

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

DE 11-250

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Investigation of Merrimack Station Scrubber Project and Cost Recovery

Joint Motion for Deposition of Gary Long

NOW COMES the Office of the Consumer Advocate (“OCA”), TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast Inc. (together, “TransCanada”), the Conservation Law Foundation (“CLF”) and the Sierra Club (“SC”) (collectively, the “Moving Parties”), and respectfully moves this Honorable Commission, pursuant to Admin. Rule Puc 203.09(j), to require Mr. Gary Long, former president of Public Service Company of New Hampshire (“PSNH”), to appear for a deposition at the offices of Orr & Reno, P.A. on August 21, 2013 at 9 a.m. or at another time and location that is agreed upon by PSNH and the Moving Parties. In support of this Motion, the Moving Parties state as follows:

1. As intervenors in this docket the Moving Parties have the right to conduct discovery pursuant to N.H. Admin. R. Puc 203.09. *See* N.H. Admin. R. Puc 203.09(a). *See Scotsas v. Citizens Insurance Co.*, 109 N.H. 386, 388 (1969) (a party to a New Hampshire legal proceeding is entitled to “be fully informed and have access to all evidence favorable to his side of the issue...whether the evidence is in the possession of his opponent or someone else.”)

2. The standard for discovery in Commission proceedings is broad and extends to information that is relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence. *Re Investigation into Whether Certain Calls are Local*, 86 NH PUC 167, 168 (2001). The Commission is required by N.H. Admin. R. Puc 203.09(j) to authorize depositions when necessary to enable the parties to acquire admissible evidence.

3. Mr. Long possesses information that is relevant to, or reasonably calculated to lead to the discovery of admissible evidence concerning, the central issues in this docket, *i.e.*, the prudence of proceeding with the project, the prudence of resisting efforts to study the project once the costs were almost double those originally estimated, whether PSNH prudently managed the construction of the Merrimack Station Scrubber, and the prudence of PSNH's management decisions not to divest or retire Merrimack Station. *See* Order No. 25, 546 (July 15, 2013) at 7-8. Mr. Long was president of PSNH during the entire time period when the scrubber law was crafted, considered, passed and then implemented; he certainly possesses knowledge of and direct responsibility for decisions that the Commission is now investigating.

4. The Moving Parties have been actively engaging in discovery in this docket. During the course of discovery, it has become apparent that Mr. Long was significantly involved in the drafting and passing of the so-called "scrubber law", RSA 125-O, legislation that PSNH was involved in "crafting" and that PSNH says was the product of a "vigorous" and "lengthy collaborative effort that PSNH spearheaded...". *See* Attachment 1, Letter from Gary Long to Debra A. Howland, DE 08-103, (Sept. 2, 2008) at 2, Attachment 2, PSNH Response to Data Request Q-TC-007-SP01 (06/04/12),

and Attachment 3, PSNH Response to Data Request Q-TC-009, pp. 1-3 of 36 (06/04/12). Discovery in this docket has also revealed Mr. Long's direct involvement in the effort to obtain internal approval at Northeast Utilities to proceed with the scrubber project after the expected costs had almost doubled. *See* Attachment 4, PSNH Response to Data Request Q-STAFF-002, pp. 1-4 of 50, and p.29 of 50 (08/30/12). As his September 2, 2008 letter cited above indicates, he was also heavily involved in the effort to make sure that neither the Commission (through the docket that it opened to inquire into the status of the scrubber and the increased costs, DE 08-103), nor the Legislature would look any further into whether it made sense to proceed with this project. *See* Attachment 3 and the legislative history of SB 152 and HB 496 from the 2009 session. The attachments to this motion make clear that Mr. Long was significantly involved in many presentations regarding this project made to the Commission, the Legislature, the press, and the internal Northeast Utilities Risk and Capital Committee and Board of Trustees. Mr. Long's involvement in the scrubber project was extensive and unique, and therefore the knowledge, information and opinions he possesses regarding the scrubber project can not be provided by any other witness. In addition, PSNH default service customers, who are and have been for some time paying significantly higher rates because of the scrubber project, are entitled to hear explanations from the person who was the President of the Company during this critical time.

5. The Moving Parties have made a good faith effort to resolve this discovery issue informally with PSNH, but to no avail. At the technical session in this docket held July 24, 2013, TransCanada's undersigned counsel asked PSNH's counsel if he would agree to make Mr. Long available for a deposition in this docket, and PSNH's counsel

said “no”. During this technical session PSNH was non-committal about the witnesses it would be calling to testify at the hearing. To date only two witnesses, Robert Baumann (who has since retired) and William Smagula, have put forward testimony. Based on discovery provided to date, neither of these witnesses were directly or indirectly involved in internal presentations and reviews of financial sensitivities and studies critical to PSNH’s decisions on proceeding with the project instead of divesting or retiring Merrimack Station. It is difficult to conceive of some rational explanation as to why Mr. Long should not be available to be questioned about the decisions that were made; as the President of PSNH for the entire time period during which PSNH took actions that are critical to this prudence review he is clearly the person with the most knowledge of and responsibility for decisions made by this New Hampshire electric utility on this project.

6. Thus, the Moving Parties are entitled to make inquiry of Mr. Long concerning the level of his knowledge of and participation in the management decisions relating to the important issues that the Commission will be exploring in this docket. The Moving Parties also submit that information provided by Mr. Long will assist the Commission in carrying out its responsibility of conducting a comprehensive and thorough prudence review. Because Mr. Long has not submitted prefiled testimony in this case, or appeared at technical sessions, the Moving Parties have not been able to avail themselves of the discovery methods typically employed in Commission proceedings (i.e. data requests propounded to witnesses who have submitted prefiled testimony and oral questions at technical sessions). In these circumstances, it is necessary to depose Mr. Long to obtain the important and relevant information he undoubtedly possesses.

7. 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). Mr. Long’s testimony is central to evaluating whether or not PSNH conducted itself with the level of care expected of highly trained specialists. He was the President of PSNH at the time that all critical actions were taken with regard to the scrubber.

8. In the interests of justice, in furtherance of the Moving Parties’ discovery rights, and because there is no statute or rule that would permit the Moving Parties to

compel Mr. Long to appear for a deposition, the Commission must exercise its discovery authority under N.H. Admin. R. 203.09(j) or its subpoena power under RSA 365:10 and issue an order requiring Mr. Long's attendance at a deposition. *See Re City of Nashua*, 90 NH PUC 291 (July 8, 2005).

9. No party will be prejudiced by the granting of the within motion and the orderly development of this proceeding will not be impaired because there is sufficient time in the procedural schedule to permit the requested deposition.

10. Staff takes no position on this Motion.

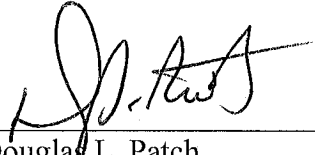
WHEREFORE, the Moving Parties respectfully request that this honorable Commission:

A. Issue an order compelling Mr. Gary Long to submit to a deposition on August 21, 2013 at 9 a.m. at the offices of Orr & Reno, P.A. or such other time and location that is agreed upon by PSNH and the Moving Parties; and

B. Grant such further relief as it deems appropriate.

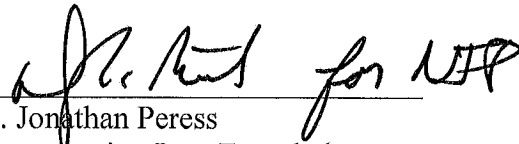
Respectfully submitted,

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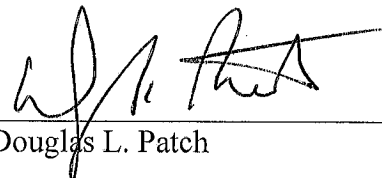


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July 29, 2013

Certificate of Service

I hereby certify that on this 29th day of July, 2013 a copy of the foregoing motion was sent by electronic mail to the Service List.



Douglas L. Patch

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