

THE STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

DE 11-250

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Investigation of Merrimack Station Scrubber Costs and Cost Recovery

MOTION TO STRIKE
SECTIONS OF REBUTTAL TESTIMONY of
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE WITNESSES
DAVID HARRISON and NOAH KAUFMAN

NOW COMES the Office of Consumer Advocate (OCA), and pursuant to RSA 541-A:33 (V) and Puc 203.07 respectfully moves this Honorable Commission to strike sections of the Rebuttal testimony of Public Service Company of New Hampshire (PSNH) witnesses David Harrison and Noah Kaufman filed July 11, 2014. In support, the OCA states:

1. On July 11, 2014 PSNH filed 709 pages of Rebuttal testimony from the following witnesses: William H. Smagula; John J. Reed; David Harrison; Noah Kaufman; Terrance J. Large; James J. Vancho; Lisa K. Shapiro and Eric H. Chung. See DE 11-150, In Re PSNH *Investigation of Scrubber Costs and Cost Recovery*, (July 11, 2014.) (PSNH Rebuttal).
2. Dr. Harrison and Dr. Kaufman provide joint testimony about after-the-fact studies of selected data from 2008 and 2009 materials. The studies are a retrospective “economic analysis of the going-forward costs to PSNH

customers for Merrimack Station assuming the Scrubber Project is installed...[compared to] two alternatives: (1) the development of a natural gas unit...and (2) market electricity purchases..." *PSNH Rebuttal* p 289 (2014 Studies). These are new studies, never before seen by the parties and which played no role in the PSNH decision making process. Therefore they are irrelevant to this prudence investigation. PSNH could have hired experts in 2008/2009 to check or validate their conclusions about continuing an expensive construction project during an economic downturn and changing market conditions, but they did not.

3. The Commission has ruled extensively on what is and is not relevant to this investigation, stating:

PSNH's prudent costs of complying with RSA 125-O must be judged in accordance with the management options available to it at the times it made its decisions to proceed with and to continue installation.

In Re Public Service Co. of N.H., Order No 25,546 (July 15, 2013).

A study using hindsight to imagine a different course of action is not addressing "management options available to it at the times it made its decisions." The option available to management in 2008/2009 was to undertake a study of market conditions, which PSNH concedes was not done. *PSNH Rebuttal* at 412 lines 16-30. PSNH Rebuttal testimony lists the actual economic analyses performed by PSNH between April 2007 and September 2, 2008. PSNH Rebuttal at 411 – 412, showing that no additional similar economic analyses were prepared by PSNH after the 2009 legislative session concluded hearings on SB 152 and HB 496. *PSNH Rebuttal* at 412 lines 16-30. *Id.*

4. The 2014 Studies go beyond responding to the direct testimonies of Dr. Stanton and Mr. Hachey by introducing new rationalizations for PSNH's historic actions.

The 2014 Studies and the supporting testimony create the impression that PSNH management considered alternatives to the scrubber project during the timeframe of mid-2008 and early 2009. This is not an accurate representation. Instead, the testimony is a hindsight justification that if PSNH had considered alternatives to the scrubber project it might have found results similar to those created for this Rebuttal testimony. As hindsight is not an appropriate means of judging management action, these 2014 Studies are irrelevant and should be excluded from Rebuttal testimony.

5. There are a total of 24 scenarios (12 in each study) and about 25 data input assumptions presented on Attachments 13 and 14. *Id* at 290. It is unreasonable to add complex, extensive new studies into the record in the guise of Rebuttal testimony at this late date. PSNH cannot claim to be unfamiliar with the Commission's practice in this regard. *See: Petition for Approval of Purchased Power Agreement with Laidlaw Berlin BioPower*, 96 NHPUC 130 (2011) ("We further note that the proceeding was considerably delayed and made more contentious by [the witness'] decision to include information in his rebuttal that was essentially direct testimony. Were he someone unfamiliar with the Commission's hearing process, the error might have been understandable...") That there is a short time available to conduct discovery does not change the fact that the 2014 Studies are direct testimony, improper as rebuttal and ultimately irrelevant as having been conducted long after the events subject to review in this proceeding.
6. These 2014 Studies played no role in PSNH management decisions regarding the scrubber in years 2008-2009 or any other time. Therefore, even as direct testimony their relevance is questionable. As rebuttal, the 2014 Studies go far

beyond a response to the prefiled direct testimony by bringing in wide ranging extraneous details and assumptions from data sources whose underlying reliability is not subject to analysis. Therefore this content and related discussion is irrelevant to this prudence investigation, is not proper rebuttal and must be stricken.

7. The testimony to be stricken is PSNH Rebuttal page 289 to page 291 lines 1-8 and page 289 line 14 through page 309 line 10. The sections of the Harrison/Kaufman Rebuttal testimony responding specifically to the direct testimonies of Dr. Stanton and Mr. Hachey are properly included.

Attachments to be stricken are identified below:

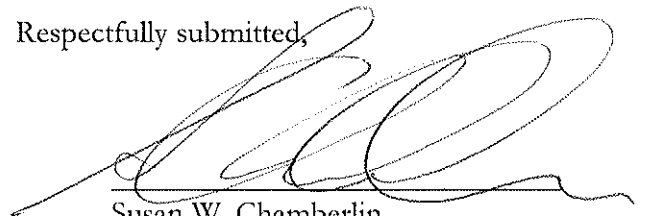
8. Attachment 3, page 376 appears to contain results of the 2014 Studies in a chart form. It must be stricken from the record as these contemporaneous study results are irrelevant to the prudence of PSNH management decisions made before 2009.
9. Attachment 6, page 379 identifies scenarios for the 2014 Studies and is irrelevant to the prudence of PSNH management decisions made before 2009.
10. Attachments 7-9, pages 380 - 383 appear to contain results of the 2014 Studies in a chart form. They must be stricken from the record as these contemporaneous study results are irrelevant to the prudence of PSNH management decisions made before 2009.
11. Attachments 12-14, pages 400 - 404 contain results of the 2014 Studies in a chart form. These must be stricken from the record as these contemporaneous study results are irrelevant to the investigation into the prudence of PSNH management decisions made in the September 2008 to March 2009 timeframe.

12. TransCanada, Sierra Club, Conservation Law Foundation and Staff take no position on the motion.

WHEREFORE, the OCA respectfully requests that this Honorable Commission:

- A. Strike the sections of Harrison/Kaufman Rebuttal testimony identified above as irrelevant, immaterial, unduly repetitious and contrary to Commission Orders; and
- B. Grant such other relief as may be just and equitable.

Respectfully submitted,

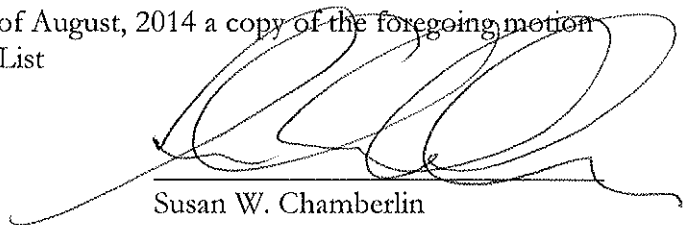


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August 6, 2014

Certificate of Service

I hereby certify that on this 6 day of August, 2014 a copy of the foregoing motion was sent by electronic mail to the Service List



Susan W. Chamberlin

THE STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

DE 11-250

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Investigation of Merrimack Station Scrubber Costs and Cost Recovery

MOTION TO STRIKE
SECTIONS OF REBUTTAL TESTIMONY OF
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE WITNESSES
TERRANCE J. LARGE and JAMES J. VANCHO

NOW COMES the Office of Consumer Advocate (OCA), and pursuant to RSA 541-A:33 (V) and Puc 203.07 respectfully moves this Honorable Commission to strike sections of the Rebuttal testimony of Public Service Company of New Hampshire (PSNH) witnesses Terrance J. Large and James J. Vancho, filed July 11, 2014. In support, the OCA states:

1. On July 11, 2014 PSNH filed 709 pages of Rebuttal testimony from the following witnesses: William H. Smagula; John J. Reed; David Harrison; Noah Kaufman; Terrance J. Large; James J. Vancho; Lisa K. Shapiro and Eric H. Chung. See DE 11-150, In Re PSNH *Investigation of Scrubber Costs and Cost Recovery*, (July 11, 2014.) (PSNH Rebuttal).
2. Pursuant to New Hampshire law and Rule Puc 203.23(d), the New Hampshire Public Utilities Commission (PUC or Commission) has the authority to exclude “irrelevant, immaterial or unduly repetitious evidence.” RSA 541-A:33(V). The Terrance J. Large and James J. Vancho Rebuttal testimony

identified below falls within these areas of exclusion and should be stricken from the record.

3. The Commission previously found legislative history of SB 152 and HB 496 irrelevant, holding:

...we considered and rejected failed legislation during the 2009 legislative session as helpful in interpreting RSA 125-O:18 and 369-B:3-a. The failure of Senate Bill 152 and House Bill 496 to pass their respective houses in 2009 tells us nothing of the meaning of RSA 125-O:11-18, enacted in 2006, or RSA 369-B:3-a, last amended in 2003. The demise of the 2009 bills may signal that the Legislature believed that the Commission already had the authority to review PSNH's decision-making in a prudence review, in which case the legislation would have been unnecessary, just as much as it may signal that, as argued by PSNH, the Legislature did not wish to provide the Commission with such authority. *See* Joint Objection to Third Motion for Rehearing at ¶5, fn.6 and Attachment B, which demonstrates that PSNH President Gary Long assured the Senate that SB 152 was unnecessary because the Commission would conduct a normal, standard, after-the-fact prudence review to determine whether PSNH was "reckless" or "made bad decisions."

Order No 25,565 (August 27, 2013).

4. The Large/Vancho Rebuttal testimony on the legislative history of SB 152 and HB 496 on p 412 lines 20-24 is irrelevant to PSNH prudence and contrary to the Commission's order above.
5. There is a real and articulable difference between: 1) legislative history being put forth as fact to influence the Commission's statutory interpretation of RSA 125-O et seq, and related statutes, which is not relevant; and 2) evidence of PSNH management action or inaction, which is factual evidence in the form of documents and testimony provided by PSNH to the legislature or other entities regarding market and other factors affecting the cost to benefit ratio of the scrubber project, which is relevant to the Commission's prudence determination. *See* RSA 125-O:13 (IX)(2006)(providing a reporting timeline);

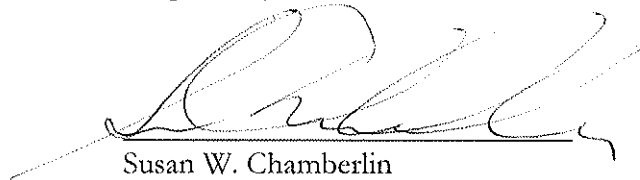
and Order No 25,640 (March 26, 2014) citing *In Re Public Service Co. of N.H.*, Order No. 25,506 at 17-18 (May 9, 2013) (“PSNH, like any other utility owner, maintained the obligation to engage in good utility management at all times.”).

6. Also irrelevant is the Rebuttal testimony p 413 lines 20-27 as it refers to the 2014 Studies by NERA (See *OCA Motion to Strike Testimony of David Harrison and Noah Kaufman*, filed simultaneously with this motion). The 2014 Studies are irrelevant as they were created after the September 2008 to March 2009 timeframe, were not relied upon by PSNH management and give no evidence about the prudence of PSNH management.
7. TransCanada, Sierra Club, Conservation Law Foundation and Staff take no position on the motion.

WHEREFORE, the OCA respectfully request that this Honorable Commission:

- A. Strike the sections of Large/Vancho Rebuttal testimony identified above as irrelevant, immaterial, unduly repetitious and contrary to Commission Orders; and
- B. Grant such other relief as may be just and equitable.

Respectfully submitted,

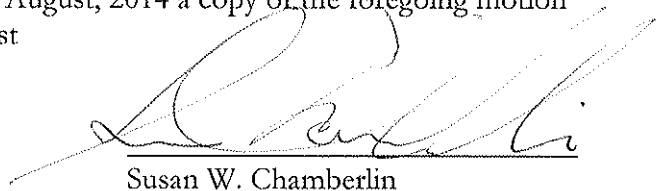


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Investigation of Merrimack Station Scrubber Costs and Cost Recovery

MOTION TO STRIKE
SECTIONS OF REBUTTAL TESTIMONY OF
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE WITNESS
JOHN J. REED

NOW COMES the Office of Consumer Advocate (OCA), and pursuant to RSA 541-A:33 (V) and Puc 203.07 respectfully moves this Honorable Commission to strike sections of the Rebuttal testimony of Public Service Company of New Hampshire (PSNH) witness John J. Reed, filed July 11, 2014. In support, the OCA states:

1. On July 11, 2014 PSNH filed 709 pages of Rebuttal testimony from the following witnesses: William H. Smagula; John J. Reed; David Harrison; Noah Kaufman; Terrance J. Large; James J. Vancho; Lisa K. Shapiro and Eric H. Chung. See DE 11-150, In Re PSNH *Investigation of Scrubber Costs and Cost Recovery*, (July 11, 2014.) (PSNH Rebuttal).
2. Pursuant to New Hampshire law and Rule Puc 203.23(d), the New Hampshire Public Utilities Commission (PUC or Commission) has the authority to exclude “irrelevant, immaterial or unduly repetitious evidence.” RSA 541-

A:33(V). The Reed Rebuttal testimony identified below falls within these areas of exclusion and should be stricken from the record.

3. The Commission previously found legislative history of SB 152 and HB 496 irrelevant, holding:

...we considered and rejected failed legislation during the 2009 legislative session as helpful in interpreting RSA 125-O:18 and 369-B:3-a. The failure of Senate Bill 152 and House Bill 496 to pass their respective houses in 2009 tells us nothing of the meaning of RSA 125-O:11-18, enacted in 2006, or RSA 369-B:3-a, last amended in 2003. The demise of the 2009 bills may signal that the Legislature believed that the Commission already had the authority to review PSNH's decision-making in a prudence review, in which case the legislation would have been unnecessary, just as much as it may signal that, as argued by PSNH, the Legislature did not wish to provide the Commission with such authority. *See* Joint Objection to Third Motion for Rehearing at ¶5, fn.6 and Attachment B, which demonstrates that PSNH President Gary Long assured the Senate that SB 152 was unnecessary because the Commission would conduct a normal, standard, after-the-fact prudence review to determine whether PSNH was “reckless” or “made bad decisions.”

Order No 25,565 (August 27, 2013).

4. Mr. Reed's Rebuttal testimony on the legislative history of SB 152 and HB 496 on p 23 line 18-22 is irrelevant to PSNH prudence and contrary to the Commission's order above. Similarly, Mr. Reed's Rebuttal testimony on the legislative history of SB 128 and HB 1673 and other bills on p 234 line 1 through p 235 line 6; page 251 lines 1- 27; page 253 line 17-23; and page 255 lines 18-25 through p 258 lines 1-7 should be stricken as irrelevant in that legislative history says nothing about PSNH prudence on the scrubber project.
5. Mr. Reed's testimony p 249 lines 19-29 – page 250 line 8 is irrelevant as it quotes correspondence from 2013. The Commission previously ruled that factual evidence after September 2011 will not be considered in this prudence investigation stating, “[a]t hearing, therefore, we will not admit evidence or allow cross examination on regulatory proposals or actions, market conditions

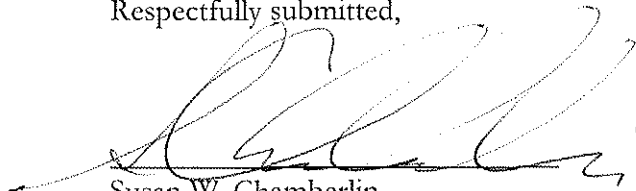
or Company decisions that extend beyond September 2011.” *In Re Public Service Co. of N.H.*, Order No 25,546 (July 15, 2013).

6. There is a real and articulable difference between: 1) legislative history being put forth as fact which is not relevant; and 2) factual evidence in the form of documents and testimony provided by PSNH to the legislature or other entities regarding market factors affecting the cost to benefit ratio of the scrubber project, which is relevant to the Commission’s prudence determination. *See* RSA 125-O:13 (IX)(2006)(providing a reporting timeline); and Order No 25,640 (March 26, 2014) citing *In Re Public Service Co. of N.H.*, Order No. 25,506 at 17-18 (May 9, 2013) (“PSNH, like any other utility owner, maintained the obligation to engage in good utility management at all times.”).
7. Throughout Mr. Reed’s testimony is legal analysis and interpretation of federal and state case law and Commission orders on the prudence standard. Legal argument is not allowable rebuttal testimony. Legal argument takes place through pleadings and legal memoranda filed by attorneys pursuant to the procedural schedule of the case. Legal argument is not factual evidence and must be stricken as irrelevant to rebuttal testimony at this stage of the proceeding. Specifically page 4 line 14 through page 11 line 15 must be stricken as irrelevant legal argument. Such arguments may be allowable in legal memoranda after the close of evidentiary testimony.
8. TransCanada, Sierra Club, Conservation Law Foundation and Staff take no position on the motion.

WHEREFORE, the OCA respectfully request that this Honorable Commission:

- A. Strike the sections of Mr. Reed's testimony identified above as irrelevant, immaterial, unduly repetitious and contrary to Commission Orders;
and
- B. Grant such other relief as may be just and equitable.

Respectfully submitted,

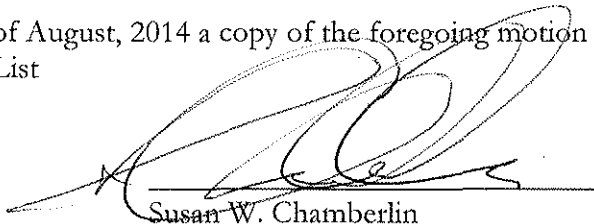


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MOTION TO STRIKE
THE REBUTTAL TESTIMONY of
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE WITNESS
LISA K SHAPIRO IN ITS ENTIRETY

NOW COMES the Office of Consumer Advocate (OCA), and pursuant to RSA 541-A:33 (V) and Puc 203.07 respectfully moves this Honorable Commission to strike the Rebuttal testimony of Public Service Company of New Hampshire (PSNH) witness Lisa K Shapiro filed July 11, 2014 in its entirety with all Attachments. In support, the OCA states:

1. On July 11, 2014 PSNH filed 709 pages of Rebuttal testimony from the following witnesses: William H. Smagula; John J. Reed; David Harrison; Noah Kaufman; Terrance J. Large; James J. Vancho; Lisa K. Shapiro and Eric H. Chung. See DE 11-150, In Re PSNH *Investigation of Scrubber Costs and Cost Recovery*, (July 11, 2014.) (PSNH Rebuttal).
2. Pursuant to New Hampshire law and Rule Puc 203.23(d), the New Hampshire Public Utilities Commission (PUC or Commission) has the authority to exclude “irrelevant, immaterial or unduly repetitious evidence.” RSA 541-A:33(V). The rebuttal testimony identified below falls within these areas of exclusion and should be stricken from the record.

3. The testimony of Dr. Shapiro must be stricken in its entirety for several reasons:
 - 1) it is legislative history for SB 152, which the Commission has previously ruled as inadmissible; and 2) the testimony addresses the public interest standard concerning “jobs, gross state product and personal income” (PSNH Rebuttal at p 670) which is not before the Commission in this prudence investigation; and 3) no party has raised these issues as part of direct testimony, so they are not proper grounds for rebuttal.
4. Dr. Shapiro describes her testimony as a discussion of a 2009 study on the economic benefits of the scrubber project. She states:

The purpose of the study was to provide an estimate of the economic benefits to New Hampshire – jobs, gross state product, and personal income – from the construction of a wet flue gas desulphurization system, commonly called a scrubber, at Merrimack Station. This report was intended to provide additional information for the legislature on the potential consequences from passing Senate Bill 152 – “An Act relative to an investigation by the public utilities commission to determine whether the scrubber installation at the Merrimack station is in the public interest of retail customers.”

PSNH Rebuttal at 670, line 15-21.

5. In spite of several Commission orders clarifying the focus and scope of this prudency analysis (See *Order Granting Motion for Rehearing in Part*, Order No 25,506 (May 9, 2013); *Order Denying Second Motion for Rehearing and Clarifying Scope*, Order No. 25,546 (July 15, 2013); *Order Denying Third Motion for Rehearing* Order No. 25,565 (August 27, 2013)) PSNH continues to misconstrue the scope of this prudence inquiry by submitting testimony outside the boundaries of what is relevant. The legislative history of failed legislation has no bearing on the prudence of PSNH management’s failure to analyze and report on changing market conditions affecting scrubber economics, to continue to own the aging coal plants during a sustained price reduction in natural gas and increased

environmental regulation, and the company's failure to consider the impact of customer migration on the rate impact of scrubber cost recovery.

6. The Commission previously found legislative history of SB 152 irrelevant, holding:

...we considered and rejected failed legislation during the 2009 legislative session as helpful in interpreting RSA 125-O:18 and 369-B:3-a. The failure of Senate Bill 152 and House Bill 496 to pass their respective houses in 2009 tells us nothing of the meaning of RSA 125-O:11-18, enacted in 2006, or RSA 369-B:3-a, last amended in 2003. The demise of the 2009 bills may signal that the Legislature believed that the Commission already had the authority to review PSNH's decision-making in a prudence review, in which case the legislation would have been unnecessary, just as much as it may signal that, as argued by PSNH, the Legislature did not wish to provide the Commission with such authority. *See* Joint Objection to Third Motion for Rehearing at ¶5, fn.6 and Attachment B, which demonstrates that PSNH President Gary Long assured the Senate that SB 152 was unnecessary because the Commission would conduct a normal, standard, after-the-fact prudence review to determine whether PSNH was "reckless" or "made bad decisions."⁵ Order No 25,565 (August 27, 2013).

PSNH fails to articulate alternate grounds that the 2009 study presented to the legislature on SB 152 is relevant to this prudence investigation. Legislative history for failed legislation is equally irrelevant to a prudence investigation as it is to interpreting commission regulatory authority.

7. Secondly, factors of economic benefit are reviewed in a public interest determination, not a prudency determination. The Commission is not making a public interest determination in this proceeding and therefore requires no testimony on the subject.
8. Further, this testimony is not rebuttal because no other party addresses the public interest elements of the scrubber in direct testimony. Dr. Shapiro submitted similar rebuttal testimony in the Burgess Biomass docket emphasizing the economic benefits of the LaidLaw project. *See* DE 10-195, *Shapiro Rebuttal*

Testimony (January 19, 2011). That investigation is distinguishable because it was a public interest determination, not a prudency review.

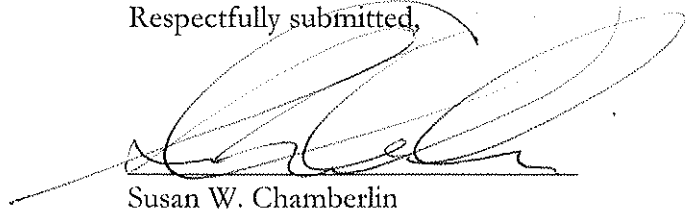
Attachments to Dr. Shapiro's testimony are also irrelevant to this prudence determination for the following reasons:

9. Attachment LKS -1, pages 676-683 is a Curriculum Vitae which is not relevant where the entire testimony is stricken.
10. Attachment LKS-2, page 684 -695 is the March 13, 2009 Study presented to the legislature during hearings on SB 152 which did not pass and its legislative history is irrelevant to this prudence investigation. It is also not a subject for rebuttal as no party raised the public interest determination as part of direct testimony.
11. Attachment LKS-3, pages 696-699 is a TransCanada webpage discussing job impacts of the Keystone XL project and Attachment LKS-4, pages 700 is an advertisement from TransCanada in support of building the Keystone XL pipeline. Each of these Attachments have no bearing on the prudence of PSNH management to fail to analyze and report on changing market conditions affecting scrubber economics, to continue to own the aging coal plants during a sustained price reduction in natural gas and increased environmental regulation, and failure to consider the impact of customer migration on scrubber cost recovery. These attachments are therefore irrelevant to this prudence investigation.
12. TransCanada, and Staff take no position on the motion. Sierra Club and Conservation Law Foundation support the motion.

WHEREFORE, the OCA respectfully requests that this Honorable Commission:

- A. Strike Dr. Shapiro's testimony and the Attachments in their entirety as irrelevant, immaterial, unduly repetitious and contrary to Commission Orders;
and
- B. Grant such other relief as may be just and equitable.

Respectfully submitted,

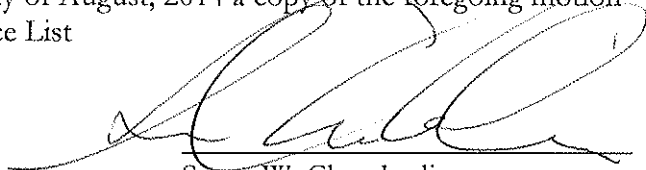


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PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE WITNESS
WILLIAM H. SMAGULA

NOW COMES the Office of Consumer Advocate (OCA), and pursuant to RSA 541-A:33 (V) and Puc 203.07 respectfully moves this Honorable Commission to strike sections of the Rebuttal testimony of Public Service Company of New Hampshire (PSNH) witness William H. Smagula, filed July 11, 2014. In support, the OCA states:

1. On July 11, 2014 PSNH filed 709 pages of Rebuttal testimony from the following witnesses: William H. Smagula; John J. Reed; David Harrison; Noah Kaufman; Terrance J. Large; James J. Vancho; Lisa K. Shapiro and Eric H. Chung. See DE 11-150, In Re PSNH *Investigation of Scrubber Costs and Cost Recovery*, (July 11, 2014.) (PSNH Rebuttal).
2. Pursuant to New Hampshire law and Rule Puc 203.23(d), the New Hampshire Public Utilities Commission (PUC or Commission) has the authority to exclude “irrelevant, immaterial or unduly repetitious evidence.” RSA 541-

A:33(V). The Smagula Rebuttal testimony identified below falls within these areas of exclusion and should be stricken from the record.

3. The Commission has ruled extensively on what is and is not relevant to this investigation, stating:

PSNH's prudent costs of complying with RSA 125-O must be judged in accordance with the management options available to it at the times it made its decisions to proceed with and to continue installation. The hearing on the merits will therefore not address current market or regulatory conditions but rather those conditions in place at the time of the decision-making under review; specifically the period of time after the Legislature's decision to require the Scrubber [June 8, 2006] up to the point of the Scrubber's "substantial completion" in September 2011. *See* Order No. 25,445 at 26. At hearing, therefore, we will not admit evidence or allow cross examination on regulatory proposals or actions, market conditions or Company decisions that extend beyond September 2011.

In Re Public Service Co. of N.H., Order No 25,546 (July 15, 2013).

4. Mr. Smagula's Rebuttal testimony on present day scrubber operation is outside the scope of this prudency investigation and not allowable. The first section of irrelevant testimony from Mr. Smagula runs from page 3, line 6 "Contextual Factors . . ." to page 28, line 7 "Rebuttal to Selected Witness Testimony . . ." Mr. Smagula includes references to events that occurred prior to the Scrubber law passage of June 8, 2006, events that occurred after September 2011 and legislative history to various bills. All of this testimony should be stricken.
5. Mr. Smagula's Rebuttal testimony on the public interest standard is outside the scope of this prudency investigation and not allowable. The Commission is not making a public interest determination in this prudence investigation and therefore requires no testimony on the subject. No party raises the public interest determination in direct testimony and therefore it is

not open as a subject for rebuttal. Introducing a new, irrelevant topic in rebuttal doesn't follow the orderly process of Commission proceedings. *See: Petition for Approval of Purchased Power Agreement with Laidlaw Berlin BioPower*, 96 NHPUC 130 (2011). ("Our decision to strike the testimony delineated by the OCA was based on our need to adhere to a fair standard of conduct for all participants, and avoid unfair advantage or surprise by a party who deviates from the process set forth at the outset of the proceeding").

6. Mr. Smagula's Rebuttal testimony on legislative history and statutory interpretation is also irrelevant and must be stricken. In addition to the testimony identified in paragraph 4, the following testimony should be stricken as irrelevant:

<u>Page</u>	<u>Line</u>
29	14-22
30-32	all
35	14
36-39	all
40	1-11
42	3-40
43	1-14

7. There is a real and articulable difference between: 1) legislative history being put forth as fact, which is not relevant; and 2) evidence of PSNH management action or inaction, which is factual evidence in the form of documents and testimony provided by PSNH to the legislature, which is relevant to the Commission's prudence determination. *See* RSA 125-O:1(IX)(2006)(on a reporting timeline for PSNH); and Order No 25,640 (March 26, 2014) citing *In Re Public Service Co. of N.H.*, Order No. 25,506 at 17-18 (May 9, 2013)

(“PSNH, like any other utility owner, maintained the obligation to engage in good utility management at all times.”)

8. The Commission made this distinction previously, finding:

We have already determined that whether PSNH supported or opposed enactment of the Scrubber Law and related legislation is irrelevant to our statutory analysis, and we will not allow further inquiry or submission of evidence that goes solely to that issue. We are cognizant, however, that information presented by PSNH and others before the legislature may be relevant to our determination of other facts in issue . . . We will make these determinations when presented with particular evidence and justification for its admissibility.

In Re Public Service Co. of N.H., Order No. 25,592 (November 1, 2013) at 6.

9. Further, all “Supplemental Testimony” in the Appendices and Attachment WHS-R-1, pages 47-65, must be stricken as it is legal argument, including interpretations of legislative history previously excluded by Commission Order No 25,546 (July 15, 2013) referenced above. Any legal argument included within these pages is allowable only after the factual hearing concludes and should be presented by legal counsel through final memoranda.

Paragraphs 10-21 identify each Attachment to be stricken.

10. Attachment WHS-R-02, pages 72-99 is an amicus curiae brief of the New Hampshire Office of the Attorney General in *Appeal of Stoneybrook Farm*, which is legal argument, not factual evidence, and must be stricken as irrelevant to this proceeding.
11. Attachment WHS-R-03, page 100 is a data response from DE 13-275 related to fossil plant operations between November 2013 – March 2014, long after September 2011 initial scrubber installation and is therefore irrelevant to this

prudence investigation as to what PSNH management did or should have done in the 2008-2009 timeframe.

12. Attachment WHS-R-04, pages 101-107 is the ISO-NE 2013 Regional Electricity Outlook and discusses the regional market years after September 2011 and is therefore irrelevant to this prudence investigation.
13. Attachment WHS-R-05, pages 108-138 is an Emissions Test Report for February 10, 2014 long after the September 2011 initial scrubber installation and is therefore irrelevant to this prudence investigation. PSNH did not know in 2008-2009 the results of any tests conducted in 2013-2014.
14. Attachment WHS-R-12, pages 156-157 contains legislative history for HB 496 which is irrelevant to this prudence inquiry.
15. Attachment WHS-R-17, pages 168-173 contains legislative history for HB 1673 which is irrelevant to this prudence inquiry.
16. Attachments WHS-R-18 and 19, pages 174-185 contain Department of Environmental Services orders on the appeals of Sierra Club and CLF regarding technical aspects of the Temporary Resource permit granted to PSNH which are irrelevant to this prudence inquiry.
17. Attachment WHS-R-20, page 186 contains a Sierra Club webpage printout discussing legislative history which is irrelevant to this prudence inquiry.
18. Attachments WHS-R-21, 22 and 23, pages 187-203 contain CLF letters and pleadings for a Clean Air Act Citizen Suit against PSNH which are irrelevant to this prudence inquiry.

19. Attachment WHS-R-24 page 204 is a printout of a CLF webpage regarding PSNH and its alleged failure to obtain clean air permits prior to construction which is irrelevant to this prudence inquiry.
20. Attachment WHS-R-25 pages 205-217 is a data response from the Sierra Club providing legislative history for HB 1673 “An Act relative to the reduction of mercury emissions” (February 2, 2006) which is irrelevant to this prudence inquiry.
21. The “Contextual Factors” testimony, Supplemental testimony, Appendices and Attachments identified above have several additional reasons for being stricken from the record:
 - 1) It is in the form of direct testimony reiterating what Mr. Smagula previously testified to or could have testified to in his direct testimony;
 - 2) The testimony provides legal analysis, legislative history and legal conclusions which are not factual evidence and are not within Mr. Smagula’s areas of expertise;
 - 3) The testimony misconstrues the findings and relevance of other agencies’ documents;
 - 4) Mr. Smagula’s interpretations of law and legislative history have no bearing on the prudence of PSNH’s management decisions. Mr. Smagula was not ‘directly or indirectly involved in internal presentations and reviews of financial sensitivities and studies critical to PSNH’s decisions’ regarding whether to proceed with the Scrubber project or instead to divest or retire Merrimack Station.” See Order No 25,566 (August 27,

2013) citing Joint Motion (July 29, 2013) at 4. Unless PSNH is representing that the Company relied on Mr. Smagula's legal analysis when making management decisions in 2008-2009 concerning the scrubber installation, such analysis should be stricken from the record.

22. TransCanada, Sierra Club, Conservation Law Foundation and Staff take no position on the motion.

WHEREFORE, the OCA respectfully requests that this Honorable Commission:

- A. Strike the sections of Mr. Smagula's testimony identified above as irrelevant, immaterial, unduly repetitious and contrary to Commission Orders; and
- B. Grant such other relief as may be just and equitable.

Respectfully submitted,



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August 6, 2014

Certificate of Service

I hereby certify that on this 6 day of August, 2014 a copy of the foregoing motion was sent by electronic mail to the Service List



Susan W. Chamberlin