to consider the interests of both customers and utility investors. TransCanada asserts that duty requires a pre-construction review of the proposed scrubber installation.

TransCanada next contends that the language of RSA 125-O is ambiguous, requiring an inquiry into its legislative history. According to TransCanada, the legislative history demonstrates that the Legislature was considering estimated costs of $250 million for scrubber installation when it passed RSA 125-O. TransCanada does not consider an after-the-fact prudence review by the Commission an adequate review. Finally, TransCanada agrees with OCA that a review of any financing needed by PSNH for the scrubber would require an "Easton"

review by the Commission of more than just the terms of the financing. *See*, RSA 369; and *Appeal of Easton*, 125 N.H. 295 (1984).

2. Commercial Ratepayers

The Commercial Ratepayers take the position that the Commission's interpretation of RSA 125-O is in error. They claim that 125-O:11, V and IV were based upon a much lower cost of installation, i.e., $250 million rather than current estimates of $457 million. The Commercial Ratepayers argue that RSA 125-O:13 requires that the Commission determine the public interest under RSA 369-B:3-a, giving due consideration to the Legislature's public interest finding under RSA 125-O:11. According to the Commercial Ratepayers, such due consideration should include consideration of the change in cost estimates for the scrubber installation.

The Commercial Ratepayers argue that by ascribing to the Legislature the power to determine the public interest of the scrubber installation, the Commission has relinquished the proper exercise of its executive powers and/or quasi judicial powers. *See,* N.H. Constitution, Pt. 1, art. 37. *See, e.g., McKay v. N.H. Compensation Appeals Bd.*, 143 N.H. 722 (1999).

The Commercial Ratepayers claim that the Commission erred in finding that its review was limited to a prudence review under RSA 125-O:18 and further erred in finding that RSA 125-O:11 and RSA 369-B:3-a conflict. They argue that these two provisions can be read together to allow a Commission public interest review of the scrubber prior to construction. Moreover, they argue that the Commission's public interest review under RSA 369-B:3-a should consider the costs of future compliance with other environmental laws including the Clean Air Act[2] and the Clean Water Act.[3] Finally, the Commercial Ratepayers argue that the Commission

[2] 42 U.S.C. § 7412(d)
[3] 33 U.S.C. § 1326(b)

should consider alternatives to installing scrubbers at Merrimack Station in terms of costs, public health, environmental protection and long term energy benefits.

3. Mr. Rolfe

Mr. Rolfe argues that the Commission reached the wrong decision regarding the interplay of the mercury statute, RSA 125-O:11-18, and RSA Chapters 365 and 374. Mr. Rolfe claims that the Commission failed to consider additional costs that may be imposed on PSNH in complying with the federal Clean Air Act, the federal Clean Water Act and the New Hampshire Regional Greenhouse Gas Initiative (RGGI) standards. He also argues that the Commission did not view Merrimack Station, a 40-year old coal plant, in the context of the Governor's Climate Change Action Plan Task Force. Mr. Rolfe contends that turmoil in the financial markets may further impact the final costs of installation.

III. PSNH OBJECTIONS TO MOTIONS FOR REHARING

A. Standing

1. TransCanada

PSNH challenged TransCanada's standing to move for reconsideration, claiming that TransCanada is not directly affected by the Order. PSNH alleges that any harm claimed by TransCanada is the result of it being unregulated, a status it chose when it purchased its generating assets. According to PSNH, TransCanada purchased its generating facilities in 2005, two years after passage of RSA 369-B:3-a. As a result, there have not been any changes to the state of the New Hampshire generation market since TransCanada entered that market in 2005. Because PSNH is subject to prudence review by the Commission, it takes issue with TransCanada's claims that PSNH's investment decisions are without risk. PSNH concludes that

TransCanada has not shown that it will suffer any injury in fact. *Appeal of Richards*, 134 N.H. 148, 155 (1991).

2. Commercial Ratepayers

PSNH argues that the Commercial Ratepayers will not suffer any injury for two reasons. First, PSNH will only recover its prudent costs of construction and operation of the scrubber through its default energy charges. Second, the Commercial Ratepayers now have a choice of their electric supplier and therefore may avoid any costs imposed by the scrubber simply by choosing another supplier. PSNH observes that there are numerous suppliers listed on the Commission's website as ready and willing to serve New Hampshire electric customers. As a result, PSNH argues that the Commercial Ratepayers' claims of injury are merely speculative and they lack standing to request a rehearing of the Order. *In re Londonderry Neighborhood Coalition,* 145 N.H. 201, 203 (2000).

B. Procedural Issues

In response to due process claims, PSNH asserts that the Commission is free to determine the manner in which it conducts an inquiry. *See*, RSA 365:5. PSNH argues that since the Commission determined that it did not have the authority to conduct a public interest review under RSA 369-B:3-a, and reached that legal conclusion without the necessity of relying upon any specific facts, the Commission's process was sufficient and appropriate. PSNH points out that the Commission did not determine whether PSNH should install scrubber technology at Merrimack Station, but instead found that RSA 125-O:11-18 mandated the installation. PSNH concludes that by finding it had no authority to consider the public interest of the scrubber

installation, the Commission did not determine any rights, duties or privileges of the moving parties.

PSNH also claims that the motion by the Commercial Ratepayers does not conform to the requirements of RSA 541:4 because it incorporated by reference arguments by the OCA, the Conservation Law Foundation and TransCanada. PSNH takes the position that those arguments are not fully set forth in the motion and consequently are not preserved for appeal.

PSNH states that Mr. Rolfe failed to serve his motion upon PSNH as required by N.H. Code of Admin. Rules Puc 203.11 (c). According to PSNH, it did not receive a copy of Mr. Rolf's motion until October 23, 2008. As a result, PSNH takes the position that the Commission may not consider Mr. Rolf's motion for reconsideration.

C. Statutory Interpretation

PSNH acknowledges that the Commission's authority is plenary in matters of ratemaking. *See, Legislative Utility Consumers Council v. Public Service Co.*, 119 N.H. 332, 341 (1979). PSNH observes, however, that the Commission's authority is delegated by the legislature and is limited to those powers expressly delegated or fairly implied. *See, New England Telephone & Telegraph Co.*, 103 N.H. 394, 397 (1961). PSNH points out that in this case the legal questions do not involve the Commission's ratemaking function, and therefore concludes that the Commission's authority over installation of the scrubber is limited to that expressly delegated to it.

PSNH rejects the Commercial Ratepayers' argument that the constitutional separation of powers prevents the Legislature from limiting the Commission's exercise of its executive or quasi-judicial powers. According to PSNH, the Commission's powers are derived only from the

Legislature and are not derived from any other generalized powers of supervision. PSNH claims that it is well established that ratemaking is a legislative function. *See, Duquesne Light Co. v. Barash*, 488 U.S. 299, 313 (1989). PSNH argues that there is no separation of power constraint from the Commission taking its direction from the Legislature. Finally, PSNH takes the position that the Legislature did not direct the Commission to review the scrubber installation and argues that the Commission's legal analysis was correct and consistent with the Legislature's intent.

IV. COMMISSION ANALYSIS

A. Standing

We find that TransCanada, the Commercial Ratepayers and Mr. Rolfe[4] each have stated a sufficient interest in this case to request rehearing pursuant to RSA 541:3. TransCanada may be affected economically by a significant capital investment in PSNH's Merrimack station insofar as it has an impact on TransCanada's ability to compete in the electricity marketplace in New Hampshire. The Commercial Ratepayers and Mr. Rolfe 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. The electric supply market in PSNH's service territory is influenced by PSNH's default service rate because that rate is the backstop for all other competitive offerings. If PSNH's default service rate increases, competitive offerings may also increase.

B. Procedural Issues

The parties filing motions for rehearing have claimed that their rights to due process have been denied because we did not commence a full adjudicative proceeding to determine the scope of the Commission's authority with respect to PSNH's installation of scrubber technology at

[4] As explained below, for other reasons we have not considered Mr. Rolfe's motion in reaching our decision.

Merrimack Station. We initiated this proceeding pursuant to the Commission's investigative authority as set forth in RSA 365:5 and 365:19. In the course of that investigation, we directed the public utility, viz., PSNH, to submit a memorandum of law addressing the scope of our authority. We also invited the OCA, which has a special status and a specific responsibility with respect to residential ratepayers, pursuant to RSA 365:28, to submit a memorandum of law. Neither of these actions was required by statute, nor by considerations of due process, but they were undertaken as a means of further informing our consideration of the threshold issue concerning the scope of our legal authority with respect to PSNH's installation of scrubber technology at the Merrimack Station. Our investigation, moreover, did not disclose facts on which we based our conclusion of law, thus the requirement of RSA 365:19 to afford a reasonable opportunity to be heard does not apply.[5] Accordingly, the process we employed to consider the scope of our authority is consistent with our governing statutes and does not violate due process. To conclude otherwise would suggest that the Commission could never reach a conclusion regarding the extent of its authority in any matter without first commencing an adjudicative proceeding and providing for public input; such a result would impermissibly restrict the Commission's powers and would be administratively unworkable.

Nevertheless, assuming for the sake of argument that a due process deficiency may have occurred, it has been cured through the rehearing process, which permits any directly affected person to apply for rehearing. Due process requires that parties be provided an adequate opportunity to be heard. *See, Society for the Protection of New Hampshire Forests v. Site Evaluation Committee*, 115 N.H. 163, 169 (1975). When issues of fact are in dispute, due

[5] TransCanada's arguments about past Commission practice, and the issuance of an order of notice, etc., are inapt and would apply only if we were to conclude that we had the authority to proceed under RSA 369-B:3-a and were acting under color of that authority.

process may require something more than a filing. *Id.* In this case, however, we are faced with a question of law, not questions of fact. As a result, the motions for rehearing filed in this case, which contain extensive analyses of the statutes at issue, comprise an adequate opportunity to present legal arguments for our consideration, and therefore afford due process. We also observe that, in the event any party ultimately seeks review of our legal conclusion, the process that we have employed has very likely provided the timeliest path to appellate review.

Finally, with respect to PSNH's argument that we should not consider Mr. Rolfe's motion for rehearing as a result of his failure to serve it on other parties, PSNH is correct that Mr. Rolfe did not comply with Puc 203.11(c). Furthermore, as the Commission noted in *Re Connecticut Valley Electric Company,* 88 NHPUC 355 (2003), failure to comply with service requirements constitutes sufficient grounds to determine that a motion for rehearing has not been properly made. While we have not considered Mr. Rolfe's motion as a basis for reaching our decision, we nevertheless observe that his arguments are largely duplicative of various arguments made by TransCanada and the Commercial Ratepayers, which we have considered.

C. Statutory Interpretation

The threshold issue to be determined in this case is the extent of the Commission's authority to determine in advance whether the installation of a scrubber at PSNH's Merrimack Station is in the public interest. The Commission's authority is derived legislatively and therefore this case requires statutory interpretation. In Order No. 24,898, we undertook an analysis of RSA 125-O:11-18 and RSA 369-B:3-a, and we found that the Legislature's public interest finding in RSA 125-O:11 that scrubber technology should be installed at Merrimack Station superseded the Commission's authority under RSA 369-B:3-a to determine whether it is

in the public interest for PSNH to modify Merrimack Station. Consequently, we concluded that the Commission lacked the authority to conduct a public interest review, in the form of pre-approval, of PSNH's decision to install scrubber technology.

When considering motions for rehearing, we must grant rehearing in order to correct an unlawful or unreasonable decision. RSA 541:3. *See, Campaign for Ratepayers Rights*, 145 N.H. 671, 674 (2001). In this case, the parties seeking rehearing have not identified any new evidence needed to interpret RSA 369-B:3-a or RSA 125-O:11-18, nor have they identified any matters that were either overlooked or mistakenly conceived. Furthermore, the legal arguments and legislative history presented in the motions for rehearing are substantially duplicative of arguments presented in the legal memoranda of PSNH and OCA.

The Commercial Ratepayers posit that the Legislature based its enactment of RSA 125-O:11-18 on a specific level of investment, i.e., $250 million, and that any departure from that level of investment by PSNH confers authority on the Commission. However, reading such a cost limitation into the Legislature's public interest finding goes beyond the express terms of the statute.[6] We note that the Legislature did refer to economic infeasibility when it allowed PSNH to seek a variance under section 125-O:17, but it did not provide a process for the Commission to compel such an action. The Legislature could have provided express cost limitations on the scrubber installation, but it did not. In retrospect, it certainly can be argued that the better approach as a matter of policy may have been to provide a mechanism for addressing increased

[6] Under the Commercial Ratepayers' theory, the Legislature's public interest finding would be restricted to a specific level of costs and the Commission would effectively be required to second guess the Legislature's public interest finding at any dollar level above $250 million. Hence, for all practical purposes, the Legislature's public interest finding would be so limited as to be negated, and the RSA 369-B:3-a approach would be resurrected to require Commission permission before PSNH could act. We find such a constrained reading of the statute to be incompatible with the generally expansive statutory scheme adopted by the Legislature to bring about the installation of scrubber technology.

cost estimates. Such a hypothetical circumstance, however, does not create a basis for the Commission to exert authority not contemplated by statute.

We will not repeat here our discussion of why RSA 369-B:3-a does not constitute a necessary approval under RSA 125-O:13. We do, however, deem it useful to address TransCanada's argument that the Legislature, by providing PSNH the opportunity of seeking, pursuant to RSA 125-O:17, a variance from the mercury emissions reductions requirements, was somehow signaling that the Commission has the authority under certain circumstances to determine, in advance, whether the scrubber project is in the public interest.

RSA 125-O:17 constitutes a mechanism for PSNH to seek relief from the Department of Environmental Services (DES) in certain circumstances; it does not constitute authority for the Public Utilities Commission to determine in advance whether it is in the public interest for PSNH to install scrubber technology. RSA 125-O:17, however, is pertinent to prudence. We found previously that we retained our authority to determine prudence, including "determining at a later time the costs of complying with the requirements of RSA 125-O:11-18 and the manner of recovery for prudent costs." We note here that although RSA 125-O:17 provides PSNH the option to request from DES a variance from the statutory mercury emissions reductions requirements for reasons of "technological or economic infeasibility," it does not provide the Commission authority to determine at this juncture whether PSNH may proceed with installing scrubber technology. RSA 125-O:17 does, however, provide a basis for the Commission to consider, in the context of a later prudence review, arguments as to whether PSNH had been prudent in proceeding with installation of scrubber technology in light of increased cost estimates and additional costs from other reasonably foreseeable regulatory requirements such as

those cited by the Commercial Ratepayers, which include the Clean Air Act, 42 U.S.C. § 7401 et seq., and the Clean Water Act, 33 U.S.C. §1251 et seq.

With regard to the question of whether the Commission should conduct an "Easton" review of the project as part of a request for approval of financing for the project pursuant to RSA 369:1, we note that there is no pending financing approval request before us from PSNH for this project. As noted in Order No. 24,898, such approval is not required prior to the start of construction.

Finally, the Commercial Ratepayers' argument that our interpretation of RSA 125-O:11-18 violates the New Hampshire constitution's requirement for the separation of powers is not correct. *See* N.H. Const. Part I, Art. 37. The Commission's authority to regulate public utilities is statutory and is not based on common law rights or remedies. Thus, the case cited by the Commercial Ratepayers, *McKay v. N.H. Compensation Appeals Bd.*, 143 N.H. 722 (1999), is inapposite. In *McKay,* the workmen's compensation statute provided an administrative alternative to common law tort claims, which are normally handled by the judiciary. In this case, no party has argued that RSA 125-O:11-18 or RSA 369-B:3-a provides an alternative to common law remedies. Instead, RSA 125-O:11-18 codifies a presumptive public interest determination by the Legislature, supplanting an assignment of the task of determining the public interest to the Commission, which is itself legislatively created.

Based upon the foregoing, it is hereby

ORDERED, that the motions for rehearing are denied.

By order of the Public Utilities Commission of New Hampshire this twelfth day of November 2008.

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Chairman

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11/12/08 Order No. 24,914 issued and forwarded to all parties. Copies given to PUC Staff.

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