

**THE STATE OF NEW HAMPSHIRE**  
**BEFORE THE NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION**

**Public Service Company of New Hampshire**

Docket No. 08-145

**Objection of Freedom Logistics, LLC and Halifax-American Energy Company, LLC to  
Public Service Company of New Hampshire's Motion to Dismiss Petition**

Pursuant to N.H. Code Admin. Rule Puc 203.07, Freedom Logistics, LLC ("Freedom Energy") and Halifax-American Energy Company, LLC ("HAEC")(collectively, "Petitioners") hereby object to the Motion to Dismiss (the "Motion") filed by Public Service Company of New Hampshire ("PSNH"). In support, Petitioners state the following facts and law.

**I. Introduction**

On November 12, 2008, Petitioners filed a petition (the "Petition") with the New Hampshire Public Utilities Commission (the "Commission") for a determination in accordance with Rule PUC 202.01 regarding whether certain modifications to Merrimack Station are in the public interest. Specifically, the Petition requests,

a determination by the Commission, as required by RSA 369-B:3-a, regarding whether it is in the public interest of retail customers of Public Service of New Hampshire ("PSNH") for PSNH to modify Merrimack Station (the "Station") by investing in capital improvements that increase the Station's net capability for the purpose of restoring the Station's net power output (as measured in megawatts) that will be reduced due to the power consumption requirements or operational inefficiencies of scrubber technology to control mercury emissions.

Pursuant to RSA 369-B:3-a, PSNH may only modify Merrimack Station "if the Commission finds that it is in the public interest of the retail customers of PSNH to do so, and provides for the cost recovery of such modification or retirement." RSA 369-B:3-a. PSNH is well-acquainted

with these requirements having previously petitioned for and received Commission approval to modify Schiller Station pursuant to RSA 369-B:3-a.<sup>1</sup>

In its Motion, PSNH acknowledges that it proceeded to modify Merrimack Station without first seeking approval from the Commission and asserts that consequently, the Petition “is moot.” Motion at 2. Instead, PSNH asserts that the Commission’s authority here should be limited to an after-the-fact prudency review. Motion at 8. The Motion provides no legal support for the proposition that completing the modifications in violation of the requirements of RSA 369-B:3-a renders a public interest determination by the Commission to be an impermissible advisory opinion.<sup>2</sup> Beyond misapplying the legal doctrine of mootness, PSNH’s argument would nullify the explicit requirement of RSA 125-O:13, IV providing that improvements to increase the capacity of Merrimack Station must be undertaken in compliance with “the requirements and regulations of programs enforceable by the state or federal government, or both.” Moreover, in prior proceedings, PSNH acknowledged that a public interest determination under RSA 369-B:3-a is a distinct requirement which applies prior to undertaking a modification as opposed to a prudency review during a reconciliation proceeding.<sup>3</sup>

Relying on the Commission’s Order and Rehearing Order in Docket No. DE 08-103 (the “Scrubber Investigation”), PSNH erroneously asserts that the Commission’s authority under RSA 369-B:3-a is preempted by RSA 125-O:13, IV. The Motion conflates the statutory public interest finding in RSA 125-O:11 supporting of the mandate for PSNH to install scrubbers, with

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<sup>1</sup> See Public Service of New Hampshire, Petition for Authority to Modify Schiller Station, Order No. 24,276 (February 6, 2006); In re Pinetree Power, Inc., 152 N.H. 92, 96 (2005)(Affirming the Commission’s order authorizing PSNH to modify the Schiller Station).

<sup>2</sup> Because a public interest determination is a statutory prerequisite to the Commission providing PSNH with cost recovery for the modifications to increase capacity, the Petition would be rendered moot by PSNH agreeing to forego any claim for cost recovery in its 2009 annual reconciliation finding.

<sup>3</sup> Public Service of New Hampshire, Petition for Authority to Modify Schiller Station, Order No. 24,276 (February 6, 2006) at 22-23.

the permissive clause allowing PSNH to make modifications to restore generation capacity only if such modifications are undertaken in compliance with state law requirements, which include the need for the Commission to make a finding that it is in the public interest. RSA 125-O:13, IV. The Commission's Orders in the Scrubber Investigation interpreting the preemptive effect of RSA 125-O:11 apply only to the installation of scrubber technology and do not empower PSNH to expend undisclosed sums for unspecified increases in the capability (i.e., capacity) of Merrimack Station without prior review by the Commission.

The Motion completely omits any facts regarding the extent, activities and cost of the modifications and the amount of the resulting increase in capacity. Instead, the Motion asserts that "[t]he capital improvements made during Merrimack Station's maintenance outage earlier this year were routine maintenance" which "did not materially impact the capacity or footprint of the plant and thus were outside the scope of RSA 369-B:3-a." Motion at 9. This statement cannot be reconciled with the legal arguments in the Motion and is contrary to factual representations made by PSNH to ISO-NE and the New Hampshire Department of Environmental Services ("NHDES"). In any event, whether the capital improvements were routine and immaterial is a factual issue that cannot be resolved by PSNH's Motion, which is devoid of facts regarding the nature and extent of the modification(s).

Ignoring party status rulings by the Commission in numerous prior proceedings addressing the cost of PSNH's electric supply, the Motion asserts that Petitioners lack standing to bring the Petition. Petitioners have repeatedly intervened and been granted party status in such matters because they are electricity market participants directly affected by PSNH's capital investments to supply electricity. Moreover, HAEC is a trade name held by South Jersey Energy Company, a registered competitive supplier in New Hampshire. South Jersey Energy

Company signed an Electric Services Supplier Agreement and an Electric Supplier Trading Partner Agreement with PSNH on November 3, 2008, a fact that was not mentioned by PSNH in its Motion.

As provided in greater detail below, the Commission's statutory authority to determine whether modifications to Merrimack Station are in the public interest applies to PSNH's project to restore generating capability. That the modifications are complete and will be subject to prudence review does not render the Petition moot. The Motion's unsupported and conclusory assertions that the capital improvements made to Merrimack Station were routine and immaterial conflict with prior statements by PSNH and raise factual issues that cannot be resolved by the Motion. Petitioners' interest in the relief requested by the Petition is a sufficient basis for standing.

## **II. Petitioners have a sufficient interest to seek the relief requested by the Petition.**

Petitioners interest as market participants and suppliers in the PSNH service territory is sufficient to provide standing for the relief requested in the Petition. Freedom Logistics, LLC is a New Hampshire limited liability company that specializes in providing high-end energy management services to large end-users that are Market Participant End-Users (MPEU). An MPEU is a member of NEPOOL and ISO-NE and purchases electricity directly from the ISO-NE hourly wholesale market.

HAEC is a New Hampshire limited liability company and acts as the exclusive New England agent for South Jersey Energy Company, a subsidiary of South Jersey Industries. South Jersey Energy Company is a registered competitive electric power supplier in New Hampshire. Halifax American Operating Company is also a trade name held by South Jersey Energy

Company. HAEC's product offering consists of streaming power from the hourly wholesale market directly to end users, using its membership in the power pool to do so.

PSNH notes that Freedom Logistics and HAEC are not registered under the requirements of Chapter Puc 2000 of the Commission's rules as either a competitive electric power supplier or as an aggregator. Motion at 3. However, Freedom Logistics does not sell electricity, nor does it aggregate customer loads and accordingly is not required to register under the Commission's rules. HAEC is a trade name held by South Jersey Energy Company, a registered competitive supplier in the PSNH service territory. South Jersey Energy signed an Electric Services Supplier Agreement and an Electric Supplier Trading Partner Agreement with PSNH on November 3, 2008. (Attached hereto as Exhibit 1) Unfortunately, the Motion omits this fact.

In support of its claim regarding standing, the Motion asserts an overly narrow view of the "public interest of the retail customers of PSNH" as provided in RSA 369-B:3-a. The public interest of PSNH's rate payers encompasses far more than simply lower rates. The public interest also includes providing greater competition, more efficient regulation, environmental impact considerations and increased customer choice. Appeal of Pinetree Power, 152 N.H. 92, 96 (2005). The extent to which PSNH is able to avoid the statutorily mandated public interest review and receive unfettered discretion to invest ratepayer funded moneys into its generating facilities to add or restore capacity will deter the development of competitive markets by providing a distinct advantage to PSNH over other suppliers. Such an advantage will impair the competitive position and cause injury to companies providing or facilitating alternative means of electric supplies such as Petitioners. Appeal of Campaign for Ratepayers Rights, 142 N.H. 629, 631 (1998). Had PSNH petitioned the Commission for the required public interest determination, the Commission could have properly considered the full scope of factors which

apply, including whether capacity from competitive market participants would better serve the public interests.<sup>4</sup>

The Commission has routinely found the interests of competitive suppliers sufficient to provide party status in dockets addressing the cost of PSNH's supply.<sup>5</sup> Moreover, the Commission recently determined that a competitive supplier had a sufficient interest to request rehearing in a proceeding addressing the applicability of RSA 369-B:3-a to PSNH's scrubber installation. See Investigation of PSNH's Installation of Scrubber Technology at Merrimack Station, Order Denying Motions For Rehearing, Order No 24,914 (November 12, 2008). The same analysis and conclusion apply to Petitioners in this proceeding. A significant capital investment that increases the capacity and supply capability of Merrimack Station will impact Petitioners' ability to compete in the New Hampshire electricity market because the cost of PSNH's supply "is the backstop for all other competitive offerings." Id. at 9.

**III. The Commission's authority to determine whether a modification is in the public interest applies to the capital improvements at Merrimack Station that increase its generating capacity.**

In its Motion, PSNH states that the Commission lacks a legal basis for asserting its authority to render the public interest determination provided for in RSA 369-B:3-a "[f]or the same reasons set forth in [the Commission's] Order and Rehearing Order in Docket No. DE 08-

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<sup>4</sup> The after-the-fact used and useful prudency analysis of the modification(s) is not a proper forum for the full scope of public interest considerations. See Public Service of New Hampshire, Petition for Authority to Modify Schiller Station, Order No. 24,276, slip op at 22-23 (February 6, 2006).

<sup>5</sup> Petitioners are full party intervenors in Docket Nos. DE 07-108 (PSNH 2007 LCIRP) and DE 08-113 (PSNH 2009 Energy Service Rate). Petitioners have expressed their concern by letter to the Commission in DE-08-113 over the PSNH's power purchases for 2009 at prices that appear to exceed current market prices by approximately \$75,000,000.

103.”<sup>6</sup> Motion at 5. Specifically, the Motion asserts that RSA 125-O:11 through 18 (the “Scrubber Law”) “eliminates” the requirement for a public interest determination for capital improvements that restore lost capacity. Motion at 5.

PSNH’s reliance on the legal conclusions in the Scrubber Investigation docket is misplaced because the Commission’s conclusions were based on statutory provisions that do not apply to the capacity restoration modification(s) and the Petition in this docket. In the Scrubber Investigation, the Commission examined RSA 125-O:11, VI, which states that it is in the public interest for PSNH to install scrubber technology at 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. Order No. 24,898 at 2. Under RSA 125-O:13, PSNH “shall install and have operational scrubber technology to control mercury emissions” subject to the additional conditions in the Mercury Control Law. RSA 125-O:13(I)(emphasis supplied). According to the Statement of Purpose and Findings for the Mercury Reduction Law, “[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 [including the Station].” RSA 125-O:11(VI). PSNH is expressly enabled by the statute to recover the prudently incurred costs “of complying with the requirements of [the Mercury Reduction Law].” RSA 125-O:18 (emphasis supplied). After reviewing the statutory text, the Commission determined that its authority over the installation of scrubber technology was preempted by statute stating that,

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<sup>6</sup> PSNH’s reliance in the Motion on the Commission’s analysis of the applicability of RSA 369-B:3-a in Order 24,898 (September 19, 2008, Docket No. 08-103) amounts to a concession that the capacity restoration project constitutes a “modification” as was determined by the Commission with respect to the scrubber installation. Although the Motion lacks any discernable facts regarding the capital improvements to restore capacity, information obtained from PSNH’s filings to NHDES and ISO-NE lead to the conclusion that the capacity restoration capital expenditures entailed one or more modifications. See section V, infra.

the Legislature has made the public interest determination [for the scrubber installation] and **required** the owner of Merrimack Station, viz., PSNH, to install and have operational scrubber technology to control mercury emissions no later than July 1, 2013. Accordingly, based on our reading of RSA 125-0 as a whole, we find that the legislature did not intend that PSNH be required to seek Commission approval pursuant to RSA 369-B:3-a for a modification that the Legislature has required and found to be in the public interest.

Id. at 10 (emphasis included in original). The Legislature's public interest finding, however, was limited to the installation of scrubber technology.

The Scrubber Law does not contain an analogous public interest finding for modifications to restore the reduction in generating capacity that will result from the scrubber installation. Nor does the scrubber law require PSNH to invest in capital improvements to increase the capability of the facility to generate power to restore the generating capacity that will be reduced by the scrubbers. RSA 125-O:13 , IV provides that

[i]f the net power output (as measured in megawatts) from Merrimack Station is reduced, due to the power consumption requirements or operational inefficiencies of the installed scrubber technology, [PSNH] **may** invest in capital improvements at Merrimack Station that increase its net capability, within the requirements and regulations enforceable by the state or federal government or both.

RSA 125-O:13(IV)(emphasis supplied). The use of the word “may” rather than “shall” indicates that PSNH is **not required** to undertake modifications to restore lost generation capacity. *City of Rochester v. Corpening*, 153 N.H. 571, 574 (2006). If PSNH intends to do so, PSNH may proceed only in accordance with all state and federal regulatory requirements.<sup>7</sup> In contrast with the statutory provisions governing the scrubber installation, the applicable state requirements that PSNH must comport with act with to restore the lost generation capacity include RSA 369-B:3-a

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<sup>7</sup> RSA 369-B:3-a is rendered enforceable by RSA 375:41 which empowers the Commission to enforce against violations of the provisions of Title 34.



because the Legislature did not mandate the restoration of generation capacity, nor find that it was in the public interest for PSNH to undertake modifications to restore the lost capacity. Simply put, there is not a conflict between the Scrubber Law and RSA 369-B:3-a.

Having already completed the modification(s) to restore lost capacity without first seeking a determination under RSA 369-B:3-a, PSNH's Motion strains to posit an argument that can imply a conflict by stretching the reach of the Legislature's public interest determination for the statutorily mandated scrubber installation to also apply to the statutes permissive provisions regarding restoration of lost capacity. The Motion asserts that RSA 369-B:3-a cannot be harmonized with RSA 125-O:13, IV because requiring PSNH to seek a public interest determination under RSA 369-B:3-a before making the capital improvements to restore generating capacity "would render RSA 125-O:13,IV superfluous." Motion at 6. Rather than seeking a reasonable construction of the two statutes taken together, PSNH's assertion, however, implicitly repeals that portion of RSA 125-O:13, IV which requires capital improvements to increase the net capability of Merrimack to be undertaken "within the requirements and regulations of programs enforceable by the state or federal government or both." See Board of Selectmen v. Planning Board, 118 N.H. 150, 153 (1978)("If any reasonable construction of the two statutes taken together can be found, this court will not find that there has been an implied repeal.").

The plain and ordinary meaning of the text reveals that there is no conflict between the two statutes. ElderTrust of Florida v. Town of Epson, 154 N.H. 693, 697 (2007). See also of Public Service Company of New Hampshire, 130 N.H. 265, 282 (1988) ("When interpreting two statutes which deal with similar subject matter, we will construe them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the

legislative purpose of the statute.") RSA 125-O:13, IV states that PSNH "may" make capital improvements to restore the capacity that will be lost as a result of the scrubber project. Those capital improvements must be in compliance with state and federal requirements. To the extent that the capital improvements constitute a modification, the requirements of RSA 369-B:3-a apply and PSNH must obtain a public interest determination prior to obtaining cost recovery. If the capital improvements are not modifications, then a public interest determination pursuant to RSA 369-B:3-a is not required. The legislature is not presumed to enact redundant provisions or waste words and whenever possible, every word of a statute should be given effect. Town of Amherst v. Gilroy, 950 A. 2d 193, 197, \_\_ NH \_\_ (2008) (citation omitted). The Motion does not identify any conflict or ambiguity between the two statutes or assert a valid basis to nullify the phrase requiring PSNH to act "within the requirements and regulations of programs enforceable by the state or federal government or both." RSA 125-O:13, IV. Accordingly, the Commission maintains its authority to determine whether modifications to restore the capacity of Merrimack Station are in the public interest.

**IV. Although PSNH completed the modification(s) without the required public interest finding, the Petition is not moot.**

In its Motion, PSNH claims that a public interest finding under RSA 369-B:3-a is unnecessary because it has already completed unspecified capital improvements to increase the Station's net capability. Motion at 8. Thus, the Motion states that the issue presented in the Petition "is moot" and the Commission will have an after-the-fact-opportunity to determine whether its investment was prudent, just and reasonable. Motion at 2, 8. PSNH's assertions are in stark contrast to the clear distinction between a prudency review and the required public interest determination, which distinction was explicitly acknowledged by PSNH in prior proceedings before the Commission. Moreover, PSNH's unclean hands, having undertaking the

modification(s) to restore (or increase) capacity before a public interest determination (and years in advance of installing the scrubbers), do not render the Petition moot.

The requirement to obtain a public interest determination in RSA 369-B:3-a is not only a condition precedent to PSNH undertaking a modification to Merrimack Station, but is also required in order for the Commission to provide PSNH with cost recovery for the modification to increase the Station's capability. With respect to the statutory requirement for the installation of scrubber technology, the Scrubber Law expressly enables PSNH to recover the prudently incurred costs "of complying with the requirements of [the Scrubber Law]." RSA 125-O:18 (emphasis supplied). The Commission Order in the Scrubber Investigation docket found this provision to further support its conclusion that the "Commission lacks the authority to pre-approve installation [of scrubbers]." Order No. 24,898, slip op at 12. In contrast, the provisions of the Scrubber Law addressing the capacity restoration project are not "requirements" of the statute and thus, the Scrubber Law does not provide for cost recovery for capacity restoration. Accordingly, the mechanism for PSNH to seek cost recover for the capacity restoration project necessarily entails the public interest determination required in RSA 369-B:3-a.

While a prudency review is also required prior to cost recovery pursuant to RSA 378:27 and 28, both PSNH and the Commission recognized, in past proceedings, that the need for a public interest determination is independent and in addition to a prudency review. In proceedings on PSNH's Petition to Modify Schiller Station, PSNH contended that "it is only seeking a determination under RSA 369-B:3-a that its decision to modify Unit 5 at Schiller Station is in the public interest of PSNH retail customers." Order No. 24,276, slip op at 22-23 (February 6, 2004). Docket DE 03-166. PSNH argued that the public interest determination is not "a predetermination that the final costs of the plant are prudent, just and reasonable." *Id.*,

(citing Legal Memorandum of PSNH). PSNH's position in the Schiller proceeding implicitly acknowledges that a prudency review is distinct from and is not a determination that a modification was in the public interest of PSNH retail customers. See also, Pinetree Power at 96-97 (the "public interest" analysis entails consideration of the multiple factors provided in the statutes governing restructuring including health and environmental benefits, facilitating competition and increased customer choice).

Having conceded that it undertook the modifications to restore the Station's without first seeking a public interest finding or guidance from the Commission regarding the applicability of RSA 369-B:3-a,<sup>8</sup> PSNH's motion claims that the Petition is moot. Motion at 2. Under the doctrine of mootness, a case is moot when the issues presented no longer can be characterized as an active case or controversy. Powell v. McCormack, 395 U.S. 486, 496 (1969). In this instance, the public benefit determination under RSA 369-B:3-a is a condition precedent to undertaking a modification and seeking cost recovery from the Commission. Accordingly, if PSNH wants the Petition to be moot, it should agree to forego any claim for cost recovery in its default service reconciliation docket for 2008 supply costs.

**V. PSNH's unsupported assertions that the capital improvements made to Merrimack Station were routine and immaterial conflict with prior statements by PSNH and raise factual issues that cannot be resolved by the Motion.**

The Motion can be characterized by its non-disclosure of facts relating to the modification(s) to restore the capacity of the Station and its conflicting statements regarding the activities undertaken during the 2008 maintenance outage. PSNH acknowledges that the Station

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<sup>8</sup> As PSNH was in possession of all of the relevant facts relating to its plans to undertake modifications to restore and/or increase the capacity of the Station, it would have been prudent for PSNH to request a declaratory ruling regarding the applicability of RSA 369-B:3-a prior to the modifications. See Rule Puc 207.01.

completed capital improvements to increase the Station's net capability "during the plant's maintenance outage earlier this year" but then goes on to state that,

[t]he capital improvements made during Merrimack Station's maintenance outage earlier this year did not materially impact the capacity or footprint of the plant and thus were outside the scope of RSA 369-B:3-a.

Motion at 8-9. Consequently, the Motion states that the "capital improvements made to Merrimack Station which are not part of the Scrubber Project are routine maintenance activities, not 'modifications' subject to RSA 369-B:3-a." Motion at 8.

Under the Commission's rules, a motion must "clearly and concisely state the facts and law which support the motion." Rule Puc 203.07(d). The Motion states that it seeks dismissal of the Petition "because there is no basis for the Commission to assert authority in this matter" and because "RSA 369-B:3-a does not apply to the actions of PSNH that are the subject of the Petition." Motion at 2. In support of its motion, PSNH asserts that the undisclosed activities did not "materially impact the capacity or footprint of the plant." Motion at 9. A determination on the Motion requires a factual understanding of the purpose, extent, cost and scope of the "actions" (i.e., capital improvements) to restore the capability of the Station, which PSNH asserts do not trigger the applicability of RSA 369-B:3-a (i.e., were not modifications). The Motion, however, is completely devoid of facts stated clearly and concisely and thus cannot support the

relief requested in the Motion.<sup>9</sup> The failure to state the relevant facts is fatal to the Motion, which must be denied.<sup>10</sup>

Notwithstanding the Motion's obfuscation and incoherent statements regarding the activities undertaken by PSNH during the 2008 maintenance outage at the Station, certain facts are ascertainable from information at NHDES and ISO-NE. As detailed below, PSNH's characterization of the maintenance outage projects in such information appears to undercut assertions in the Motion that the actions were routine and/or immaterial and lead to the inexorable conclusion that the activities were undertaken to "modify" the Station, thus triggering the applicability of RSA 369-B:3-a.

By letter dated January 31, 2008 (the "NHDES Letter" copy attached as Exhibit 2), PSNH's Director of Generation, William H. Smagula, provided NH DES with the analysis required under the Clean Air Act when a power plant intends to make a non-routine physical change that could potentially result in a significant net emissions increase (i.e., a major modification). See NHDES Letter at 3 (stating that the analysis is required to compare "annual emissions that will occur following a non-routine physical change)(emphasis supplied). The

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<sup>9</sup> Assuming arguendo, that RSA 125-0:13, IV does preempt the Commission's authority to render a public interest determination (which Petitioners emphatically contest), the Motion lacks the factual information necessary for the Commission to determine that the "actions" undertaken by PSNH are within the ambit of capital improvements envisioned by RSA 125-0:13, IV. For example, the Motion does not disclose the extent to which the capability of the Station was increased by the actions of PSNH. Likewise, the Motion does not include facts regarding the magnitude of the diminution of capacity that will result from the scrubber installation. Without the relevant facts, the Board cannot grant PSNH's Motion.

<sup>10</sup> In this respect, PSNH's suggestion that the Commission treat the Petition as a request for declaratory ruling regarding the applicability of RSA 369-B:3-a appears to be both evasive and cynical. The lynchpin to such a request is knowledge of the facts necessary for the Petitioner to set forth and Commission to analyze the applicability of the prospective legal requirements. See Rule Puc 207.01(c)(1). PSNH's Motion does not set forth facts necessary to support its contentions regarding the applicability of the statutes at issue in this Docket and PSNH is the exclusive party in possession of such facts. Petitioners respectfully request that the Commission consider the extent to which PSNH has failed to provide sufficient facts in considering the merits

NHDES Letter includes the following statements relevant to the activities during the 2008 maintenance outage for Merrimack Unit 2:

The HP/IP project involves the replacement of one of the six steam turbine components with a functionally equivalent component. [] As part of the project, the HP/IP rotor, stationary blade rings, and inner and outer cylinder casings will be replaced. The repair work to the rotor involves an in-kind replacement of the generator motor. (NHDES Letter at 2);

Following the completion of the MK2 HP/IP turbine project and associated generator work, MK2 is expected, per the contract guarantee, to produce an additional 6.5 megawatts of electricity. The actual net unit output will range between 6 and 13 megawatts – an increase that is necessary to support the large power consumption of the future, new scrubber system – due to the increased efficiency of the turbine blades. (NH DES Letter at 2);

The approach proposed by PSNH for regulatory review is based on EPA guidance documents, specifically those applicable to Detroit Edison's Monroe Power Plant and Otter Tail Power's Coyote Station where similar projects have been undertaken. (NHDES Letter at 2)(emphasis supplied).

EPA's analysis of whether Detroit Edison project was routine is informative to PSNH's assertions regarding routineness and the applicability of the Commission authority to render a public interest determination. EPA's letter dated May 23, 2000 (the "Detroit Edison Letter" copy attached as Exhibit 3) from EPA Regional Administrator, Francis X. Lyons, to Henry Nickel, Counsel for Detroit Edison Company, states that the project,

goes significantly beyond the both historic turbine work and what would otherwise be considered regular, customary or standard undertaking for the purpose of maintaining the existing steam turbine units. The project also goes well beyond routine turbine maintenance, repair, and replacement activities for the utility industry in general.[] The nature and extent of the work in question – replacement of the entire high pressure sections of the turbines for Units 1 and 4 at Monroe – suggests that the Dense Pack project is not routine.

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of the Motion and in any subsequent proceedings regarding the public benefit and prudence of PSNH's modification(s).

Based on PSNH's statement that its activities are similar to those described in the Detroit Edison Letter, it is apparent that the actions undertaken by PSNH were not routine or immaterial such that they could avoid the public benefit review required by RSA 369-B:3-a.

In addition, the NHDES Letter provides sufficient information to determine that the capacity restoration project, at a minimum, constitutes a modification under RSA 369-B:3-a. Under the Commission's precedent from proceedings on the Schiller modification, "a utility clearly seeks to 'modify' a generation facility when it asks for authority to make changes to it that do not increase its capacity. Order 24,276, slip op, at 57 (February 6, 2004). However, because PSNH has not provided facts regarding the full extent of the capacity that will be lost as a result of the scrubber project, and because it appears that PSNH has already increased its capacity prior to any diminution of capability due to the scrubber installation, the turbine upgrade project presently amounts to the construction or acquisition of new generation capacity by PSNH. In fact, PSNH submitted an interconnection study request to ISO-NE with respect to the increase in capacity for Merrimack Station Unit 2 after the outage turbine project was completed. PSNH Motion at 8, note 10. At present, PSNH lacks the statutory authority to construct or acquire new generation. See Public Service of New Hampshire, 2004 Least Cost Integrated Resource Plan, Order No. 24,695, slip op at 24 (November 8, 2006).<sup>11</sup>

In sum, PSNH undertook capital improvements at the Station during its 2008 maintenance outage that were neither routine or immaterial as claimed in the Motion. In accordance with RSA 369-B:3-a, the Commission and interested parties must be provided with an

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<sup>11</sup> By the turbine upgrade project at Merrimack, PSNH apparently constructed or acquired new generation capacity without the approval of the Commission or the Legislature. Petitioners respectfully request that the Commission should consider PSNH's excursion beyond its existing authority in deciding the Motion and in any subsequent proceedings regarding public benefit and/or prudence.



opportunity to review the actual facts regarding PSNH's actions and whether the improvements to the Station are in the public benefit.

## **VI. Conclusion**

The Commission should deny PSNH's Motion to Dismiss because: 1) Petitioners interest in this proceeding is sufficient to confer standing; 2) the Commission's authority to determine whether modifications to Merrimack Station are in the public interest of the retail customers of PSNH, pursuant to RSA 369-B:3-a, applies to PSNH's capital improvements to restore the Station's capacity; 3) that the modifications have been completed and will be subject to prudence review (if the Commission first determines that they were in the public interest) does not render the Petition moot; and, 4) the capital improvements made to Merrimack Station during the 2008 maintenance outage constitute one or more modifications and are therefore subject to the Commission's authority under RSA 369-B:3-a.

Dated: December 4, 2008

Respectfully submitted,

Freedom Logistics LLC  
Halifax-American Energy Company LLC

By their Attorney,

DOWNS RACHLIN MARTIN PLLC



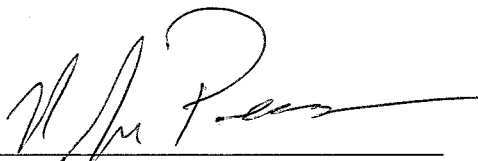
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# CERTIFICATE OF SERVICE

I certify that on this date I caused the attached Objection to PSNH's Motion to Dismiss to be served pursuant to N.H. Code Admin. Rule Puc 203.11.

Dated: December 4, 2008

  
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N. Jonathan Peress

2904917.1

Service List. Docket No. DE08-145

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