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

DE 11-250

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Investigation of Merrimack Station Scrubber Project and Cost Recovery

TRANSCANADA LEGAL BRIEF

NOW COMES TransCanada Power Marketing, Ltd. and TransCanada Hydro Northeast, Inc. (collectively "TransCanada"), through its undersigned counsel, and respectfully submits the following Legal Brief in response to the Public Utilities Commission ("Commission") Order Regarding TransCanada's Motion to Compel, Order No. 25, 398, issued on August 7, 2012 ("Order").

I. INTRODUCTION

The Commission has provided all parties the opportunity to file legal briefs on the proper interpretation of the non-severability, variance and cost recovery provisions of RSA 125-O, and how these provisions relate to one another, to the application of the standard for discovery of evidence and to relevance. *See* Order at 10. The Commission also stated a specific interest in the parties' views on: (i) the types of variance requests that may be made under RSA 125-O:17; (ii) the meaning of the phrases "alternative reduction requirement" and "technological or economic feasibility" in RSA 125-O:17, II; (iii) the duty of PSNH to seek a variance under RSA 125-O:17, if any, in order to obtain cost recovery under RSA 125-O:18; (iv) the meaning and application of the non-severability clause in RSA 125-O:10 for purposes of a prudence determination under

RSA 125-O:18; and (v) how RSA 215-O:10 and :17 relate to one another and to the prudence determination that the Commission must make under RSA 125-O:18. *Id.*

TransCanada has previously set forth the basis for its view that PSNH had the ability and the responsibility, from a prudence perspective, to consider a variance pursuant to RSA 125-O:17, and that the Commission's prudence review must include consideration of all relevant evidence. *See* TransCanada's July 16, 2012 Motion to Compel at 2, 5. TransCanada incorporates all arguments presented in the Motion to Compel and sets forth below the following additional arguments.

First, the plain language of the variance provision in RSA 125-O:17, when read in conjunction with other provisions in RSA 125-O, supports an interpretation that PSNH was obliged to consider requesting a variance that would, at the very least, delay the scrubber installation deadline based upon changed circumstances regarding anticipated costs of the scrubber technology.

Second, the plain language of RSA 125-O:17 authorized the Department of Environmental Services ("Department"), in consultation with this Commission, to consider allowing PSNH to entirely avoid installation of the scrubber technology by establishing an "alternative reduction requirement" based upon "technological or economic infeasibility." PSNH's assertion in its objections to data requests and its objection to TransCanada's Motion to Compel that it had no choice but to install the scrubber technology, regardless of cost, ignores that the legislature adopted the variance provision with an economic infeasibility component. PSNH's contention that it had no choice but to install the scrubber also would lead to an absurd result essentially a "blank check" authorization belied by the variance language and other provisions in the statute,

including the cost recovery provision allowing for recovery of only "prudent" costs, which under PSNH's interpretation would mean "any and all" costs.

Third, the economic infeasibility component of the variance provision, when read in conjunction with other provisions of the statute, and when put in the context of (i) a huge increase in the cost of the scrubber project over what was represented to the legislature in 2006, (ii) an increasing migration of customers away from default service, (iii) an economic slowdown and decrease in the price of natural gas, and (iv) "additional costs from other reasonably foreseeable regulatory requirements"[1] make it clear that PSNH had a duty to seek a variance or to seek other means of relief from the nearly half billion dollar mercury reduction expenditure in its 40 year old coal-fired Merrimack Station in order to justify cost recovery under RSA 125-O:18.

Fourth, the non-severability clause, variance provision and cost recovery provisions must be read together to reach the sensible and legislatively intended interpretation of the statute, which is: in light of a huge increase in scrubber costs known well before installation began, increased PSNH customer migration known well before installation, and the statutory limitation that cost recovery could only come from default service customers, the Commission should only authorize recovery of that portion of the scrubber installation cost which can be shown by PSNH to be economically feasible from a default service customer perspective because that is all that should be considered to be prudent. These are all arguments that the Commission should take into consideration at

[1] The Commission has stated "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...*" [Emphasis added]. *Re Investigation of PSNH's Installation of Scrubber Technology at Merrimack Station*, 93 NH PUC 564, 572 (2008).

this point in the proceeding in deciding whether to compel PSNH to respond to the data requests at issue and whether to allow for broad discovery on these issues going forward.

II. ARGUMENT

A. The Variance Enabled PSNH to Avoid or Delay the "Scrubber Mandate"

1. RSA 125-O:17 generally allows for variance requests

RSA 125-O:17 allows the owner to request "a variance from the mercury emissions reduction requirements of this subdivision." All compliance requirements set forth in RSA 125-O:13, including the "scrubber mandate," which required installation and operation of the scrubber technology by July 1, 2013, *see* RSA 125-O:13, I, are subject to variance requests under RSA 125-O:17. This is because the language of the statute expressly provides for variance from the "the mercury emission reduction requirements." As set forth in RSA 125-O:11, VIII, [t]he mercury reduction requirements set forth in this subdivision ... [are] viewed as an integrated strategy of the non-severable components." *See also* RSA 125-O:10 (stating that provisions of RSA 125-O:1 through RSA 125-O:18 are not severable). Because the installation/operation of the scrubber technology is not severable from either the deadline for compliance under RSA 125-O:13, I or the level of mercury reduction required under RSA 125-O:13, II, PSNH is entitled, if not specifically directed, to seek a variance from any or all of the compliance provisions. PSNH chose to ignore both entitlement and direction.

Because PSNH could request a variance for any "applicable requirements" under RSA 125-O:13, I, all information related to its failure to request or even give consideration to requesting a variance is relevant to these proceedings. This is especially true with regard to the scrubber. Installation and operation of the scrubber lay at the core

of compliance with the "mercury reduction requirements" and associated deadlines, *see* RSA 125-O:13, I, and cannot be separated from other "applicable requirements" subject to variance. *See* RSA 125-O:11, VIII; *Green Crow Corp. v. Town of New Ipswich*, 157 N.H. 344, 346 (2008) ("We interpret a statute to lead to a reasonable result and review a particular provision, not in isolation, but together with all associated sections"). To the extent that PSNH's data responses suggest it could not request a variance from the "scrubber mandate," its position is contradicted by the language of the first two sentences of RSA 125-O:17.

2. *The Department is authorized to delay or modify the requirements*

Paragraphs I and II expressly provide the Department with authority to grant two types of variances that could fundamentally change the mercury reduction requirements. Without changing the underlying compliance provisions of RSA 125-O:13, the legislature authorized the Department to waive the strict letter of the compliance requirements under RSA 125-O:13 by authorizing: (i) a specific delay in the timeframe for compliance under paragraph I; or (ii) substitution of an alternative to the mercury reduction requirement in paragraph II. *See* RSA 125-O:17, I and II. In doing so, the legislature allowed PSNH to seek, and the Department to grant, a "variance from a literal enforcement of the [statute]" where the Department is satisfied that the "variance from the applicable requirements is necessary." RSA 125-O:17; *see Stone v. Cray*, 89 N.H. 483, 487 (1938) (municipal variance); *see also Ouimette v. City of Somersworth*, 119 N.H. 292, 294 (1979) ("variance from a municipal zoning ordinance may be granted [when] literal enforcement of the provisions of the ordinance will result in unnecessary hardship"). As the legislature has granted variance authority to the Department in other

air pollution statutes, it was not unusual for the legislature to do so here. *See, e.g.,* RSA 125-C:16 ("the [Department] may suspend the enforcement of the whole or any part of this chapter").

When read in conjunction with the first two sentences of RSA 125-O:17, paragraphs I and II define the circumstances under which two different types of variances, if requested, could be granted by the Department. Under general principles of statutory construction, the department could grant a variance to the mercury reduction schedule or mercury reduction requirement, either of which would fundamentally change the underlying requirements of RSA 125-O:13. *See Zorn v. Demetri,* 158 N.H. 437, 438-39 (2009) ("we do not consider words and phrases in isolation, but rather within the context of the statute as a whole"); *Town of Amherst v. Gilroy*, 157 N.H. 275, 279 (2008) ("[t]he legislature is not presumed to waste words or enact redundant provisions and whenever possible, every word of a statute should be given effect").

However, the statutory language is such that the Department cannot grant a variance unless one is requested. *See* RSA 125-O:17, I ("Where an alternative schedule is sought ...) and RSA 125-O:17, II (Where an alternative reduction requirement is sought ..."). The statute does not allow the Department to initiate any change to the mercury reduction requirements, regardless of the existence of new information demonstrating to public officials that the requirements were no longer feasible. The responsibility to show the Department "that variance from the applicable requirements is necessary," RSA 125-O:17, in order to retain reasonable rates for default service customers, meet prudency obligations or for other reasons, fell entirely upon PSNH. Economic infeasibility in this context presumably means that the cost of the scrubber

project had become so substantial that it would raise default service customer rates to the point where migration of customers would accelerate, driving up the rates to remaining customers even further, resulting in a death spiral.[2] Therefore, although PSNH could have sought a variance to suspend or modify either the schedule or strict mercury reduction requirement set forth in the statute, it failed to do so and should be subject to broad discovery on that issue.

a. *Paragraph I would allow unlimited delay in installing scrubber*

In particular, under the language of paragraph I, the Department is required to grant a variance request for an "alternative schedule," as long as the "delay is reasonable under the cited circumstances." *See* RSA 125-O:17, I. This provision does not supplant the first two sentences of RSA 125-O:17, which require a showing that the variance is "necessary," but rather, adds a requirement that the requested timeframe for delay in compliance must be reasonable under the circumstances. *See Town of Amherst v. Gilroy*, 157 N.H. 275, 279 (2008) ("whenever possible, every word of a statute should be given effect").

Because the critical "schedule" established under RSA 125-O:13 relates to installation and operation of the scrubber technology by July 1, 2013, a request for delay of the RSA 125-O:13, I deadline could have been submitted, along with a proposed alternative schedule for the delayed installation. *See* RSA 125-O:17, I. Nothing in the statutory language suggests that PSNH was required to demonstrate that it was

[2] PSNH has unsuccessfully, to date, sought a non-bypassable charge on *all* of it customers to address the customer migration problem, as opposed to taking prudent courses of action such as requesting a variance under RSA 125-O:17 to address the economics of imposing spiraling scrubber costs upon its remaining customers. Such a non-bypassable charge would undermine opportunities in the competitive market, thereby enriching its investors at the expense of PSNH customers.

impossible to meet the 2013 deadline or that increased cost could not be a factor in requesting an alternative schedule. There is also no limit placed on the duration of any delay that could be granted under paragraph I. The statute only requires that the alternative schedule is "reasonable under the cited circumstances."[3] RSA 125-O:17, I.

Given the significant increase in estimated scrubber technology costs that became evident in 2008, within two years after adoption of the statute and a full five years before the compliance deadline, a variance request under paragraph I could have been submitted to allow for further review of alternative courses of action, including assessment of alternatives to continued operation, including retirement, which would have obviated the need to meet the requirements of RSA 125-O. Such a variance, if granted, would provide an alternative to incurring more than $430 million in costs to comply with a "contingent" installation requirement potentially recoverable from ratepayers. *See* RSA 125-O:13, I (stating that installation requirement is contingent upon obtaining all necessary permits and approvals)

In light of the dramatic increase in the costs of the scrubber project from the not-to-exceed $250 million cost that PSNH provided to the Department and the legislature in 2006 and that was used as the basis for a determination that the project was going to be done "with reasonable costs to consumers," *see* RSA 125-O:11, V, PSNH could have and arguably should have carefully reviewed whether there was a less expensive technology or other means available to provide most, if not all, of the same mercury reductions. The

[3] There is no conflict between RSA 125-O:13, III regarding early reductions and the availability of an extended compliance schedule for installation of the scrubber technology under RSA 125-O:17, I because the early reductions provision relates to testing and implementing "mercury reduction control technologies or methods" that did not necessarily involve the scrubber. The existence of RSA 125-O:13, III also indicates that the legislature was aware of the possibility that other technologies might be available to achieve the mercury reduction requirements.

"technological and economic infeasibility" provision in the variance statute appears to have contemplated and, from a prudence perspective, appears to have required this kind of analysis. As soon as it became evident that the scrubber cost had increased dramatically, that migration numbers had increased, that the economy was in a downturn, and that decreasing gas prices were undermining coal in the power market, prudence and good business planning would have pointed toward the clearly available variance options.

PSNH also could have requested or supported a legislative or Commission review of the updated cost information submitted under RSA 125-O:13, IX before contracting or constructing the scrubber technology. Instead, PSNH vigorously opposed efforts in the context of the DE 08-103 docket and in connection with the 2009 legislation that would have required further study before constructing the scrubber, even though other imminent environmental regulations would only increase the costs even further. All discovery related to efforts that PSNH made or did not make in this regard could lead to the discovery of information that should be admissible in this proceeding.

b. *Paragraph II allows for change to the "scrubber mandate"*

RSA 125-O:17, II allows the Department to approve "an alternative reduction requirement." *See* RSA 125-O:17, II. Because the mercury reduction requirement consisted of an integrated strategy of non-severable components, *see* RSA 125-O:11, VIII, any variance granted under this subsection necessarily could have modified the underlying mercury reduction requirements set forth in RSA 125-O:13. Any other interpretation would amount to a repeal of the variance provision. *See Appeal of Campaign for Ratepayer's Rights,* 142 N.H. 629, 631 (1998) ("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").

There is no express statutory limitation within paragraph II that would prevent the Department from granting a variance with the practical effect of modifying the "scrubber mandate." While the term "alternative reduction requirement" is singular rather than plural, suggesting that perhaps the legislature meant to allow the department to modify only the percentage reduction requirement set forth in RSA 125-O:13, II ("total mercury emissions from the affected sources shall be at least 80 percent less on an annual basis"), there is nothing in the statute preventing the department from reducing the 80% reduction requirement to a level that would avert the need for installation of the scrubber.

To the contrary, the language of paragraph II indicates that the department was authorized to modify the 80% reduction requirement in such a way as to avoid the purchase and installation of the scrubber, *e.g.,* by substantially reducing the reduction requirement to allow for substitution of other technologies or fuels in order to meet the modified reduction level. First, the owner had to substantiate "an energy supply crisis, a major fuel disruption, an unanticipated or unavoidable disruption in ... operations, or *technological or economic infeasibility.*" RSA 125-O:17, II. (Emphasis added.) That only such major events or circumstances would warrant a variance from the "scrubber mandate" demonstrates that the variance was available to modify not only the reduction levels, but also the technology itself. The legislature's finding that "the installation of scrubber technology will not only reduce mercury emission significantly but will do so without jeopardizing electric reliability and with reasonable costs to consumers," RSA 125-O:11, V, made roughly seven years before the installation deadline, must be read in

conjunction with the variance provision to lead to the conclusion that the legislature sought to reduce mercury emissions through the scrubber technology as long as the material events and circumstances set forth in RSA 125-O:17, II did not occur.

Second, by allowing for a variance from the reduction requirement in case of "technological or economic infeasibility," the legislature expressly provided flexibility where PSNH could substantiate that the scrubber could not be installed for technical or cost reasons. RSA 125-O:17, II. The term "infeasible" is not defined in the statute, but the Oxford Dictionary defines it as "impracticable" or "not possible to do easily or conveniently." In the context of zoning law, variances may be granted "where, owing to special conditions, a literal enforcement of the [law] will result in unnecessary hardship." *See Ouimette v. City of Somersworth*, 119 N.H. 292, 294 (1979). Thus, based upon the plain language of the statute, PSNH did not need to demonstrate that installation of the scrubber was impossible, but only that it would have imposed undue burden on ratepayers (in this case default service customers) or was otherwise impracticable from a cost standpoint. Based upon the economic infeasibility factor alone, the variance was available to PSNH as a means to provide relief to ratepayers in the face of a substantial increase in scrubber technology installation costs. *See Hair Excitement*, supra, at 369 ("We look to the plain and ordinary meaning of the word used in the statute").

c. *Economic infeasibility required PSNH to seek a variance*

Whether PSNH failed to give careful and deliberate consideration to requesting a variance based upon economic infeasibility, when that factor was expressly set forth in RSA 125-O:17, II, is, in TransCanada's view, directly relevant to PSNH's ability to recover costs under RSA 125-O:18. In cases where the economic feasibility of an

environmental directive arises, the availability of a variance or remedial legislation is a significant consideration in determining whether the directive could have been remedied by the regulated entity. *See, e.g., Plymouth Fire Dist. v. Water Pollution Comm'n,* 103 N.H. 169, 172-73 (1961) ("We cannot overlook the fact that various remedies have been available ... since the original order was issued [including a variance and remedial legislation] that, if granted, would have remedied the situation").

PSNH cannot argue that it was *unconditionally* required or *mandated* to install the scrubber technology and thereby avoid discovery regarding whether it considered seeking a variance and if not, its basis for failing to do so. *See* section B.2. below. PSNH also cannot claim that the scrubber installation was not economically infeasible simply due to the fact that it could potentially recover costs from default service customers. Under this theory, scrubber installation would never be "economically infeasible," leading to the absurd result under which PSNH would be required to install the scrubber at *any cost*, despite the existence of the "economic infeasibility" provision. With its long history of sensitivity to electricity costs, the legislature cannot be presumed to have intended to impose an undue burden or "unreasonable" costs on ratepayers. *See State v. Gallager*, 157 N.H. 421, 423 (2008) ("we do not presume that the legislature would pass an act leading to an absurd result").

Had the legislature intended to limit the department's variance authority to apply only to certain "applicable requirements," as suggested by PSNH, or to prevent the department from granting a variance from the scrubber installation requirement contained in RSA 125-O:13, I, despite its finding that all mercury reduction requirements consisted of "non-severable components," RSA 125-O:11, VIII, it could have said so. Because it

did not, the Commission should interpret RSA 125-O:17 as allowing for variance of any compliance requirement, including the "scrubber mandate". *See Hair Excitement, Inc. v. L'Oreal U.S.A., Inc.*, 158 N.H. 363, 369 (2009) ("We ... will not consider what the legislature might have said, or add words not included in the statute"); *Green Crow Corp. v. Town of New Ipswich*, 157 N.H. 344, 346.

Moreover, that PSNH was obligated to seek a variance is supported by the requirement in RSA 125-O:17, II that the Department consult with this Commission before granting or denying a variance to an "alternative reduction requirement." The consultation requirement makes sense in view of the ratepayer interests at stake in the cost recovery provisions and the Commission's role in protecting those interests. Had PSNH sought a variance based upon the escalating costs of scrubber technology or had it sought Commission approval to retire or otherwise modify operations of the affected sources, *see* RSA 369-B:3-a , it is likely that some type of action under RSA 125-O:17, II would have averted the utility's huge investment in an aging plant.

There is no indication in RSA 125-O:17 that the variance authority could not be used to delay indefinitely the installation of scrubber technology under paragraph I or to substitute a reduction requirement pursuant to paragraph II that might entirely negate the need for scrubber technology. Presumably the legislature was cognizant of the need to assess changing circumstances, especially in light of its recognition in 2006 that scrubber technology was the "*best known* commercially available technology" (emphasis added). RSA 125-O:11, II. Use of the phrase "best known" indicates the legislature's express recognition that there could be other technologies that were *not* known at the time, which might be better from a technological and economic perspective. That the legislature

expressly authorized the granting of a variance from the "scrubber mandate" is reinforced by the variance option made available in RSA 125-O:17.

In addition, PSNH could have decided to retire or divest Merrimack Station (RSA 369-B:3-a), with the practical outcome being no future mercury emissions from Merrimack Station and, as a result, more than an 80% reduction in mercury emissions from baseline levels. Because the legislature expressly recognized divestiture as a possibility when it adopted cost recovery provisions, it is reasonable to assume that the legislature meant to allow for Commission approval of termination of operations. *See* RSA 125-O:18. That the legislature did not intend to require PSNH to continue operating Merrimack Station indefinitely and to install the scrubber at any cost is only logical and is borne out by the language of the statute.

B. The Relationship Between RSA 125-O and the Prudence Determination

1. *PSNH cost recovery is subject to prudency standard*

As this Commission has noted, citing *Appeal of Seacoast Anti-Pollution League*, 125 N.H. 708, 723 (1985), "when a utility has incurred costs resulting from demonstrated inefficiency or waste, or action inimical to the public interest, those costs may not be passed on to ratepayers." *Re Public Service Company of New Hampshire*, 87 NH PUC 876, 886 (2002). This prudence standard was developed "as one criterion to assist the Commission in determining whether costs should be included or excluded for ratemaking purposes." *Id.* In the 2002 Order, the Commission determined that the prudence standard made it "the Commission's responsibility and obligation under the law ...to determine whether PSNH conducted itself with the level of care expected of highly trained specialists... ." *Id.* The Commission went on to say that when evaluating actions

and decisions, it is not the Commission's role "to apply the perspective of hindsight, but rather to consider the actions in light of the conditions and circumstances as they existed at the time they were taken." *Id.* The Commission said that the prudence consideration is "similar to the duty of care in a case of negligence at common law, namely, what would a reasonable person do at the time the decision was made." *Id.* The second "critical consideration" that the Commission cited was that the entity that engages in the business "'must exercise the requisite degree of learning, skill and ability of that calling with reasonable and ordinary care.'" *Id.* (*citing* 57 A Am.Jur2d, Negligence Sec. 190).

The prudence standard articulated by the Commission comes into play as a result of the language of one section of the scrubber law, RSA 125-O:18, entitled "Cost Recovery", which reads as follows:

> If the owner is a regulated utility, the owner 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. During ownership and operation by the regulated utility, such costs shall be recovered via the utility's default service charge. In the event of divestiture of affected sources by the regulated utility, such divestiture and recovery of costs shall be governed by the provisions of RSA 369:B:3-a.

This provision allows the owner of Merrimack Station to recover "the prudent costs" of the scrubber project "in a manner approved" by the Commission, but if the owner is a regulated utility, as PSNH is, then the costs can only be recovered through the default service charge, and thus not from ratepayers who do not take default service. RSA 125-O:18. Since, as noted above, in light of principles of statutory construction and the non-severability clause in RSA 125-O:10, the statute must be read as a whole, it is clear that the variance section and the cost recovery section, which invokes the prudency standard, must be read together.

The 2006 passage of HB 1648, the legislation that enacted the relevant provisions of RSA 125-O, placed PSNH on notice that it could only recover the prudent costs of the project from default service customers, in light of the availability of the variance if the project became technologically or economically infeasible. Thus, when PSNH became aware in 2008 that the costs had escalated from $250 million in 2013 dollars (the "not to exceed costs" that PSNH had represented to DES and the Legislature) to $457 million in 2013 dollars, that migration of customers away from default service was an issue[4], that the economy, including the price of natural gas, was suffering a significant decline, and that there were other "reasonably foreseeable regulatory requirements" that could affect future capital and operational costs, PSNH officials had a duty as the "highly trained specialists" to at least consider and possibly act upon whether it was going to be economically feasible for the project to proceed. The prudent thing to do in 2008 was to perform a complete feasibility analysis that took into account all of these issues, including consideration of whether to seek a variance or to take other remedial measures, and to perform the analysis in a responsible and unbiased manner. PSNH owed that duty first and foremost to its ratepayers under RSA 125-O:18, if not also to its stockholders.

2. *PSNH assessment of other "economic" alternatives is relevant*

Even if the Commission determines that the variance provision could not have provided relief from the "scrubber mandate," the plain language of RSA 125-O:18 makes clear that the legislature contemplated other remedial measures that were available to PSNH and that, under a prudency review, would have to be considered in reviewing cost recovery. First, it is the "owner" and not necessarily PSNH that is required to incur

[4] See testimony of PSNH witness in DE 10-261, morning session Day 1, page 36, that migration has "been an issue in a variety of different ways since, I would say, approximately 2008."

the costs of scrubber installation. *See* RSA 125-O:18 ("*If the owner is a regulated utility*, the owner shall be allowed to recover all prudent costs of complying ..."). (Emphasis added.) Second, all compliance provisions in RSA 125-O:13 are expressly applicable to the "owner," which is defined as "the owner or owners of the affected sources," not PSNH as a regulated utility. *See* RSA 125-O:12, IV. Third, the legislature stated that "in the event of divestiture of affected sources by the regulated utility," cost recovery would be governed by RSA 369-B:3-a. *See* RSA 125-O:18.

Thus, even if the Commission determines that the variance provision would not allow for avoidance of the "scrubber mandate," the legislature expressly recognized that PSNH had the ability to address the "economic interests" of its customers while at the same time achieving the legislature's "public interest" goals of reducing mercury emissions, *i.e.*, by pursuing divestiture or other options available under RSA 369-B:3-a. *See* RSA 369-B:3-a (allowing PSNH to divest its generation assets if the Commission finds that "it is the economic interest of retail customers of PSNH to do so" and providing for cost recovery of such divestiture). Because RSA 125-O:18 did not provide for cost recovery by other types of owners, who would presumably bear the risk of such an investment, PSNH customers might have avoided increased rates attributable to the scrubber installation had PSNH pursued divestiture.

Therefore, the RSA 125-O:18 limitation on recovery of only "prudent costs" incurred by a regulated utility owner, when read in the context of related statutes, supports TransCanada's position that the Commission should allow for broad discovery, in the context of cost recovery, on whether PSNH assessed the variance, divestiture, retirement or other options before installing the scrubber technology. *See* RSA 369-B:3-a;

Town of Amherst v. Gilroy, 157 N.H. 275, 279 (2008) ("whenever possible, every word of a statute shall be given effect"); *Green Crow Corp. v. Town of New Ipswich*, 157 N.H. 344, 346 (2008) (reviewing statutes together with all associated sections).

C. TransCanada Discovery is Relevant to Statutory Criteria

TransCanada's discovery requests are intended to elicit information about what PSNH did or did not do during the relevant periods of time, especially in light of various changes to the assumptions that were in place in 2006. At this point in time, TransCanada is not seeking a Commission determination on whether some or all of the costs of the project should be deemed to be imprudent; rather, TransCanada seeks a determination that PSNH must respond to its requests for information, all of which are relevant to whether PSNH considered or otherwise assessed filing a request for a variance under RSA 125-O:17 or seeking other means to avoid imposing the costs of scrubber installation upon its default service customers. TransCanada asks the Commission to rule that PSNH cannot avoid responding to TransCanada requests by merely stating that the premise is "faulty".

The premise of TransCanada's request for information is that PSNH had the ability under the law to seek a variance or other forms of relief, for all of the above reasons. At this point in the proceeding, TransCanada's requests are appropriate, as the responses are highly relevant to this proceeding under the RSA 125-O:18 cost recovery provision, which incorporates a prudency standard. The Commission should be guided by its responsibility to ultimately determine recoverable costs and the relevancy of the requested information to the Commission's determination under RSA 125-O:18.

III. CONCLUSION

For the reasons stated above, the Commission should direct PSNH to respond to the data requests at issue.

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 28th day of August 2012, a copy of the foregoing "TransCanada Legal Brief" was sent by electronic mail to all parties on the DE 11-250 Service List.

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