

Douglas L. Patch
dpatch@orr-reno.com
Direct Dial 603.223.9161
Direct Fax 603.223.9061

Orr&Reno
Professional Association

One Eagle Square, P.O. Box 3550
Concord, NH 03302-3550
Telephone 603.224.2381
Facsimile 603.224.2318
www.orr-reno.com

April 13, 2009

Thomas S. Burack, Chairman
NH Site Evaluation Committee
c/o NH Department of Environmental Services
29 Hazen Drive, P.O. Box 95
Concord, NH 03302-0095

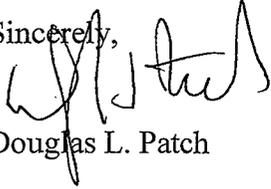
Re: Docket No. 2009-01 – Motion for Declaratory Ruling Regarding Modifications to Merrimack Station Electric Generating Facility in Bow

Dear Chairman Burack:

Attached to this letter is the Moving Parties' Response to Objection of Public Service Company of New Hampshire in the above-captioned matter.

Thank you for your cooperation. Please let me know if you have any questions.

Sincerely,


Douglas L. Patch

cc. Christopher J. Allwarden, PSNH
Enclosure

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STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

DOCKET NO. 2009-01

**RE: MOTION FOR DECLARATORY RULING
REGARDING MODIFICATIONS TO MERRIMACK STATION
ELECTRIC GENERATING FACILITY IN BOW**

**Moving Parties' Response To Objection Of
Public Service Company of New Hampshire**

The Moving Parties (Campaign for Ratepayers Rights, Conservation Law Foundation, Freedom Logistics LLC, Granite Ridge Energy, LLC, Halifax-American Energy Company LLC, TransCanada Hydro Northeast Inc., and the Union of Concerned Scientists) hereby respond to the April 1, 2009 Objection of Public Service Company of New Hampshire ("PSNH").

Introduction

PSNH's lengthy objection boils down to one main argument – that it can proceed to construct a \$450 million upgrade (the "Project") necessary to extend the useful life of a 40-year-old coal-fired power plant without even a threshold determination by this Committee on whether it should exercise its statutory obligation to ensure that environmental, economic, public health and other state interests are not harmed. PSNH has unilaterally decided not to undergo an RSA 162-H review and now asks the Committee to refuse to consider a request from other interested parties, consistent with the Committee's rules, that it at least consider whether this addition is subject to its own jurisdiction. The Committee should reject what amounts to private control of the process. PSNH has repeatedly argued in legislative settings that it should be allowed to operate and develop generation assets as a regulated utility, but now argues that it should be exempt from the kind of regulatory review that the Legislature

has required for all sizeable generating facilities, with which unregulated generating companies have complied. The Committee should consequently reject PSNH's claim that the Legislature's public interest finding in RSA 125-O totally exempts the Project from this Committee's statutory obligation to review "all environmental, economic and technical issues" associated with the Project, RSA 162-H:1, despite the plain language of RSA 125-O:13 that it must obtain all necessary approvals. This Committee is charged with asking the very questions that PSNH seeks to avoid, including how sizeable the upgrade really is and whether direct mercury-discharges into the Merrimack River can be avoided, as well as the other relevant questions that this Committee must address under the statute. The Committee should find that it has jurisdiction over the Project and proceed with the integrated and comprehensive review mandated by RSA 162-H.

A. The Moving Parties Have Standing and the Committee Should Assert Jurisdiction

PSNH argues that the Moving Parties lack "statutory standing" to seek a declaratory ruling from the Committee as to whether the Committee has jurisdiction over the Project on grounds that it is a "sizeable addition" to the Bow power plant within the meaning of RSA 162-H:5, I. PSNH posits that the only way in which this issue can be raised is by a "petition" brought by registered voters in, or the selectmen of, Bow or abutting communities, or by PSNH itself (citing RSA 162-H:2, X-a and XI). However, this Committee has an independent obligation to fulfill its obligations under RSA 162-H when appropriate, just as the Attorney General's Office has an obligation to enforce noncompliance with its terms. RSA 162-H:1, I-II. The Moving Parties have standing to bring their request to the Committee. The Legislature's decision to confer special status on towns and citizens to bring certain projects within the purview of RSA 162-H does not mean that other parties, including the Moving Parties, are precluded from raising the applicability of RSA 162-H if PSNH chooses not to do so.

The Committee's own rule, Site 203.01, says that "any person" may submit a motion for declaratory ruling. Although PSNH argues that there is no provision in RSA 162-H authorizing the Committee to entertain a motion for declaratory ruling, PSNH conveniently disregards the Administrative Procedures Act and in effect challenges the validity of the rule. RSA 541-A:16,I(d) requires an agency to adopt a rule providing for the filing of petitions for declaratory ruling. As we noted in our Motion, "declaratory ruling" is defined as "an agency ruling as to the specific applicability of any statutory provision or of any rule or order of the agency." RSA 541-A:1,V. RSA 162-H:10,VI and Chapter 364:5, Laws of 2007 required the Committee adopt rules, including specifically a rule addressing motions for declaratory rulings. Finally, rules have the force of law, RSA 541-A:22,II. This rule clearly allows any person to submit a motion for declaratory ruling and the subject of this motion is exactly the kind of issue that declaratory rulings are intended to address, i.e. the applicability of a statute to a specific undertaking. PSNH's argument should therefore be rejected.

While the Moving Parties represent different interests, each of their interests would be injured if the Committee fails to consider the issues posed by their motion for a declaratory ruling. The Campaign for Ratepayers Rights represents the economic interests of ratepayers, which will be harmed if the cost of the scrubber project and other emission control requirements makes Merrimack Station uneconomical to operate and leaves ratepayers with a new bill for stranded costs. The Conservation Law Foundation and the Union of Concerned Scientists represent environmental interests, which would be harmed if mercury waste residue from the operation of the scrubber is discharged directly into the Merrimack River. Freedom Logistics, Granite Ridge Energy, Halifax-American Energy, TransCanada and other merchant companies will be competitively harmed if a regulatory statute which applies to them is not applied to PSNH.

In a related matter, the Public Utilities Commission determined that some of the Moving Parties had standing to file a Motion for Rehearing of the Commission's decision that it did not have jurisdiction to review the costs of the scrubber project. Order No. 24,914 in DE 08-103, issued November 12, 2008. Clearly, the moving parties all have sufficient interest in the issue raised by the Motion. Thus, the motion for declaratory ruling is proper and should be granted. See also, Appeal of Richards, 134 NH 148 (1991).

PSNH's objection underscores an ultimate issue in this case, namely: who decides whether the Committee has jurisdiction to review a particular proposed addition to an existing energy or bulk power facility in New Hampshire under RSA 162-H:5, I -- is it the facility owner or the Committee? (Objection, p 26, par. 32). PSNH accurately observes that "Every prior project where the Committee has been asked to consider the question of 'sizeable additions' to an existing facility has been put before the Committee by the facility owner and operator, as the proponent of the project." This raises the question of why PSNH elected not to ask the Committee (as it did with regard to its modification to the Schiller Station). PSNH answered this question in its Objection: it did not ask the Committee because it decided unilaterally that the Committee does not have jurisdiction. The Moving Parties respectfully suggest that the Legislature did not intend to have the owners of New Hampshire power facilities decide whether or not RSA 162-H:5, I would apply to proposed additions to their facilities.

B. PSNH Cannot Exempt Itself From RSA 162-H Review

PSNH asserts that the Legislature's finding that the installation of scrubber technology at Merrimack Station was "in the public interest" effectively "eliminates any need or requirement for the Committee to engage in its own public interest review and approval of the siting of the same project." (Objection, p 7, par. 10). RSA 125-O did not limit this Committee's jurisdiction to review both the

installation and the operation of the Project under RSA 162-H. To the contrary, the 2006 scrubber law expressly requires this Committee to act because PSNH remains subject to all necessary federal, state and local approvals¹. Regardless of whether the Committee decides that siting of the Project has been predetermined by the Legislature under RSA 125-O, as PSNH suggests, the Committee's charge extends far beyond the siting of bulk power facilities and additions to them. The Committee must ensure that "the construction and operation of energy facilities is treated as a significant aspect of land-use planning in which all environmental, economic and technical issues are resolved in an integrated fashion." RSA 162-H:1, I. Thus, "siting" of the Project is only one aspect of the Committee's review. Project construction and operations will have additional considerations and consequences that also fall within this Committee's jurisdiction and that should be considered before the opportunity to influence any aspect of the Project is lost.

For example, under RSA 162-H:16, IV the Committee is charged with making specific findings that: (a) the Applicant has adequate financial, technical, and managerial capacity to assure construction and operation of the facility in continuing compliance with the certificate's terms and conditions; (b) the Project will not unduly interfere with the orderly development of the region; (c) the Project will not have an unreasonable adverse effect on aesthetics, historic sites, air and water quality, the natural environment, and public health and safety; and (d) operation is consistent with the state energy policy. While PSNH suggests that the Committee would merely be duplicating the public interest finding already made by the Legislature in RSA 125-O, Objection at 8, the language of the relevant statutes dictate otherwise. The Legislature's public interest finding, which other bodies are "encouraged to give due consideration to," RSA 125-O:13, I, related to whether the scrubber should be installed, not how it should be installed and operated in a way that preserves environmental, economic and other

¹ RSA 125-0:13, I provides in part "The achievement of this requirement is contingent upon obtaining all necessary permits and approvals from federal, state, and local regulatory agencies and bodies".

state interests. The Legislature neither reviewed these issues in any comprehensive and integrated proceeding nor made related findings. That is the Committee's responsibility under RSA 162-H.

That PSNH is subject to this Committee's review under RSA 162-H is essentially confirmed by PSNH's demonstration that it has sought other applicable approvals related to construction of the Project. Objection, 22-24. PSNH concedes that it must obtain approvals beyond that provided by the Legislature in RSA 125-O, Objection, p. 9, par. 12, but apparently contends that it is empowered to determine which state approvals are "unnecessary" under RSA 125-O:13, I. The Committee's role is even more important than that of other bodies under governing statutes because it is the type of integrated and comprehensive review of this project that no other agency or board has taken or may ever take.

In addition, although one of the most fundamental purposes of the Site Evaluation Law is "full and complete disclosure to the public" of plans for any sizeable addition, RSA 162-H:1, II, PSNH has disclosed very limited and often conflicting information on the Project. It has consistently and aggressively used the Legislature's "public interest" finding in RSA 125-O:11 as a shield against all attempts—by members of the public, ratepayers, regulators and legislators—to require "full and complete disclosure to the public of such plans." The result is that ratepayers, who will pay the bill and any stranded costs, and the public, who will bear the environmental consequences, have been systematically stymied in their efforts to understand what the scrubber project consists of and what its environmental and economic consequences will be. It should be this Committee, not PSNH, who decides what information is disclosed to the public, through this Committee's review process.

C. A Proceeding Should Be Convened to Review the “Sizeable Addition” Issue

PSNH devotes 10 pages of its Objection to its contention that the \$457 million scrubber project is not a “sizeable addition” to Merrimack Station. The Moving Parties believe this Response is not the appropriate place to address the merits of this issue, and respectfully suggest that it would be better addressed in a hearing on the merits if the Committee determines it does have jurisdiction to consider the question. However, the Moving Parties note three things:

1. Although PSNH represents (Objection p. 18, par. 23) that the scrubber-related increase in Merrimack Unit 2’s generating capacity will be “in the range of 6 to 13 MW,” there is still a significant question about what the upper bound of the anticipated output increase may be, because PSNH has provided different information to different regulatory agencies. In a June 7, 2006 letter to Robert Scott, Director of NHDES Air Resources Division, PSNH’s William Smagula put the estimated increase at 6 to 13 MW. However, PSNH’s January 31, 2009 Interconnection Request to the Administered Transmission System (queue position 291) suggests it could be as high as 32 MW measured in winter seasonal capacity.² Finally, at page 20, paragraph 25 of its Objection, PSNH notes that potential efficiencies from the new turbine could add another 4.175 MW to Merrimack 2’s gross generating capacity, for a total of up to 17.175 MW.

2. One effect of the Project would be to extend the operating life of a 40-year old coal plant for another 15 to 20 years. In its Objection (p.2, fn1), PSNH claims that not completing the scrubber modifications “would lead to a shutdown of the plant.” Seen in this light, and in consideration of the magnitude of the Project, the upgrade is not so much a modification of an existing bulk power facility as a new project to provide 450 MW of generating capacity for a period of 15 to 20

² PSNH reported in its 2007 Least Cost Integrated Resource Plan (Sept. 30, 2007) that Merrimack Unit 2’s winter capacity rating is 321.75 megawatts, and the summer capacity rating is 320 megawatts. PSNH’s January 2009 ISO request seeks an uprate to 340 megawatts in the summer (an increase of 20 megawatts), and to 353.5 megawatts in the winter (an increase of 31.75 megawatts).

years. The cost of that life-extension project – \$457 million and counting – is comparable to the cost of constructing a brand new, state-of-the-art, mercury-free natural gas-fired combined cycle plant (roughly \$1 million/MW), yet this proposal has undergone no serious regulatory review of any kind, let alone the comprehensive and integrated kind required by RSA 162-H.

3. PSNH's suggestion, at p. 16 of the Objection, that "the Scrubber Project will represent only a 0.2% increase, or a change of from 1.2% to 1.4% in buildings area coverage, as a percentage of the approximate 13.35 million square feet of land comprising the entire Merrimack Station site" is a clever but fundamentally flawed attempt to minimize the impact of what they themselves have characterized as "a monumental project" (see Motion, Attachment G). If one carefully analyzes PSNH's math they are admitting that this will add a significant increase to the buildings and facilities that already occupy the site.

D. Construction Permits Do Not Replace Committee Review of Project

PSNH asserts that the Committee's review of the Scrubber Project would be "duplicative and unnecessary" because "full and complete disclosure to the public" and "extensive and comprehensive" federal, state and local permitting reviews have already been accomplished. Objection, p. 22, par. 27, and p. 26, par. 31. While PSNH attempts to demonstrate keen attention to environmental issues with a lengthy list of construction-related permits and approvals (Objection at pp. 21-25), it makes no mention of the issue of potential discharge of mercury-laden wastewater directly into the Merrimack River as part of post-scrubber operations at Merrimack Station. Although these water discharges could have profound environmental, aquatic and human health consequences as a result of contamination and ingestion of mercury and other metals and pollutants, PSNH has not submitted applications to federal or state regulatory agencies, nor has it disclosed particulars to regulators or to the public. This hardly

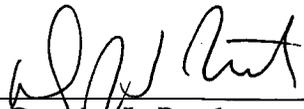
meets the public interest requirement governing this Committee's review of construction and operation of energy facilities with regard to "full and complete disclosure to the public" and "full and timely consideration of environmental consequences" in a comprehensive review in which issues are resolved in an "integrated fashion." *See* RSA 162-H:1, I, II; Objection at p. 26, par. 31.

If the Committee does not exercise its jurisdiction to review this and other environmental concerns regarding operations, as well as construction, of the Project, no regulatory body will have the opportunity to review possible alternatives to treating the wastewater on-site before this major component is constructed and operated. *See* RSA 162-H:16, IV. For example, the Committee might decide that discharging mercury into the Merrimack River at any level is unacceptable due to unreasonable adverse effects to the environment and public health, so that any mercury residue would have to be removed from the site. Even assuming that mercury discharges would be allowed and that appropriate water discharge permits and approvals could be obtained sometime in the future, the public should be apprised and this Committee should require a comprehensive review now, as permitting authorities would later be limited to reviewing how much, as opposed to whether, mercury-laden discharges into the river are acceptable.

Finally, to the extent that the Committee considers the jurisdictional question in light of other permits already obtained by PSNH, it should resist PSNH's effort to limit its role to that of approving a permit checklist provided outside of a Committee proceeding. *See* Objection, pp. 21-22.

Thus, the Moving Parties respectfully request that the Committee grant their motion for declaratory ruling and exercise its jurisdiction to determine whether the Project meets the criteria of RSA 162-H:16, IV, including whether there would be an unreasonable adverse effect on water quality and public health, RSA 162-H:16, IV(c).

Respectfully submitted,

by: 

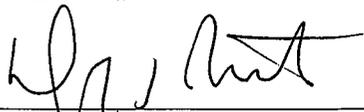
Douglas L. Patch
Duly Authorized

ORR & RENO, P.A.
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Union of Concerned Scientists

Certificate of Service

I hereby certify that on this 13th day of April 2009, a copy of the within Response was sent to Christopher J. Allwarden, Senior Legal Counsel, Legal Department, PSNH either by electronic mail or first class mail, postage prepaid.



Douglas L. Patch