

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 11-250

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Investigation of Merrimack Station Scrubber Project and Cost Recovery

Order Regarding TransCanada's Motions to Compel

ORDER NO. 25,445

December 24, 2012

I. PROCEDURAL HISTORY

In this order we decide several pending items, left unresolved by Order No. 25,398 (Aug. 7, 2012), concerning TransCanada's first motion to compel. We also rule on the data requests contained in TransCanada's second and third motions to compel filed on September 11, 2012 and October 9, 2012.

On November 18, 2011, the Commission opened Docket DE 11-250 to investigate the costs of, and cost recovery related to, the installation of the wet flue gas desulphurization system (Scrubber) at the Merrimack Station owned and operated by Public Service Company of New Hampshire (PSNH). The Office of Consumer Advocate (OCA), the New England Power Generators Association, Inc. (NEPGA), TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast Inc. (collectively, TransCanada), Sierra Club (SC) and Conservation Law Foundation (CLF) are all parties to this docket.

On April 10, 2012, the Commission issued Order No. 25,346 setting a temporary rate to allow PSNH to begin to recover costs associated with the Scrubber.¹ PSNH filed testimony

¹ Additional procedural history on discovery conducted during the temporary rate phase of the proceeding can be found in *Public Service Company of New Hampshire*, Order No. 25,334 (March 12, 2012) and *Public Service Company of New Hampshire*, Order No. 25,361 (May 11, 2012) denying PSNH's motion to reconsider Order No. 25,334.

with associated exhibits on June 15, 2012 related to the permanent rate phase of this docket. On July 16, 2012, TransCanada filed a motion to compel PSNH to respond to certain data requests. PSNH filed an objection to the motion to compel on July 26, 2012.

On August 7, 2012 the Commission issued Order No. 25,398 (Prior Order) compelling PSNH to answer some of TransCanada's data requests and holding its ruling on a number of questions in abeyance, pending receipt of legal briefs. Pursuant to the Prior Order, on August 28, 2012 the parties filed briefs on issues concerning the interpretation of RSA 125-O:11-18. The Commission further allowed TransCanada to supplement its July 16, 2012 first motion regarding TC 2-4 through TC 2-6 within five business days of the order. TransCanada requested on August 14, 2012 that the Commission stay the requirement that TransCanada supplement its first motion, and on August 17, 2012, the Commission denied the request for stay. TransCanada has not supplemented its first motion regarding TC 2-4 through TC 2-6.

On September 11, 2012, TransCanada filed a second motion to compel PSNH to respond to various data requests contained in TransCanada's third set of requests. PSNH objected to TransCanada's second motion on September 13, 2012. On September 20, 2012, PSNH supplemented its objections to TransCanada's second motion. On October 9, 2012, TransCanada filed a third motion to compel PSNH to respond to various data requests in TransCanada's fifth set of requests. PSNH objected to TransCanada's third motion on October 16, 2012.

II. MOTIONS TO COMPEL AND OBJECTIONS

Following Order No. 25,398, these data requests from TransCanada's first motion are still pending for decision: TC 1-1 through TC 1-5, TC 1-12, and TC 1-14 through TC 1-16. In addition, the following data requests are contained in TransCanada's second motion: TC 3-16,

TC 3-17, and TC 3-19 through TC 3-23. Finally, TransCanada's third motion seeks responses to TC 5-4 through TC 5-6. PSNH objected to each of TransCanada's motions.

A. TransCanada's First Motion to Compel

1. TransCanada's Requests

The following TransCanada data requests to PSNH, contained in its first motion, remained unresolved following the Prior Order:

TC 1-1:

Please provide copies of all economic analyses relied on by PSNH in its decision to install a flue gas scrubber at Merrimack Station.

Response:

PSNH objects to this question as it is based upon a faulty premise. Notwithstanding this objection, PSNH responds as follows:

PSNH was required by law (RSA 125-O: 11-18) to install a wet flue gas desulfurization system at Merrimack Station as soon as possible. ("The owner shall install and have operational scrubber technology to control mercury emissions at Merrimack Units 1 and 2 no later than July 1, 2013." RSA 125-O: 13, I) The law is not discretionary.

TC 1-2:

Please provide all fuel price forecasts available to PSNH at the time of its initial decision to construct the flue gas scrubber at Merrimack Station.

Response:

PSNH objects to this question as it is based upon a faulty premise. Moreover, the information requested is irrelevant to the subject of this proceeding. Notwithstanding this objection, PSNH responds as follows:

See the response to [TC 1-1]

TC 1-3:

Please identify which of the fuel forecasts in question 2, above, were relied on by PSNH in its decision to install a flue gas scrubber at Merrimack Station.

PSNH Response:

PSNH objects to this question as it is based upon a faulty premise. Moreover, the information requested is irrelevant to the subject of this proceeding. Notwithstanding this objection, PSNH responds as follows: See the response to [TC 1-1].

TC 1-4:

Please provide all fuel price forecasts available to PSNH at the time of development of Gary A. Long's letter dated September 2, 2008 to Ms. Debra A. Howland Re: Docket No. DE 08-103.

PSNH Response:

PSNH objects to this question because the information requested is irrelevant to the subject of this proceeding.

TC 1-5:

Please identify all individuals at PSNH or its affiliates, or any consultant to PSNH, responsible for conducting economic analyses related to PSNH's decision to install a flue gas scrubber at Merrimack Station.

PSNH Response:

PSNH objects to this question as it is based upon a faulty premise. Notwithstanding this objection, PSNH responds as follows: See the response to [TC 1-1].

TC 1-12:

How did PSNH account for the probability that Merrimack Station could be required to implement closed cycle cooling at the station in its analyses of the economics of installing a flue gas scrubber, given consideration of regulatory experiences at other regional and national energy generation facilities?

PSNH Response:

PSNH objects to this question as the information sought is not relevant to the subject of this proceeding; i.e., recovery of the prudent costs of complying with the legislative mandate contained in 2006 N.H. Laws, Chapter 105, "AN ACT relative to the reduction of mercury emissions." In addition, the question requires speculation regarding future regulatory actions of NHDES and/or USEPA.

TC 1-14:

Did PSNH give any consideration to whether to seek a variance from the mercury emission reduction requirements of RSA 125-O as authorized under RSA 125-O:17?

PSNH Response:

PSNH objects to this question, as it is based upon a faulty and erroneous interpretation of the law. Notwithstanding this objection, PSNH responds as follows:

There was no need for PSNH to seek any variance from NHDES under either RSA 125-O:17 sections I or II, because, I. the scrubber was successfully placed

into service prior to the statutorily mandated date of July 1, 2013 (RSA 125-O:13, D); and, II. an alternative reduction requirement was not necessary as the scrubber meets all of the statutorily mandated emissions reduction requirements set forth in RSA 125-O:13.

TC 1-15:

If the response to question 15 is in the negative, please state the basis for your response.

PSNH Response:

See the response to [TC 1-14].

TC 1-16:

If the answer to question 15 is in the affirmative please explain the process which PSNH used to decide whether to seek the variance, which employees of PSNH were Involved in such decision, and provide any and all correspondence, working papers and documents related to such consideration.

PSNH Response:

See the response to [TC 1-14].

In its first motion, TransCanada stated that TC 1-1 through 1-5, TC 1-12 and TC 1-14 through TC 1-16, sought PSNH's economic analyses related to the installation of the Scrubber system and to ascertain whether PSNH considered seeking a variance from the requirements of the emission reduction goals set by RSA 125-O. TransCanada said that PSNH's unresponsive or incomplete responses appear to be based on an argument that the law mandates the use of the wet flue gas desulphurization technology and that PSNH could not evade this requirement, thus relieving PSNH from the obligation to respond to these questions. TransCanada argued that PSNH's objection based on relevancy ignores the ability and, from a prudence perspective, the responsibility, that PSNH had to consider seeking a variance pursuant to RSA 125-O:17, which includes technological or economic infeasibility as the basis for a request for a variance.

According to TransCanada, the plain language of the statute gives PSNH the ability to seek a variance if and when the project became uneconomic, or if the technology designated in

the law became uneconomic, or not the least expensive or most efficient way of achieving the emissions reductions required by law. TransCanada asserted that PSNH's responses suggest that PSNH believes it had no duty or ability to even look into the possibility of a variance.

Further, according to TransCanada, PSNH overlooked the plain language of the statutory requirement and the Commission's enabling authority establishing the scope of cost recovery. Pursuant to RSA 125-O:18, the Commission may only authorize cost recovery through PSNH's default energy service charge. TransCanada said that the Commission's prudence review may consider the extent to which it was reasonable to believe that the costs of the project could feasibly be recovered through PSNH's default service charge. TransCanada also referred to *Public Service Company of New Hampshire*, Order No. 24,914 (November 12, 2008) where the Commission stated that RSA 125-O:17 provides a basis for the Commission to consider, in the context of the prudence review of the Scrubber costs, "arguments as to whether PSNH had been prudent in proceeding with installation of the scrubber technology in light of increased cost estimates and additional costs from other reasonably foreseeable regulatory requirements. . . ." Order No. 24,914 at 13.

2. PSNH's Objection to TransCanada's First Motion to Compel

In its Objection regarding TC 1-1 through 1-5, requesting economic analyses and fuel forecasts, and TC 1-12 concerning possible costs of a closed loop cooling cycle at Merrimack station, PSNH repeated its response to the data requests. According to PSNH, the law requires PSNH to "install and have operational scrubber technology to control mercury emissions at Merrimack Units 1 and 2 no later than July 1, 2013." RSA 125-O:13, I. PSNH argued that TransCanada mistakenly assumes that PSNH had the liberty to decide whether or not to install the Scrubber; rather, the Legislature made the decision that installation of the Scrubber was in

the public interest and mandated such installation. PSNH stated that it did not rely on economic analyses or fuel forecasts in any decision to install the Scrubber—it complied with a statutory requirement that it could not circumvent. As a result, PSNH asserted that economic analyses and fuel forecasts are not relevant to this proceeding.

With respect to TC 1-14 through 1-16, PSNH also argued that TransCanada is misguided in its assertion that PSNH had the ability to seek what amounts to a “waiver” of the mandate to install the Scrubber set forth in RSA 125-O. According to PSNH, RSA 125-O:17, II clearly and expressly applied only to situations “where an alternative reduction requirement is sought.” PSNH opined that the variance provision does not allow the Department of Environmental Services (DES) to waive or repeal the determination of the General Court that the installation of the Scrubber is in the public interest, or the legislative mandate that the Scrubber must be installed to control mercury emissions at Merrimack Units 1 and 2.

In further support of its objection, PSNH argued that TransCanada’s request is based upon a faulty and erroneous interpretation of the variance provision because TransCanada did not read the statute in its entirety. PSNH said that RSA 125-O contains a critical non-severability provision, RSA 125-O:10, which is unusual and should be given careful consideration. PSNH asserted that this non-severability clause removes any flexibility in the statute’s mandate for PSNH to install a Scrubber and thus limits the variance provision of RSA 125-O:17 to scheduling and emissions level adjustments. Based upon these arguments, PSNH claimed that the information requested in TC 1-1 – TC 1-5, TC 1-12, and TC 1-14 – TC 1-16 is not relevant to the issues under review in this docket.

B. TransCanada's Second Motion to Compel

1. TransCanada's Requests

In its second motion TransCanada sought responses from PSNH to the following data requests:

TC 3-16:

During the period of 2006 - 2009 what other proposed or adopted environmental regulatory requirements (other than the requirements in RSA 125-O) for Merrimack Station or other existing, coal-fired power plants from the state or federal government was PSNH monitoring or otherwise made aware? Please include in your response any internal assessments, discussions with federal or state regulators or other internal or third party communications with respect to Clean Water Act, Clean Air Act, Resource Conservation and Recovery Act and any applicable air, water or waste regulations. Please provide any and all documentation in the possession of PSNH or its agents related to these requests, including estimated costs for compliance with any proposed or anticipated requirements that would be applicable to Merrimack Station. *See Re Investigation of PSNH's Installation of Scrubber Technology at Merrimack Station*, 93 NH PUC 564, 572 (2008). "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..."

TC 3-17:

When did PSNH first become aware that the U.S.E.P.A. was contemplating a finding that closed cycle cooling water technology would be considered "best technology available" under the Clean Water Act for purposes of Merrimack Station compliance with thermal discharge or other water-related standards? Was PSNH aware of the status of Phase II rules adopted by U.S.E.P.A. in 2004 regarding compliance with Clean Water Act requirements related to entrainment and thermal discharges? What was PSNH's understanding in 2008 with regard to the potential requirement that Merrimack Station would be required to install closed cycle cooling water technology? Please include in your response reference to all discussions between PSNH or its agents and U.S.E.P.A. officials regarding the agency's review of PSNH's NPDES renewal application at any time between 2006 and issuance of the draft NPDES permit. Please also include in your response whether and when PSNH was made aware of the U.S.E.P.A. proposed finding on closed cycle cooling water technology at the Brayton Point coal-fired power plant. Please indicate whether and when PSNH prepared or submitted to any agency the estimated costs for installation of closed cycle cooling water technology at Merrimack Station and provide copies of all such estimates. Please provide any and all documentation in the possession of PSNH or its agents that explains the responses to

these requests, including all notes of discussions with U.S.E.P.A. officials and internal cost estimates.

TC 3-19:

Was any thought given to either: (1) retirement of Merrimack Station; or (2) retirement of Merrimack Station as a coal unit as an option and conversion to natural gas for both economic and environmental compliance reasons? Recent media reports regarding coal retirements have been lauding the switch to gas for both price and environmental quality and have been recognized by public health and environmental organizations. "The trend is good. We like it. We are pleased that we're shifting away from one of the dirtiest sources to one that's much cleaner," said Janice Nolen, an American Lung Association spokeswoman. 'It's been a real surprise to see this kind of shift. We certainly didn't predict it.' Power plants that burn coal produce more than 90 times as much sulfur dioxide, five times as much nitrogen oxide and twice as much carbon dioxide as those that run on natural gas, according to the Government Accountability Office, the investigative arm of Congress. Sulfur dioxide causes acid rain and nitrogen oxides lead to smog." (Nashua Telegraph, 8/20/12)

TC 3-20:

Based on the recent ruling by the NH Air Resources Council affirming the New Hampshire Department of Environmental Services determination of the baseline mercury emissions pursuant to RSA 125-O:14, II and assuming that this ruling remains in effect pending or following any appeal, what if any additional control technologies, equipment, capital or operating costs has PSNH determined can be reasonably anticipated or otherwise may be necessary to comply with the mercury reduction requirements of RSA 125-O? Please provide any and all documentation in support of your answer.

TC 3-21:

Please indicate whether any alternative scenario, technology or cost analyses/estimates were performed between 2006 and present with regard to mercury reduction levels and associated costs that would be required under potential mercury baseline determinations, including the determination recently affirmed by the Air Resources Council and, if so, provide copies of such analyses. If no such analyses/estimates were conducted, please explain the reason for not doing so and provide any and all documentation that explains your answer.

TC 3-22:

Please identify the means by which PSNH intends to comply with the U.S. E. P. A. final rule on "National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units" published in the Federal Register on February 16, 2012 at 77 Fed. Reg. 9304, and whether such compliance would require any additional technologies, equipment, capital or operating costs, or any additional costs whatsoever, for Merrimack Station. Please provide any and all documentation that explains your answer.

TC 3-23:

Has PSNH developed a compliance strategy with regard to state and federal mercury reduction requirements? Please provide any and all documentation in support of your response, including but not limited to any plans for operational limitations on Merrimack Station.

PSNH Response to TC 3-16, 3-17, 3-19, 3-20, 3-21, 3-22 and 3-23:

PSNH objects to this question. The requested information is not relevant to the prudence of PSNH's compliance with the mandate contained in the Mercury Reduction law, nor is it reasonably calculated to lead to the discovery of admissible evidence in this proceeding.

In addition to the response on relevance PSNH included this response to TC 3-19:

PSNH also objects to the testimonial narrative included in this question following subpart 2. TransCanada will have an opportunity to present testimony in accordance with the procedural schedule established for this docket.

In support of its second motion TransCanada quoted from Commission Order No.

24,914 (Nov. 12, 2008) "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 by TransCanada) Based upon this language, TransCanada claims that questions about the costs of environmental and other regulatory compliance for Merrimack Station are relevant to this proceeding.

2. PSNH Objection to TransCanada's Second Motion to Compel

In its objection to TransCanada's second motion to compel responses to TC 3-16, TC 3-17, and TC 3-19 – TC 3-23 concerning various environmental compliance issues relating to Merrimack Station, PSNH incorporated the arguments from its objection to TransCanada's first motion to compel. In addition, PSNH reiterated that the installation of the Scrubber, as well as

a very tight timeline for completion of the installation, was mandated by RSA 125-O. PSNH maintained that interpreting the variance provision as broadly as TransCanada suggests would have slowed the project substantially and would have defeated the purpose of the statute. According to PSNH, environmental requirements and fuel forecasts are constantly changing. As a result, requiring PSNH to embark on a variance request to DES each time a change occurred was an unworkable approach and would defeat the purpose of RSA 125-O. PSNH cited April 11, 2006 testimony at the legislature from Robert Scott, Director of DES Air Resources Division, concerning the prescriptive nature of the statute and the need to install the Scrubber at Merrimack Station immediately in order to achieve both mercury and SO₂ reductions as soon as possible.

C. TransCanada's Third Motion to Compel

1. TransCanada's Requests

In its third motion, TransCanada sought responses from PSNH to the following data requests:

TC 5-4

Did any PSNH employee or representative ever discuss with or put in writing to any state official including any state representative or state senator or any employee of DES, the fact that the Sargent and Lundy estimate contained, as the Jacobs report notes, the following caveat: "No specific mercury guarantee was included in S&L pricing since it was not available at this time from supplier." If so, please provide copies of any such written documentation.

TC 5-5

Did any PSNH employee or representative ever discuss with or put in writing to any state official, including any state representative or state senator or any employee of DES, the fact that the Sargent and Lundy estimate was, as the Jacobs report notes, "conceptual", "generic" or "not site specific". If so, please provide copies of any such written documentation.

TC 5-6

Is it true, as the Jacobs report says, that the Sargent and Lundy estimate was done “In an expedited time line and with no vendor guarantees in writing”. If so, was this fact ever communicated to any state official: If so, please provide copies of any such documentation.

PSNH Response to TC 5-4, 5-5 and 5-6:

PSNH objects to this question. The requested information is not relevant to the prudence of PSNH’s compliance with the mandate contained in the Mercury Reduction law, nor is it reasonably calculated to lead to the discovery of admissible evidence in this proceeding.

In support of its third motion, TransCanada argues that the statutory language stating that “[t]he mercury reduction requirements set forth in this subdivision represent a *careful, thoughtful balancing of cost, benefits, and technological feasibility* and therefore the requirement shall be viewed as an integrated strategy of non-severable components.” (emphasis added by TransCanada) TransCanada claimed that state officials at DES and the legislature clearly relied upon PSNH’s cost estimates in passing the mercury reduction law. According to TransCanada, PSNH’s communications with such state officials or legislators as it attempted to get the mercury reduction law passed are relevant to its prudence in pursuing construction of the Scrubber.

2. PSNH Objection to TransCanada’s Third Motion to Compel

In its objection to TransCanada’s third motion to compel responses to TC 5-4, TC 5-5 and TC 5-6 requesting information on the Sargent and Lundy report provided to the Legislature by PSNH when the mercury reduction bill was being considered, PSNH incorporated the arguments made in its objections to TransCanada’s first and second motions. PSNH went on to argue that TransCanada’s questions about what information PSNH supplied to the legislature and what the legislature relied upon in enacting RSA 125-O:11-18 is “well beyond the purview of this proceeding.” PSNH Objection at 3. PSNH asserted that interpreting the variance

provision as TransCanada suggests, would be an attempt at second guessing the wisdom of the statute's mandate for PSNH to install the Scrubber. According to PSNH, if the Commission were to interpret the statute in that way, it would be exceeding its legislatively delegated authority.

PSNH pointed to a New Hampshire Supreme Court holding in which the Court declined to independently examine the factual basis for a statute, or to second guess the wisdom or necessity of a statute. *Carson v. Maurer*, 120 N.H. 925, 933 (1980). PSNH argued, citing *Trustees of Dartmouth Coll. v. Woodward*, 1 N.H. 111, 120-21 (1817), that because the Commission is acting in its judicial capacity in this docket, the Commission should follow the Court's guidance and refrain from attempting to repeal RSA 125-O:11-18 through an adjudicative decision. PSNH stated that TransCanada and other parties sought to change the law during the legislative session in 2009 when PSNH estimated the cost of the Scrubber at \$457 million. At that time, according to PSNH, TransCanada and other parties made both the New Hampshire House and Senate aware of the higher cost estimate for installation of the Scrubber, and the legislature nonetheless rejected any requests for changes to RSA 125-O:11-18.²

PSNH concluded by reiterating its arguments that the variance provision cannot be used to prevent or delay the installation of the Scrubber, and that the "Pandora's Box" of issues raised by TransCanada are beyond the scope of the variance and would frustrate the purpose of the statute. Having found that "[i]t is in the public interest to achieve significant reductions in mercury emissions at the coal-burning electric power plants in the state as soon as possible,"

² Senate Bill 152 would have required the Commission to investigate whether installation of the scrubber technology was in the interest of PSNH's retail customers. House Bill 496 would have established a limit on the amount of cost recovery for the emissions reduction equipment installed at Merrimack Station.

RSA 125-O:11, I, PSNH maintained that the legislature did not intend to provide, through the variance process, an opportunity to subvert the purpose of the statute.

D. BRIEFS ON INTERPRETATION OF RSA 125-O:11-18

1. Public Service Company of New Hampshire

PSNH noted that Order No. 25,398 identified five issues to be addressed in briefs.

According to PSNH the first issue was what type of variances could be requested pursuant to RSA 125-O:17. PSNH said that RSA 125-O mandated installation of the scrubber technology at Merrimack Station and that RSA 125-O:17 is a mechanism by which PSNH could seek relief from DES in only two instances: (1) if and when some variation in the compliance schedule (for example, the July 1, 2013 deadline) was needed while still demonstrating “reasonable further progress” to compliance; and (2) if and when some variation in the 80 percent mercury emissions reduction required by RSA 125-O:13, II was needed. PSNH argued that no other variances are permitted by statute and, because neither a change in schedule nor a change in emissions reduction amount was necessary, PSNH did not seek a variance. PSNH Brief at 2.

The second issue to be addressed, according to PSNH, is the meaning of the phrases “alternative reduction requirement” and “technological or economic infeasibility” in RSA 125-O:17, II. PSNH maintained that the only mercury emissions reduction requirement is contained in the law and, specifically, that requirement was to reduce mercury emissions from the sources by at least 80 percent on an annual basis from the baseline mercury input beginning on July 1, 2013. PSNH argued that, because the legislature mandated the installation of scrubber technology, the only “alternative” reduction requirement would mean some deviation from the law’s 80 percent reduction mandate, and that compliance with the reduction mandate could only be ascertained after the Scrubber had been installed.

According to PSNH the term “technological or economic infeasibility” in RSA 125-O:17, II provides evidence of legislative intent that DES evaluate the performance of the Scrubber in meeting the 80 percent reduction requirement. PSNH asserted that if DES determined that mercury emissions were reduced by less than 80 percent, DES would then assess whether achieving the 80 percent reduction was either not possible with the particular scrubber technology chosen, or whether the additional investment required to meet the 80 percent reduction goal was “economically feasible.” *Id.* at 3. PSNH claimed that nothing in the statute suggests that the variance section permits a wholesale waiver of the mandate to construct the Scrubber or that “economic infeasibility” relates to the duty to construct. *Id.*

PSNH said that the third issue for its brief is whether PSNH had a duty to seek a variance from DES under RSA 125-O:17 in order to obtain cost recovery pursuant to RSA 125-O:18. PSNH argued that PSNH had no such duty, nor the opportunity, to seek such a variance; rather, PSNH said its primary duty was to install the scrubber technology as mandated by law. PSNH said it was not necessary for it to seek a variance because the circumstances that would have permitted PSNH to request a variance did not occur. PSNH argued that RSA 125-O:17 is simply not relevant to the Commission’s determination of PSNH’s prudent costs under RSA 125-O:18. *Id.*

Next, PSNH addressed the fourth issue—the meaning of RSA 125-O:10 in the context of the prudence determination required pursuant to RSA 125-O:18. PSNH insisted that RSA 125-O:10, together with RSA 125-O:11, VIII provides evidence that RSA 125-O:17 was not intended to create a general exception to the mandate that PSNH install scrubber technology at Merrimack Station. According to PSNH, an interpretation of the variance section that would reassess the threshold duty of PSNH to build the Scrubber is “completely inconsistent” with RSA

125-O:10 which provides that “no provision of RSA 125-O:1 through RSA 125-O:18 of this chapter shall be implemented in a manner inconsistent with the integrated, multi-pollutant strategy [of RSA 125-O:1 through 18].” *Id.* at 4. PSNH claimed that the purpose of the non-severability clause when considered within the context of the statute was to ensure that there would be no second guessing of legislative intent.

PSNH said that the fifth issue concerned the relationship of the variance and non-severability clauses to one another and to the Commission’s prudence determination under RSA 125-O:18. According to PSNH, the non-severability provision supports its view that the variance provision cannot be interpreted as a means of avoiding the construction of scrubber technology at Merrimack Station. PSNH argued that, because the Legislature determined that the cost of the Scrubber was a reasonable means of complying with the mercury reduction goals and was in the public interest, the Commission cannot use RSA 125-O:18 to determine that the cost to construct the Scrubber is not prudent *per se*. *Id.* According to PSNH, the Legislature’s refusal to enact SB 152 and HB 496 in 2009 are evidence that the Legislature did not intend to have RSA 125-O:17 modify or limit the mandate for PSNH to install the Scrubber. Because the statute mandated construction of the Scrubber without a specific cost figure, PSNH argued that the variance provision should not be read to impose a cost limit.

PSNH recommended that the Commission deny TransCanada’s first motion to compel. According to the Company, the outstanding discovery requests that remain to be ruled on in the first motion to compel relate to (1) PSNH’s “decision” to construct the Scrubber, (2) whether PSNH considered requesting a variance pursuant to RSA 125-O:17 and (3) information for which the only purpose is to look behind and undermine the statutes mandating the installation

of Scrubber technology at Merrimack Station. PSNH said that the information sought is not relevant. *Id.* at 38.

2. TransCanada

TransCanada argued that the language of RSA 125-O:17 supports an interpretation that would obligate PSNH to consider a variance to avoid the Scrubber mandate or, at the very least, delay the Scrubber installation deadline based on changed circumstances regarding the anticipated cost of the scrubber technology. TransCanada Brief at 2. According to TransCanada, PSNH incorrectly interprets the statute to mandate the installation of the scrubber technology because RSA 125-O:17 authorized DES, in consultation with the 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.’” *Id.* TransCanada said that the increase in the cost of the installation of the Scrubber over the estimate presented to the legislature in 2006, the increase in customer migration, the economic slowdown and decrease in the cost of natural gas, and additional costs to the Company for other reasonably foreseeable environmental regulation, should have prompted PSNH to seek a variance from installing the Scrubber at Merrimack Station. *Id.* at 3.

TransCanada argued that DES was expressly authorized to delay or modify the requirement that PSNH install the Scrubber at Merrimack Station, provided that PSNH make the request. According to TransCanada, 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 could be granted: (1) a variance to the mercury reduction schedule, and (2) a variance to the mercury reduction requirement. *Id.* at 6. TransCanada stated that “[t]he 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 on PSNH." *Id.*

According to TransCanada, PSNH could either have asked for a delay of the deadline for the installation of the Scrubber pursuant to RSA 125-O:17, I, or requested a waiver of the mercury reduction requirement due to "technological or economic infeasibility," pursuant to RSA 125-O:17, II. TransCanada argued that the words "economic infeasibility" could be interpreted to include a cost increase that would raise default service rates to a level where customer migration would accelerate, "driving up the rates to remaining customers even further, resulting in a death spiral." *Id.* at 7. TransCanada also pointed out that RSA 125-O:11, V included language that said that the Scrubber was going to be installed "with reasonable costs to consumers" which was based on the 2006 estimated total not-to-exceed \$250 million cost figure. In light of the significant increase in the estimated cost of the scrubber technology that became evident in 2008, TransCanada said that PSNH could have reviewed whether less expensive technology, or other means, were available to accomplish the same mercury reduction goals and, if so, asked for a variance under RSA 125-O:17, II. *Id.* at 8.

TransCanada also interpreted RSA 125-O:17, II as allowing DES to approve an alternative reduction requirement. Because the mercury reduction requirement consisted of an integrated strategy of non-severable components, TransCanada concluded that any variance granted under this subsection necessarily could have modified the underlying mercury reduction requirements set forth in RSA 125-O:13. According to TransCanada, any other interpretation would amount to a repeal of the variance provision (citations omitted). *Id.* at 9.

TransCanada noted that RSA 125-O:18 allows PSNH to recover "all prudent costs" of installing the Scrubber "in a manner approved by the public utilities commission." Because the

statute must be read as a whole pursuant to the non-severability clause in RSA 125-O:10, TransCanada argued that the variance section and the cost recovery section invoking the prudence standard must be read together. *Id.* at 15. TransCanada noted that RSA 125-O:18 contains a sentence that allows a regulated utility to recover the cost of the Scrubber through default service rates “[d]uring ownership and operation by a regulated utility.” According to TransCanada, this language evidences the legislature’s recognition that PSNH had options, including divestiture or retirement under RSA 369-B:3-a, and could have avoided increased rates to customers by pursuing divestiture under RSA 369-B:3-a. TransCanada concluded that even if the Commission finds the variance provision did not allow for avoidance of the Scrubber mandate, 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, by divestiture or other options available under RSA 369-B:3-a. TransCanada argued that the Commission should grant TransCanada’s motion to compel, and allow discovery in the context of cost recovery, regarding whether PSNH assessed the variance under RSA 125-O:17 in light of divestiture, retirement, or other options available to it, before installing the scrubber technology. *Id.* at 17.

3. Office of Consumer Advocate

The OCA stated that the subject of the docket is whether the costs of installing the Scrubber were prudently incurred and eligible for recovery pursuant to RSA 125-O:18 and whether the resulting rates are reasonable pursuant to RSA 378:7 and 378:28. Because the estimated cost of the Scrubber increased from \$250 million in 2006 to \$450 million in 2008, the OCA asserted that it is appropriate to consider whether it was prudent to invest more than \$400 million in the Scrubber and to expect recovery of these costs through “reasonable” default

service rates. The OCA argued that a reasonable utility similarly situated to PSNH would have, or should have, known the then-present and reasonably foreseeable status of various factors would influence their ability to recover the costs through rates. Accordingly, the OCA argued that PSNH should have concluded that the Scrubber was not a prudent investment, or have sought relief from the requirement that the Scrubber be installed. The OCA argued that PSNH's interpretation of RSA 125-O:11 as requiring the installation of the Scrubber, notwithstanding the costs associated with the installation and the foreseeable effect that recovery of those costs would have on default service rates, "is inconsistent with the statutory requirements governing the Commission's rate-setting authority and the requirement that utilities recover only prudent investment." OCA Brief at 4.

The OCA concluded by saying that the Commission should permit the discovery of information sought by TransCanada in its motion to compel because PSNH's recovery of the Scrubber costs is bounded by the requirements that the costs are prudently incurred and the resulting default service rates are reasonable. *Id.* at 5.

4. Conservation Law Foundation/Sierra Club

CLF/SC argued that it is not necessary for the Commission to decide the legal interpretation of the various provisions of RSA 125-O:1-18 in order to rule on the pending discovery disputes. According to CLF/SC, at this early stage in the proceeding it is sufficient to find that certain facts may be relevant to legal determinations under the variance provision and the cost recovery provision, without reaching a final determination on whether various claims or defenses are viable. Because discovery is to be treated liberally in New Hampshire, CLF/SC urged the Commission to allow discovery and, only after the parties have gathered the facts, apply those fact to the law at a later stage in the proceeding. CLF/SC Brief at 3.

CLF/SC stated that statutory provisions are to be interpreted by first looking to their plain language and thereafter in part through reference to the statute as a whole. According to CLF/SC, when interpreting multiple provisions, one should avoid interpretations of a provision that would tend to render the other provision redundant, nonsensical or unnecessary. *Id.* at 6.

CLF/SC examined the language of the non-severability provisions in RSA 125-O:10 that states that “[n]o provision of RSA 125-O:1 through RSA 125-O:18 shall be implemented in a manner inconsistent with the integrated, multi-pollutant strategy of RSA 125-O:1 through 125-O:18” and that the provisions, therefore “are not severable.” According to CLF/SC, the non-severability provision “provides a powerful statement” that all aspects of the referenced statute are to be incorporated. *Id.* at 7.

CLF/SC said that PSNH’s position that the non-severability provision nullifies the variance provision would “sever” the variance provision from the statutory scheme, rendering it meaningless. CLF/SC claimed that PSNH’s interpretation is incorrect because the purpose of the non-severability provision is to ensure that no one provision—in this case, the variance provision—is interpreted out of the statute. *Id.*

CLF/SC argued that any interpretation of the multi-pollution program statute (RSA 125-O:1 through RSA 125-O:18) must consider the program’s emphasis on achieving improvements in air quality through flexible means. They asserted that PSNH’s interpretation of the non-severability provision (RSA 125-O:10) was contrary to the principle of flexibility because such an interpretation would give preference to some parts of the statute (such as those requiring mercury controls) over other parts (such as allowing DES to craft a flexible approach to achieving the statute’s objectives). *Id.* at 8.

CLF/SC argued that the non-severability provision also applies to the recovery of PSNH's prudent costs for the Scrubber (RSA 125-O:18). According to CLF/SC, the statute allowing a request for waiver on the grounds of "economic infeasibility" (RSA 125-O:17, II) must be read together with RSA 125-O:18 which requires that PSNH's costs must be recovered through default service rates. Based on such a reading, when the estimated cost of the Scrubber increased, a prudency determination would consider the extent to which the market for electricity among its default service customers would support the costs of the Scrubber installation. If the market would not support those higher costs, the Scrubber might become economically infeasible. *Id.* at 8.

CLF/SC concluded by stating that PSNH is attempting to avoid discovery by claiming that the variance provision was unavailable to it, and that PSNH's argument is not supported by the language in the statute. *Id.*

III. COMMISSION ANALYSIS

A. Standard Of Review

In addressing motions to compel discovery responses, we consider whether the information being sought is relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence. *See, Investigation into Whether Certain Calls are Local*, Order No. 23,658 (2001) at 5. "[I]n general, discovery that seeks irrelevant or immaterial information is not something we should require a party to provide." *City of Nashua*, Order No. 24,681 (2006) at 2. In Order No. 24,681 we stated:

In the context of civil litigation, New Hampshire law favors liberal discovery, *see, e.g., Yancey v. Yancey*, 119 NH 197, 198 (1979), and discovery is regarded as "an important procedure 'for probing in advance of trial the adversary's claims and his possession or knowledge of information pertaining to the controversy between the parties.'" *Johnston v. Lynch*, 133 NH 79, 94 (1990)

(citing *Hartford Accident etc., Co. v. Cutter*, 108 NH 112, 113 (1967)). Consistent with Superior Court Rule 35(b) regarding the scope of discovery, we require parties to show that the information being sought in discovery is relevant to the proceeding or is reasonably calculated to lead to the discovery of admissible evidence.

We review the motions and the objections in light of these principles and the statutory directive in RSA 125-O:18 that PSNH “shall be allowed to recover all prudent costs of complying with the requirements of the [mercury emissions] subdivision in a manner approved by the public utilities commission.” We will apply a liberal approach to discovery, as we consider the parties’ legal arguments concerning the application of RSA 125-O:11-18.

B. Variance Provision of the Mercury Emissions Law

At our request, the parties briefed the interpretation of the variance provision, RSA 125-O:17, and have made plausible arguments for either a narrow or an expansive interpretation of the provision. There is no dispute that RSA 125-O:17 is part of the overall statutory scheme to significantly reduce mercury emissions from coal-burning electric power plants as soon as possible. The legislature concluded that reduction of 80% or more of mercury emissions from several coal-burning electric power plants through installation of scrubber technology at Merrimack Station was in the public interest. RSA 125-O:11, I. The legislature also found that use of the scrubber technology would not jeopardize reliability and could be installed at a reasonable cost to consumers. RSA 125-O:11, V. The mercury reduction requirements were part of an integrated strategy of “non-severable components.” RSA 125-O:11, VIII.

Because our understanding of RSA 125-O:17 depends in part on the structure of the provision’s language, we restate the entire section below:

The owner may request a variance from the mercury emissions reduction requirements of this subdivision by submitting a written request to the department. The request shall provide sufficient information concerning the conditions or special circumstances on which the

variance request is based to demonstrate to the satisfaction of the department that variance from the applicable requirements is necessary.

- I. Where an alternative schedule is sought, the owner shall submit a proposed schedule which demonstrates reasonable further progress and contains a date for final compliance as soon as practicable. If the department deems such a delay is reasonable under the cited circumstances, it shall grant the requested variance.
- II. Where an alternative reduction requirement is sought, the owner shall submit information to substantiate an energy supply crisis, a major fuel disruption, an unanticipated or unavoidable disruption in the operation of the affected sources, or technological or economic infeasibility. The department, after consultation with the public utilities commission shall grant or deny the requested variance. If requested by the owner, the department shall provide the owner with an opportunity for a hearing on the request.

We read the opening paragraph of RSA 125-O:17 as a general statement that variances may be requested, but only if a request meets the criteria set forth within paragraphs I or II that follow. That is, the introductory paragraph is not an independent provision for a variance separate from the two types of variances set forth in paragraphs I and II. We then determine if the circumstances PSNH faced after enactment of the statute potentially fall within the provisions of paragraphs I or II.

Paragraph I authorizes a variance from the timetable for completion of the Scrubber installation. This is not an issue in this case, because the Scrubber was placed in service in September 2011, well before the statutory deadline of July 1, 2013.

Paragraph II authorizes a variance from the reduction requirement, which in this case is the requirement that at least 80% of the mercury emissions from PSNH's coal-burning power plant units at Merrimack Station in Bow and Schiller Station in Portsmouth be removed. Under this paragraph, in this case, PSNH would have to demonstrate that there was: 1) an energy supply crisis; 2) a major fuel disruption; 3) an unanticipated or unavoidable disruption in the operation of Merrimack Station; or 4) "technological or economic infeasibility".

Only the fourth circumstance is relevant to the facts surrounding PSNH's installation of the scrubber technology. Without concluding whether the facts would have supported the grant of a variance, a variance request could have been structured as follows: the cost of reaching 80% reduction had risen from \$250 million to over \$450 million and could no longer be obtained "at a reasonable cost to consumers" as the statute anticipated and, therefore, a variance from the 80% reduction level, or from any installation of mercury reducing technology, could have been requested. Therefore, while we agree with PSNH's statement that RSA 125-O:17 should not be used to defeat the overall purpose of the statute, the prompt and significant reduction of mercury emissions, we disagree that PSNH had no opportunity or obligation to consider a variance in the face of a significant escalation in cost. As TransCanada notes, when the Scrubber cost projections rose to nearly double the cost presumed by the Legislature when enacting the statute, PSNH, citing economic infeasibility, could have requested a variance from the 80% reduction requirement, and could have sought a lesser level of reduction, even down to no reduction at Merrimack Station, while pursuing a request to retire Merrimack Station pursuant to RSA 369-B:3-a. Retirement of Merrimack Station would effectively eliminate all emissions from the station and leave only continued emissions from PSNH's other generation units reducing PSNH's overall mercury emissions significantly.

PSNH's interpretation that the law required installation of the Scrubber irrespective of cost would have allowed PSNH, or another utility owner, to install scrubber technology costing many billions, a decision which flies in the face of common sense and would violate the principle of statutory interpretation that one avoid an illogical or absurd result when construing legislative language. *In re Johnson*, 161 N.H. 419, 423 (2011) *citing Weare Land Use Assoc. v. Town of Weare*, 153 N.H. 510, 511-12 (2006); and *In re Alex C.*, 161, N.H. 231, 235 (2010)

citing State v. Gubitosi, 157 N.H. 720, 723-24 (2008). It would not comport with the statute's express understanding that the mercury reduction requirement was part of a balanced approach that could be accomplished at a reasonable cost to consumers. Finally, to read the variance provision as PSNH urges would lessen from PSNH, or any other utility owner, the obligation to engage at all times in good utility management. *See Public Service Company of New Hampshire*, Order No. 20,794, 78 NH PUC 149, 160 (1993); and *West Swanzey Water Company, Inc.*, Order No. 25,203 (March 25, 2011) at 7.

Accordingly, we will allow discovery of PSNH's economic analyses of the Scrubber installation up to the point it was substantially complete in September 2011. Such economic analyses might include estimated costs of construction and operation, as well as income projected from the sale of power, capacity, emissions credits and any other source. Costs might also include environmental compliance costs and estimated fuel costs for Merrimack Station and PSNH's other coal burning plants. We will not, however, allow discovery of economic analyses or regulatory actions that occurred after the scrubber technology was substantially complete.

C. TransCanada's First Motion to Compel

The data requests remaining at issue in the first motion are TC 1-1 through 1-5, TC 1-12 and TC 1-14 through 1-16. These requests ask for PSNH's economic analysis, fuel forecasts, and analysis of the need for, and cost of a cooling tower, all in the context of PSNH's decision to proceed with construction of the Scrubber. Further, these data requests explore whether PSNH considered using the variance process pursuant to RSA 125-O:17.

We find that any economic analysis PSNH may have conducted and what conclusions it reached regarding the costs of the Scrubber and environmental compliance related to the

Scrubber, are reasonably calculated to lead to evidence that is relevant to our consideration of PSNH's prudence in constructing the Scrubber. Further, whether or not PSNH analyzed its options under RSA 125-O:17, and what conclusions it reached as a result of its analysis, are reasonably calculated to lead to evidence relevant to PSNH's prudence in constructing the Scrubber. As a result, we will compel PSNH to answer all remaining data requests contained in TransCanada's first motion.

D. TransCanada's Second Motion to Compel

We find that PSNH's analysis of various potential environmental compliance issues, including compliance cost estimates, are relevant to its prudence in constructing the Scrubber.³ As a result, we will require PSNH to respond to TC 3-16 regarding the Clean Water Act and wastewater issues, but not with regard to the other laws referenced in TC 3-16. We will require PSNH to respond to TC 3-17 with the exception of the sentence beginning "[p]lease include in your response reference to all discussions between PSNH or its agents and U.S.E.P.A. officials...." This sentence is an overly broad request. Further, a response to the balance of the request should provide sufficient information regarding PSNH's analysis of various environmental compliance issues.

We will require PSNH to respond to TC 3-19, but we agree with PSNH that the text following the second subpart of the question ("The trend is good....") appears to be testimony by TransCanada and requires no response by PSNH. PSNH need not respond to TC 3-20 regarding baseline mercury emissions because the referenced Air Resources Council decision does not appear to be a final determination. PSNH must respond to TC 3-21 concerning cost scenarios for various mercury reduction levels, but need not address the Air Resources Council

³ See Order 24,898 (2008) at 13-14.

decision. PSNH also need not respond to TC 3-22 regarding federal air pollution standards for coal fired electric generating facilities, because this rule was issued in 2012, well after substantial completion of the scrubber technology in 2011. Finally, we will not require PSNH to respond to TC 3-23 regarding its mercury reduction compliance strategy. PSNH's mercury reduction compliance strategy now that the Scrubber is completed is not relevant to the proceeding, nor reasonably calculated to lead to the discovery of admissible evidence.

E. TransCanada's Third Motion to Compel

The data requests contained in TransCanada's third motion to compel seek information from PSNH concerning the information it communicated to NH DES and the Legislature in 2006 regarding the preliminary nature of the Sargent and Lundy cost estimate for the Scrubber. In its motion, TransCanada claims that PSNH should be compelled to respond to data requests TC 5-4, TC 5-5 and TC 5-6 because state legislators and officials relied upon PSNH's original cost estimates when approving the mercury reduction law in 2006; and that the response to these questions will shed light on the Company's prudence in pursuing construction of the Scrubber. PSNH objected to the request, arguing that TransCanada's motion should be denied because the Legislature's decision to mandate the construction of the Scrubber in 2006 and its subsequent decision to leave the mandate unchanged is beyond the scope of this proceeding. PSNH insisted that "[w]hat state senators or representatives knew during the 2005-2006 timeframe when the Scrubber Law was considered by the Legislature is a matter the General Court itself controls." PSNH Objection to Third Motion to Compel at 13.

We previously ordered that PSNH respond to TransCanada data requests (TC 1-9) that asked for copies of any letters or other documents provided to state officials relative to the 2006 law. *See* Order No. 25,398 (August 7, 2012) at 13-14. In addition, PSNH has produced the

Sargent and Lundy cost estimate. To go further would require discovery into the thought process of elected representatives. Hence, we do not find that the answers to TC 5-4, TC 5-5 and TC 5-6 are necessary, or reasonably calculated to lead to evidence admissible in this proceeding. For the above reasons, we deny TransCanada's third motion.

Because of the unresolved discovery issues we suspended the procedural schedule by secretarial letter on October 12, 2012. Having resolved those outstanding discovery issues we order resumption of the procedural schedule as follows:

PSNH responses to Data Requests as Ordered	January 11, 2013
PSNH files updated cost schedules	January 18, 2013
Technical Session	January 30, 2013
PSNH Responses and Objections to Technical Session Questions	February 13, 2013
Staff and Intervenor Testimony	March 15, 2013
Data Requests to Staff and Intervenors	March 22, 2013
Staff and Intervenor Responses and Objections to Data Requests	April 5, 2013
Rebuttal Testimony	April 17, 2013
Settlement Conference	April 24, 2013
File Settlement, if any	May 3, 2013
Hearing on the Merits	May 14-16, 2013

Included in the procedural schedule above is a requirement that PSNH file updated cost schedules. Due to the passage of time and the completion of certain plant items, having updated cost numbers will be beneficial to all involved in the proceeding. Any questions related to the updated numbers can be addressed at the technical session that follows.

Based upon the foregoing, it is hereby

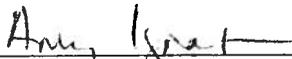
ORDERED, that TransCanada's first motion to Compel is GRANTED; and it is

FURTHER ORDERED, that TransCanada's second motion to Compel is GRANTED in part and DENIED in part; and it is

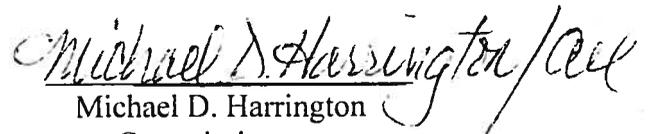
FURTHER ORDERED, that TransCanada's third motion to Compel is DENIED; and it is

FURTHER ORDERED, that the procedural schedule for completion of this docket shall be as set forth herein.

By order of the Public Utilities Commission of New Hampshire this twenty-fourth day of December, 2012.



Amy E. Ignatius
Chairman



Michael D. Harrington
Commissioner

Attested by:



Debra A. Howland
Executive Director and Secretary