

**PUBLIC UTILITIES COMMISSION**

**Docket DE 11-250**

**PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE**

**Investigation of Merrimack Station Scrubber Project and Cost Recovery**

**Staff's Memorandum**

The Staff of the New Hampshire Public Utilities Commission (Staff), through counsel, respectfully submits the following post-hearing memorandum.

**Characterization of the July 30, 2008, meeting with Staff and the OCA**

The \$5.29 spread between the price of coal and the price of natural gas was critical to the Scrubber being economical. PSNH disclosed this fact and its importance to Northeast Utilities Risk and Capital Committee (RaCC) and Board of Trustees. *See* Exh. 27-5 at 11 (June 25, 2008, presentation to RaCC, which states "a spread of approximately 5.29/mmbtu (escalating) is required to create customer benefits"), and Exh. 42 at 10 (July 15, 2008, presentation to the NU Board of Trustees, with the same quote).

PSNH prepared a different presentation document for its July 30, 2008, meeting with Staff and the OCA. Exh. 39. Although this document contains the price of coal and PSNH's prediction for the price of natural gas, the document does not specify the \$5.29 spread and, more importantly, does not state how critical a spread of \$5.29, as opposed to some other spread, was to the economics of the Scrubber. Staff's witness Thomas Frantz was at the July 30, 2008 meeting and stated that he was not told of the \$5.29 spread and

its importance to the economics of the project. Hearing Transcript (Tr.) of 10/14/2014 (p.m.) at 107 and 110 (“we did not receive the \$5.29”).<sup>1</sup>

Whether and when PSNH notified Staff, the Commission, and others of the importance of this \$5.29 spread is an issue raised by several parties in the context of arguments that PSNH violated its duty of candor. Counsel for PSNH, through cross-examination of other witnesses including Mr. Hachey, suggested that Staff and the OCA were smart enough to ask the right questions and to figure out the \$5.29 spread. *See* 10/17/2014 Tr. (p.m.) at 60-67.

Staff does not dispute its awareness of the obvious fact that the economics of the Scrubber project relied heavily on the relative prices of coal and gas. Staff does, however, dispute the characterization of the July 30, 2008 meeting as an opportunity for Staff to figure out on its own that the \$5.29 spread was “required to create customer benefits.” Staff thus reminds the Commission of the basic facts surrounding the July 30, 2008 meeting.

PSNH asked for the meeting. 10/22/2014 Tr. (a.m.) at 48. PSNH called for the meeting primarily to advise Staff of the increase in estimated Scrubber costs to \$457 million. *Id.* at 49, 55. There was no relevant docket or investigation pending before the Commission at the time. *Id.* at 54. The July 2008 meeting was merely informational: “the primary purpose was to identify that the Project cost had risen dramatically to \$457 million.” *Id.* at 55.

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<sup>1</sup> *But see* Tr. 10/15/2014 (a.m.) at 136: “Q. Do you think PSNH misrepresented facts to you at any time in this process? A. No. Q. Do you think PSNH was less than candid with you at any point in this process? A. No.”

### **Issues Related to Possible Breach of PSNH's Duty of Candor**

Mr. Reed testified that PSNH owes a duty of candor to the Commission and to other policy makers. "I think being candid with your regulator, especially when you're presenting information in a regulatory proceeding, is important." 10/23/2014 Tr. (a.m.) at 134. When asked whether that duty applies "for presentations made to policymakers, such as legislators," Mr. Reed answered, "I think being candid and forthcoming is important." *Id.* at 134-135. This duty extends to correcting mis-information in appropriate circumstances: "Do I think it's good regulatory practice to keep the record as correct as possible? Yes. If I saw that type of statement made, and I thought it was material to the matter being considered, I would seek to correct it." *Id.* at 136.

Mr. Reed's testimony is consistent with case law. *See Bay State Gas*, 2012 WL 5448763 at 62, Mass. DPU Order No. 12-25 at 106 (Nov. 1, 2012) ("full disclosure of information by regulated companies is essential for the Department to properly fulfill its function of regulating in the public interest."); *Wisconsin Power and Light*, 2010 WL 5069409 at 6 (Dec. 8, 2010) ("WP&L's lack of candor also implicates its respect for and willingness to comply with the regulatory compact [which] depends on the full disclosure of information to provide fundamental fairness for both the utility and ratepayers"); and *Spring Valley Water Co.*, 20 NYPSC 1831, 1990 WL 597017 at 11-12 (Oct. 3, 1990) (New York Public Services Commission ordered nearly \$2 million in ratepayer relief arising from the company's "failure to provide relevant and material information about the subject land's value" at relevant times).

There is evidence in this case that could support findings that PSNH violated its duty of candor. For example, the Commission could find the following: (1) that PSNH

failed to correct the “not to exceed \$250 million” statements that state officials attributed to PSNH in the 2006 timeframe; (2) that PSNH did not make the \$5.29 disclosure to Staff and the OCA at the July 30, 2008, meeting; (3) that PSNH did not disclose the \$5.29 disclosure in its September 2008 report to the Commission; (4) that PSNH did not update its economic calculations in the spring of 2009 when it represented to legislators that the rate impact of the Scrubber would be \$0.003 per kilowatt hour, a figure that the Commission could find had become inaccurate, and that PSNH knew it was inaccurate, in light of changing gas prices and lower sales forecasts; and (5) that PSNH made conflicting statements about its intentions regarding the secondary waste water treatment facility. If the Commission makes these or similar findings of fact, the Commission could conclude that PSNH breached its duty of candor.

If the Commission concludes that PSNH breached its duty of candor, the Commission will then face the question of an appropriate remedy. It is difficult to connect any of the above instances of lack of candor to a specific dollar amount. It is impossible, for example, to say precisely what the Legislature would have done had PSNH not breached its duty of candor.

This inability to establish a direct cause-and-effect does not preclude the Commission from ordering relief if it finds PSNH violated its duty of candor. To the contrary, the Commission’s options are broad. First, as Mr. Reed stated, the Commission could “reprimand the company for not having been fully forthcoming with its cost estimates and [say] don't let it happen again.” 10/23/2014 Tr. (a.m.) at 138. Mr. Reed was describing the instance where he found a lack of candor in his role as the “independent prudence auditor” and recommended that the Florida commission grant full



recovery but reprimand the company for not being “candid and forthcoming.” *Id.* at 137, 138.

Second, the Massachusetts DPU decreased a utility’s return on equity for lack of candor in failing to disclose \$19 million in income tax credits. *Bay State Gas*, 2012 WL 5448763 at 203. The DPU found “that it is appropriate in setting [the company’s] ROE in this case to consider the Company’s failures to disclose.” *Id.* at 63.

Third, in *Wisconsin Power and Light*, the utility was granted permission to construct a \$497 million wind powered electric generation facility and ordered the company to “notify the Commission immediately of changes in the project’s scope.” *Wisconsin Power and Light*, 2010 WL 5069409 at 5. The company failed to notify the commission that the region’s ISO issued a study for the facility “that identified substantial transmission constraints in the area [which] would reduce [the facility’s] to only 39 MW, a drop of more than 80 percent.” *Id.* at 5. The company sought \$6.9 million in its next rate case to buy power to replace that lost from the wind facility. “Because of [the company’s] delay in identifying the transmission constraints, the Commission was denied the opportunity to work with [the company] to potentially mitigate the financial impacts of the transmission constraints.” *Id.* at 6. Although deprived the ability to calculate the precise damage caused by the failure to notify, the Wisconsin commission nonetheless imposed a monetary disallowance:

Given these factors, it is not reasonable to approve all of the \$6.9 million in retail jurisdiction fuel costs that WP&L is seeking to replace Bent Tree’s lost production. To keep WP&L’s rates within the range of reasonableness, the Commission finds it appropriate to disallow \$3,235,000 from the utility’s revenue requirements.

*Id.* The opinion does provide a specific basis for the disallowance amount.

The New York Public Service Commission did have precise numbers upon which to base a remedy for the lack of candor in *Spring Valley Water Co.*, 1990 WL 597017. In that case a water company obtained commission approval to sell a parcel of land to an affiliate for about \$300,000. Only 32 days after the commission approved the sale (and about six months after filing the petition), the company's affiliate sold the land for \$1.8 million. The company failed to disclose that, prior to filing the petition, the company had obtained preliminary subdivision approval for the parcel, thus depriving the commission of important knowledge regarding the value of the land. At a subsequent rate case the commission reduced the company's rate base to reflect the gain from the sale, and lowered future rates to recoup the rates customers had overpaid on that higher rate based during the intervening years.

As applied to this docket, these cases provide the Commission with authority to fashion an appropriate remedy should it find PSNH breached its duty of candor.

#### **Characterization of Need for Secondary Wastewater Treatment Plant**

Jacobs Consultancy, Inc. (Jacobs), Staff's consultant, performed a prudence review of PSNH's management of the Scrubber installation and the change orders made as Scrubber installation progressed. Jacobs testified that, from a dollar perspective, the secondary wastewater treatment (SWWT) system was the "single largest change in scope" at approximately \$36.4 million. 10/15/14 Tr. (p.m.) at 69-79.

When asked by Jacobs why the Company had decided to install the SWWT, PSNH said that it initially had proposed to discharge treated liquids from the primary wastewater treatment (PWWT) into Merrimack River, but the Environmental Protection Agency (EPA) would not grant the necessary modification to the then-current Merrimack

Station National Pollutant Discharge Elimination System (NPDES) permit to allow discharge from the PWWT.<sup>2</sup> PSNH expected that the renewal of its NPDES permit would take years given likely litigation, and worked with its engineers to develop a solution to allow the Scrubber to be operational by July 2013 as required by the Scrubber law. PSNH said that the Company made the decision to install the SWWT in November 2010 and that the costs of the SWWT had nothing to do with the estimated project cost rising from \$250 million to \$457 million in 2008. 10/14/2014 Tr. (p.m.) at 16-27.

According to PSNH, the SWWT system was designed to reduce liquid effluent from the Scrubber to zero with remaining solids to be trucked to appropriately licensed publicly owned water treatment systems (POWTs). With this solution, no revision to the NPDES permit would be required. Based on PSNH's representations, Jacobs found PSNH's decision to install the SWWT to be prudent. Exh. 16 at 37. No party propounded discovery on Jacobs questioning its finding of prudence with any aspect of the Scrubber installation, including the SWWT. Consequently, although the Scrubber law requires PSNH to have "all necessary permits" (RSA 125-O:13), PSNH's decision to add the SWWT to the plant obviated the need for a federal NPDES permit modification.

The EPA issued a draft NPDES permit for Merrimack Station in September 2011 and issued a revised draft NPDES permit in April 2014. In the revised draft permit, EPA requires PSNH to use the SWWT to treat liquid effluent from the Scrubber. Exh. 77. At hearing, PSNH testified that it was seeking permission from the EPA to discharge from the PWWT directly into the Merrimack River and that PSNH intended to use the SWWT to treat water from the PWWT pending a decision from the EPA. 10/14/14 Tr. (a.m.) at

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<sup>2</sup> See Exh. 62, PSNH's response to a question from Jacobs regarding PSNH's decision to install the \$36.4 million SWWT in addition to the \$2.6 million PWWT.

32-33. When asked about PSNH's decision to discharge treated liquids from the PWWT into Merrimack River, Jacobs said that if PSNH were allowed to discharge directly from the PWWT into the Merrimack River, there would be no use for the SWWT as it was specifically designed to treat liquids processed by the PWWT. 10/15/14 Tr. (p.m.) at 11. Jacobs also opined that without the SWWT system, PSNH would be in violation of its NPDES permit. 10/15/14 Tr. (p.m.) at 18.

In his redirect testimony on the last day of the hearing, Mr. Smagula provided new information to support the installation of the SWWT. He said that the SWWT was put "into place because alternate means of disposing of liquid effluent from the [PWWT] would not be sustained in the long run" 10/23/14 Tr. (p.m.) at 57 lines 7-10, and because trucking water from the PWWT was not sustainable "due to emerging federal regulations" *Id.* Mr. Smagula did not reference such regulations prior to this testimony.

The record shows that PSNH invested \$36.4 million in the SWWT to treat liquids discharged from the PWWT which it seeks to recover from ratepayers and in fact represented to the EPA that the SWWT would be used on a permanent basis to complement the PWWT. *Id.* at 64. PSNH now states that it only intends to use the SWWT until such time as a final NPDES permit is issued for Merrimack Station. PSNH has also been trucking Scrubber effluent to POWTS at a cost it also seeks to recover from ratepayers.

There is nothing in the record to indicate that the decision to install the SWWT was imprudent at the time it was made. Further, the record shows that Jacobs appropriately relied on the information provided to them at the time Jacobs conducted its prudence review of the Scrubber installation, including the decision to install the SWWT.



However, the record also demonstrates that PSNH has now changed its position on whether it will use the SWWT on a permanent basis. Staff recommends that the Commission closely monitor the operation of the SWWT to determine whether it is a permanent used and useful addition to PSNH's plant and eligible for a return on investment as required by RSA 378:28.

Respectfully submitted



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Suzanne Amidon, Esq.  
Michael Sheehan, Esq.  
Staff Attorneys  
New Hampshire Public Utilities Commission  
21 South Fruit Street, Suite 10  
Concord, New Hampshire 03301  
603-271-6616

### **CERTIFICATE OF SERVICE**

I hereby certify that I have this day electronically served a copy of this objection upon each party on the official service list compiled by the Secretary in this proceeding.

Dated at Concord, New Hampshire, this 14<sup>th</sup> day of November, 2014.



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Suzanne Amidon