STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

Docket No. 2009-01

Re: Motion of Campaign for Ratepayers Rights, *et. al.*, for a Declaratory Ruling Regarding Modifications to Merrimack Station Electric Generating Facility.

August 10, 2009

ORDER DENYING MOTION FOR DECLARATORY RULING

Introduction

On March 9, 2009, the New Hampshire Site Evaluation Committee (Committee) received a pleading entitled "Motion for Declaratory Ruling Regarding Modification to Merrimack Station Electric Generation Facility" (Motion). The Motion was filed by the following organizations: The Campaign for Ratepayers Rights, Halifax-American Energy Company, LLC, the Conservation Law Foundation, TransCanada Hydro and Northeast, Inc., Freedom Logistics, LLC, the Union of Concerned Scientists, and Granite Ridge Energy, LLC (hereinafter referred to jointly as the "Moving Parties"). Collectively, the Moving Parties consist of non-profit ratepayer and environmental advocacy groups, merchant generators, and competitive energy suppliers that do business in the State of New Hampshire. The Motion seeks a declaratory ruling with respect to Merrimack Station, an electric generating facility located in Bow, Merrimack County, New Hampshire and owned by Public Service Company of New Hampshire (PSNH). Merrimack Station was first constructed in 1960 by PSNH. It has operated since that time and, currently, has a rated capacity of 478 megawatts. Over the years, various modifications have been made to

the facility. The facility consists of two coal fired electric generation units, Unit 1 which began commercial operation in 1960 and Unit 2 which began commercial operation in 1968. In addition, the facility also consists of two combustion turbines, each rated at 22.6 megawatts, for a total facility rating of 478 megawatts. In 2006, the New Hampshire Legislature passed a law referred to as the "Scrubber Bill" that was codified at RSA 125-O:11-18. The statute mandates significant reductions (80%) in mercury emissions at coal burning electric power plants in the state. The statute also requires the installation of a wet flue gas desulfurization system (Scrubber Project) otherwise known as a "Scrubber" at the Merrimack Station facility no later than the year 2013. *See*, RSA 125-O: 11. The Legislature found that the installation of scrubber technology was in the public interest of the citizens of New Hampshire and customers of the affected sources. In accordance with RSA 125-O, PSNH has begun construction of portions of the scrubber technology at the Merrimack Station facility.

The Motion brought by the Moving Parties requests that the Committee make a declaratory ruling determining whether the construction, installation and operation of the scrubber system and associated facilities constitutes a sizable addition to Merrimack Station under RSA 162-H:5, I, and whether the Scrubber Project requires a Certificate of Site and Facility. The Moving Parties also requested the Committee to evaluate whether action should be taken against PSNH under RSA 162-H:19, which provides penalties for the willful violation of RSA 162-H. The Moving Parties assert that RSA 125-O:13 required PSNH to obtain all necessary permits, and that a determination from the Site Evaluation Committee as to whether or not the scrubber technology constituted a sizable addition was a necessary permit under RSA 125-O:13. On April 1, 2009, PSNH formally objected to the Motion for Declaratory Ruling. In the Objection, PSNH argued that RSA 125-O: 11-18 (2006 N.H. Laws 105) pre-empted the

authority of the Committee to issue a Certificate of Site and Facility with respect to the scrubber technology. PSNH also argued that the Moving Parties lacked standing to bring their Motion. Finally, PSNH argued that the scrubber system and associated facilities do not constitute a sizable addition to the Merrimack Station electric generating facility.

Procedural History

On May 8, 2009, the Committee held an initial public hearing in this docket. At that hearing, after significant deliberation, the Committee determined that it did have jurisdiction to consider the Motion for Declaratory Ruling as brought by the Moving Parties. The Committee voted to recess to the call of the Chair for an evidentiary hearing. The evidentiary hearing was originally scheduled for May 22, 2009, but was subsequently continued until June 26, 2009 with the assent of all parties. During the time leading up to the June 26, 2009 evidentiary hearing, the parties met on several occasions and, with the assistance of Committee Counsel, negotiated and prepared a stipulation of facts. The stipulation was filed with the Committee on June 25, 2009 and formally received by the Committee at the evidentiary hearing on June 26, 2009. In addition to receiving the stipulation of facts from the parties, the Committee also heard the testimony of William Smagula, Director of Generation for PSNH. At the conclusion of Mr. Smagula's testimony, the fact finding portion of the proceeding was recessed and the matter was reconvened on July 7, 2009 for the Committee's deliberations.

On July 7, 2009, the Committee met to deliberate on the merits of the Motion for a Declaratory Ruling and the objection thereto. After considering all of the arguments made by the parties, and all of the evidence submitted by the parties, the Committee ruled that the replacement of the Merrimack Station Unit 2 turbine (the Turbine Replacement Project) and the Scrubber Project were, in fact, two separate projects. The Committee further found that neither

the Scrubber Project nor the Turbine Replacement Project constituted sizable additions to the Merrimack Station facility. The Committee further decided that the determination that neither the Turbine Upgrade Project nor the Scrubber Project constituted a sizable addition to the Merrimack Station facility obviated the need for the Committee to determine whether or not the provisions of RSA 125-O:11-18 pre-empted the provisions of RSA 162-H:5, I, pertaining to sizable additions to existing facilities. Finally, the Committee determined that the costs incurred by the Committee, including legal fees and court reporter fees, should be assessed to the Moving Parties.

The "Turbine Upgrade" and the "Scrubber Project" Are Separate Projects

The initial determination to be made by the Committee is whether the "Turbine Upgrade Project" and the "Scrubber Project" are a single project or separate projects for our consideration in this docket.

The Moving Parties assert that the Turbine Upgrade Project and the Scrubber Project are a single unified project. In support of their argument, they make reference to comments and statements in correspondence between PSNH and various state agencies. Specifically, during the testimony of William Smagula, the Moving Parties referenced a June 7, 2006, letter from Mr. Smagula to the Director of the Air Resources Division of the Department of Environmental Services; *see,* MP Exh. 6; a June 12, 2006 letter from the Director of the Air Resources Division to Mr. Smagula; *see,* MP Exh. 11; a January 31, 2008 letter from Mr. Smagula to the Director of the Air Resources Division; *see* MP Exh. 7; and a March 31, 2008 letter from Craig Wright of the Air Resources Division to Mr. Smagula. In each correspondence, there are references which suggest a linkage between the Turbine Upgrade Project and the Scrubber Project. In addition, the Moving Parties asked the Committee to take administrative notice of Public Utilities

Commission Docket No. 08-145.[1] The Moving Parties claim that PSNH argued in that docket that RSA 125-0, dubbed as the "Scrubber Law", exempted the Turbine Upgrade Project from PUC review. The Moving Parties argue that the aforementioned correspondence and the PUC docket require that the Committee find that the Turbine Upgrade Project and the Scrubber Project are one and the same project.

PSNH claims that the Turbine Upgrade Project is separate from the Scrubber Project and would have been undertaken regardless of the Scrubber Project. PSNH presented the testimony of William Smagula who testified that the Turbine Project was first planned by PSNH in 2004. Transcript, June 26, 2009, p. 33. Mr. Smagula testified that the planning for the turbine upgrade project began as early as 2003 when PSNH performed its last major maintenance inside the turbine. At that time, PSNH engaged the turbine manufacturer in a dialogue about the future of the Merrimack turbine. Transcript, June 26, 2009, p. 34. PSNH continued internal discussions regarding the fate of the turbine until late 2004 when a decision was made that the turbine would be replaced. Transcript, June 26, 2009, p. 36. Mr. Smagula testified that the idea behind replacing the turbine centered upon the fact that a new turbine would not require major maintenance every five years and would likely deliver more energy output while consuming the same amount of fuel. Transcript, June 26, 2009, p. 32-33. Mr. Smagula further testified that he "knew nothing about scrubbers" in the years 2003 and 2004. Transcript, June 26, 2009, p. 170. In fact, in 2005 and as late as 2006, PSNH's mercury reduction discussions and testing focused on activated carbon injection technologies. Transcript, June 26, 2009, p. 52. However, these technologies did not test well with the existing boiler unit at Merrimack Station, yielding mercury reduction of approximately twenty percent. Transcript, June 26, 2009, p. 52 - 53. Therefore, in 2006, PSNH refocused its mercury reduction strategy on a wet flue gas

[1] The Committee granted this request. Transcript, June 26, 2008, p.143.

desulfurization system otherwise known as a scrubber. Id. In response to questions regarding various references in correspondence from Mr. Smagula that appeared to tie the Turbine Project and the Scrubber Project together, Mr. Smagula testified that the references were really nothing more than a recognition that the two projects dovetailed with each other and that the incidental increase in energy output as result of the Turbine Replacement Project would offset the parasitic load required by the Scrubber Project. As a result of this coincidence, Mr. Smagula testified that he, "as an engineer", often linked two projects in various correspondence. He testified that, in retrospect, that linkage was a mistake. Transcript, June 26, 2009, p. 165-166. In addition, PSNH points to references contained within the various correspondence and in the PUC docket that indicate that the turbine project and the scrubber project were in fact separate projects. *See*, e.g., PUC Docket No.08-145, Transcript, January 16, 2009, p. 25-26.

On this record, the Committee finds Mr. Smagula's testimony to be credible. Although the two projects may have appeared to have been linked from sporadic references in correspondence, a complete review of the record demonstrates that the Turbine Project was planned well before PSNH had begun to consider wet flue gas desulfurization technologies. Additionally, the Turbine Upgrade plan commenced before the Legislature required the construction of the Scrubber Project in 2006. The Turbine Upgrade project would have gone forward and been supported on its own economics even in the absence of the Scrubber Project. Additionally, the position taken by PSNH before the PUC is not inconsistent with the determination that the Turbine and Scrubber Projects are separate. In the PUC docket, PSNH appears to maintain that the turbine Upgrade and Scrubber Projects are separate, but that RSA 125-0, the Scrubber Law, specifically pre-empts PUC public interest review of the Turbine Upgrade Project. This argument may or may not prevail before the PUC, but it is not an

argument that requires the Committee to make a factual finding that the Turbine Upgrade and the Scrubber Projects are one unified project in this docket. Therefore, the Committee will consider each project separately and determine whether each project, on its own, constitutes a sizable addition to an existing facility.

The Scrubber Project Is Not a Sizable Addition to an Existing Facility Requiring the Issuance of a Certificate of Site and Facility.

In the Motion for Declaratory Ruling the Moving Parties argue that the Scrubber Project is a sizable addition to the Merrimack Station facility. In doing so they point to prior cases before the Committee where the Committee has considered the issue of whether or not a particular improvement of a facility constituted a sizable addition. The Moving Parties allege that the cost for the Scrubber Project substantially exceeds the cost of the recent Seabrook Station upgrade and that the Scrubber Project would increase the footprint of the existing Merrimack Station plant by 40%. Motion, p. 5. The Moving Parties also argued that the Scrubber Project should be distinguished from the Schiller Station conversion project in 2004. In closing argument, the Moving Parties asserted that the Scrubber Project is a sizable addition based upon the cost of the Project, the alleged increase in size of the project, the capacity increase of the Turbine Project (17MW) and the alleged change in and increase to the footprint of the plant primarily based upon the measurement of increased volume.

PSNH argues that the Scrubber Project is not a sizable addition. PSNH argues that the Scrubber Project exists within the confines of the existing industrial site. PSNH also argues that there is no substantial increase in power generation. By PSNH's measure, the increase in size of the facility is somewhere between 0.65 and 1.8 %--a measure that was far less than the increased size of the previously mentioned Schiller Station conversion project.

RSA 162-H:5, I, provides that a certificate of site and facility is "required for sizable additions to existing facilities." The statute, however, does not provide a definition for the term "sizable addition." Thus, the Committee must, in the first instance, interpret the meaning of the term "sizable addition".

In construing the meaning of a statute, the goal "is to apply statutes in light of the legislature's intent in enacting them and in light of the policy sought to be advanced by the entire statutory scheme". *See, State v. Dansereau*, 956 A.2d 310 (2008); *In Re Liquidation of Home Insurance Company*, 953 A.2d 443 (2008). When interpreting the meaning of a statute, one must look to the legislative intent as expressed in the words of the statute considered as a whole. *See, Liam Hooksett, LLC v. Boynton*, 956 A.2d 304 (2008); *State v. Dansereau,* 956 A.2d 310 (2008). In doing so, one must ascribe to the words of the statute their plain and ordinary meaning unless otherwise defined. *See, DuPont v. New Hampshire Real Estate Commission*, 956 A. 2d 316 (2008).

In considering the meaning of the term "sizable addition", the Committee looks to the plain meaning of words used by the legislature. "Addition" means "the act or process of adding; something added, especially a room or annex to a building". *See*, Webster's II New College Dictionary, Third Edition. The word "sizable" is defined as "having considerable size". Id. "Considerable" means: "large in amount, extent or degree" or "worthy of consideration, important". Id. These definitions are helpful to the Committee in determining whether or not the Scrubber Project is a sizable addition to the existing Merrimack station facility. In applying these definitions to the statute, the Committee finds that the Scrubber Project is not a sizable addition as that term is interpreted in the context of RSA 162-H: 5,I.

In considering whether any addition is sizable, that is, having considerable size or being worthy of consideration or important, the Committee looks at the siting statute, RSA 162-H, and its declaration of purpose. *See,* RSA 162-H:1, II (Supp. 2008). The statute states that "the public interest requires that it is essential to maintain a balance between the environment and the need for new power sources; that electric power supplies must be constructed on a timely basis; that in order to avoid undue delay construction of needed facilities and to provide full and timely consideration of environmental consequences, all entities planning to construct facilities in the state should be required to provide full and complete disclosure to the public of such plans". The statute also provides that "the siting of electric generating plants and high voltage transmission lines should be treated as a significant aspect of land-use planning in which all environmental economic and technical issues should be resolved in an integrated fashion, so as to assure the state an adequate and reliable supply of electric power in conformance with sound environmental utilization". RSA 162-H:1, II (Supp. 2008). In addition to the foregoing, it is also notable that the statute recognizes a 30MW threshold (in most instances) for the Certificate requirement. *See,* RSA 162-H: 2, II (a); RSA 162-H:2, VII and RSA 162-H, XII.

Applying this standard, it is apparent that the majority of siting considerations which the Committee normally considers, result in a determination that the Scrubber Project at the existing Merrimack Station site is not a sizable addition and, therefore, does not require a Certificate of Site and Facility. The Scrubber Project does not require the acquisition of new land. *See,* Stipulation, II (C); Transcript, June 26, 2009, p. 55. The existing site is an industrial site consisting of approximately 306.5 acres. *See,* Stipulation, I (C). The entire Scrubber Project will be installed within the confines of the existing site. *See,* Stipulation, II (C). The Scrubber Project will be located on land already in use at the facility. *See,* Transcript, June 26, 2009, p.

55. Moreover, RSA 125-0, mandates the installation of the Scrubber Project at this particular industrial site. In considering whether the Scrubber Project constitutes a sizable addition, the Committee recognizes that the facilities associated with the Scrubber Project will be positioned as close as possible to the existing generation plant. *See,* Transcript June 26, 2009, p. 56. Finally, the Committee recognizes that the Scrubber Project is a pollution control device. It will not increase electrical production at Merrimack Station. In fact, the scrubber device will constitute a parasitic load that will slightly decrease the facility's overall ability to generate electricity. *See*, Stipulation p. 2. These factors support our finding that the Scrubber Project does not fit within the definition of a sizable addition when we consider the underlying purposes of RSA 162-H. Understanding that the matter before the Committee is not an Application for a Certificate of Site and Facility, it is, nonetheless, helpful to consider the statutory findings that have been entrusted to the Committee in such cases when we look at the statute, as a whole, in order to interpret the meaning of the term "sizable addition." RSA 162-H: 16, IV, sets forth the statutory findings that the Committee must make in order to issue a certificate. Those statutory findings are intertwined with the statutory declaration of purpose as set forth at RSA 162-H: 1, II. Reviewing those criteria is instructive in the context of determining whether the Scrubber Project constitutes a "sizable addition" under the statute.

The statute requires the Committee to consider available alternatives and to fully review the environmental impact of the facility and all other relevant factors bearing on whether the objectives of the statute are best served by the issuance of a certificate. RSA 162-H:16, IV. The Committee must then go on to determine whether or not the applicant has adequate financial technical and managerial capability to ensure the construction and operation of the facility in compliance with the terms and conditions of the certificate; *see*, RSA 1620H:16, IV, (a); whether

the project will unduly interfere with the orderly development of the region with due consideration given to the views of municipal and regional planning commissions and local governing bodies; *see,* RSA 162-H: IV (a); whether the project will have an unreasonable adverse effect on aesthetics, historic sites, air and water quality, the natural environment or public health and safety; *see*, RSA 162-H:IV (a); and finally, whether operation of the project is consistent state energy policy established in RSA 378:37. *See*, RSA 162-H: 16, IV (d). In this docket, it cannot be said that requiring PSNH to acquire a certificate of site and facility will advance any of the objectives of the statute. PSNH is a regulated utility whose rates are set under the authority of the Public Utilities Commission. Thus, it could reasonably be found that PSNH has sufficient financial, technical and managerial capability to ensure compliance of Merrimack Station with the law. Again, because the existing facility is located on a heavily used industrial site, it could not be said that the addition of the Scrubber Project will unduly interfere with the orderly development of the region. Likewise, because the Scrubber Project will be installed an area of heavy industrial use, there would not appear to be any unreasonable adverse effects that will occur to the aesthetics of the site, historic sites, public health or safety air and water quality or the natural environment. In fact, the purpose of the construction of the Scrubber Project is to prevent the emission of pollutants into the air. In addition, because the Legislature specifically required the installation of the scrubber, it could not be found that the project is inconsistent with the state's energy policy as established by the Legislature. Thus, the Committee finds that when we consider the purposes of RSA 162-H, and the factors in RSA 162-H:16 that inform the issuance of certificates by the Committee under that statute, the construction of the Scrubber Project does not constitute a sizable addition to the existing Merrimack Station facility.

Similarly, the Scrubber Project is not sizable when considered in proportion to the existing heavy industrial facility. The existing site consists of approximately 306.5 acres or 13,350,000 square feet. The existing facility footprint covers 109.73 acres of the land at the site or 4,780,024 square feet. After demolition of some existing buildings and facilities, and reconstruction of new facilities and the installation of the Scrubber Project, the overall footprint of the facility will increase by 86,204 square feet. *See,* Transcript, June 26, 2009, p. 59-60. The total square footage of the footprint of the facility after installation of the Scrubber Project will increase by 1.8%. When considered against the size of the entire existing site, the increased footprint square footage is only .65%. The Committee declines to accept the Moving Parties invitation to consider the increased volume of structures at the site as the measure by which we should consider whether the Scrubber Project is a sizable addition. The Moving Parties' methodology for the calculation of increased volume is not supported by sufficient data. Moreover, the Committee is not persuaded that measuring volume presents a better standard than considering the footprint of the facility in proportion to the existing facility.

The Committee also does not find that the cost of the Scrubber Project should be determinative in determining whether or not scrubber project is a sizable addition to the existing facility. First, although there is certainly a significant cost associated with construction of the Scrubber Project (approximately $457 million dollars), there is no clear yardstick against which to measure proportional costs. The Moving Parties argue that the present book value, an accounting figure, should be compared to the cost of the project. Transcript, June 26, 2009, p. 210–211, 215. PSNH argues that if cost is to be considered it should be considered against the replacement cost of the facility which is estimated be in excess of $2 billion dollars. Transcript, June 26, 2009, p. 152. Moreover, the weakness of using cost as a determining factor is

demonstrated by the fact that the project cost is really a function of construction, labor and raw material market factors and other economic factors such as inflation. Because these factors can change prior to or even during the construction process, it is typically not possible to establish a fixed cost for a project as a basis for analysis by the Committee. Therefore, cost is not a factor that is determinative for the Committee in considering whether any particular addition is sizable under the statute.

Considering whether the scrubber project constitutes a sizable addition to the existing Merrimack Station facility, the Committee has also considered Stipulated Exhibits B, C, and D. Exhibit B is in an image depicting Merrimack Station facility as it appeared in 2008 prior to the construction Turbine Project. Exhibit D is an image which depicts how the Merrimack Station facility will look following the installation of Scrubber Project by 2013. The Committee notes that the newly added features of the facility will be constructed in an area where industrial structures already exist and will include a new chimney that is slightly higher than the already existing chimney. However, the Committee also notes that the images depicted in said exhibits are viewed from only one perspective and that perspective is designed to show as much of the new facility as possible. The majority of the Committee does not believe that the facilities pictured in Stipulated Exhibit D constitute a sizable addition to the existing facility in the light of the purpose of Scrubber Project as a pollution control device rather than to increase power generation and its relationship to the overall industrial site. For all of the reasons stated above, the Committee does not find the Scrubber Project to constitute a sizable addition pursuant to RSA 162-H:5,I.

Finally, both parties have argued that prior decisions of this Committee concerning sizable additions at other energy facilities support their respective requested relief. See, Motion,

p. 5 – 7; Motion, Attachments, D-2, E-1. It must be noted, however, that there are relatively few occasions when this Committee has been called upon to make "sizable addition" determinations. In each of the cases the Committee considered whether the proposed addition was sizable in the context of the existing facility, the nature of the existing facility and the proposed change. Each decision was based on criteria that were specific to the existing facility. Because each of the prior decisions was "fact specific," the Committee specifically indicated, in each instance, that the case should not be relied upon as precedent for future projects. The Committee finds that such comparisons are not very useful in determining whether the Scrubber Project is a sizable addition to Merrimack Station.

The Turbine Upgrade Project Is Not a Sizable Addition To An Existing Facility That Requires a New Certificate of Site and Facility.

The original turbine at Merrimack Station was installed in 1968. Transcript, June 26, 2009, p. 31. As the result of its present age, the turbine requires major maintenance on a periodic basis, every five years. The maintenance includes dismantling of the turbine in order to reach internal parts such as turbine blades. Transcript, June 26, 2009, p. 32-33. The increasing maintenance costs caused PSNH to investigate and plan to replace the turbine in order to avoid expensive maintenance and repair costs and to gain additional efficiencies from a new turbine. Transcript, June 26, 2009, p. 31–32. A new turbine was expected to deliver increased energy output while burning no more fuel than the original turbine. Transcript, June 26, 2009, p. 32. The Turbine Replacement occurred during the scheduled Merrimack Station outage during April and May 2008. Transcript, June 26, 2008, p. 27. The new turbine was designed, planned, and installed in the same location, within millimeters, of where the original turbine is located. Transcript, June 26, 2009, p. 44-45. The installation of the new turbine did not require the

construction of new housing or other buildings. The turbine was installed in the same building that existed prior to 2007. Transcript, June 26, 2009, p. 146. In addition to the installation of the new turbine, other maintenance work was performed on the unit. However, the additional maintenance work was of a standard nature that would have been required regardless of the turbine replacement. Transcript, June 26, 2009, p. 30-31; *see also*, PSNH Exhibit 3. The new turbine provides additional output capacity in an amount between 6MW and 13MW, and possibly as high as 17MW. *See,* Stipulation, Exhibit K.

The replacement of the original turbine does not constitute a sizable addition to the facility. The new turbine simply replaces the pre-existing turbine and is of similar size and located almost precisely in the same place as the pre-existing turbine. The increased output capacity of the plant from the new turbine is marginal. The replacement of the turbine eliminated the need for periodic expensive maintenance and repairs. Neither the Turbine Replacement nor the construction that accompanied it can be determined to be a sizable addition to the facility. Therefore, the Committee finds that the turbine replacement project was not a sizable addition to the existing facility and did not require the issuance of a certificate of site and facility.

The evidence in this docket also revealed that the new turbine, at least initially, did not perform as expected. Transcript, June 26, 2009, p. 38. As a result, additional work was performed on the new turbine and more work may be necessary. However, this development does not affect our finding that the Turbine Upgrade Project and the Scrubber Project are separate and distinct from each other.

Having Found No Sizable Addition, the Committee Need Not Address the Legal Effect of RSA 125-O

Having decided that neither the Turbine Upgrade Project nor the Scrubber Project is a sizable addition to the Merrimack Station facility, it is not necessary for the Committee to undertake an analysis of the pre-emptive effect, if any, that occurred as a result of the Legislative mandate set forth in RSA 125-O. While the parties have each argued about the effect that RSA 125-O should have on the Committee's deliberation, the finding that neither project is a sizable addition to the facility obviates the necessity for the Committee to rule on that issue.

The Moving Parties Shall Be Required to Pay for Legal Fees and Court Reporter Fees Incurred by the Committee

When the Motion for Declaratory Ruling was filed by the Moving Parties, the Chairman of the Committee contacted Attorney Michael J. Iacopino of Brennan, Caron, Lenehan & Iacopino. Mr. Iacopino has represented the Committee in a number of matters over the last few years as legal counsel. Attorney Iacopino corresponded with the Chairman and indicated that he was available to act as legal counsel in this matter. The Chairman authorized Attorney Iacopino to begin representation of the Committee in this matter. Attorney Iacopino's first invoice for legal services was forwarded to counsel for the Moving Parties. At that point in time, the Moving Parties filed a letter with the Committee objecting to being required to pay the legal fees of the Committee. Thereafter, PSNH filed a letter with the Committee objecting to the Moving Parties' suggestion that the Committee's legal fees should be borne by PSNH. In addition, the Committee required the services of Steven Patenaude, a court reporter, to create a verbatim recording and transcript of all of the proceedings before the Committee in this docket, as well as the secretarial services of Jane Murray.

On July 7, 2009, prior to considering the issue of the assessment of legal fees and court reporter fees, the Committee asked the parties to meet and see if they might be able to achieve agreement with respect to the payment of said fees. After a period of time, the parties reported that they could not reach an agreement. Therefore, the Committee went on to determine how the legal fees, court reporter fees and secretarial fees would be paid. It is important to note that the Site Evaluation Committee meets on an "ad hoc" basis, has no formal staff, and has no budget provided for its operation by the state.

The Moving Parties argued that they are not an "applicant", as that term is defined under RSA 162-H, or under the Committee's procedural rules. The Moving Parties also argued that assessing the Committee's legal fees and court reporter fees against them would have a chilling effect that might discourage other members of the public from raising important legal issues before the Committee. Finally, the Moving Parties argued that it was incumbent upon PSNH, under RSA 125-O, to bring this issue to the attention of the Committee, and the failure to do so is what caused the Committee to incur costs.

For its part, PSNH argued that it was involuntarily brought before the Committee by the Moving Parties attempting to invoke the Committee's jurisdiction. PSNH argued that it hasn't applied for anything in this case, but has simply answered the Motion filed by the Moving Parties. Finally, PSNH argued that it, in fact, prevailed on the issues raised by the Moving Parties in that the Committee found that neither the Turbine Replacement Project nor the Scrubber Project constituted sizable additions to the Merrimack Station facility.

RSA 162-H: 4, II, provides that "the Committee shall hold hearings as required by this chapter and such additional hearings as it deems necessary and appropriate". The Committee finds that inherent in the authority to conduct hearings is the authority to assess the costs of those

hearings. Otherwise, the Committee's enabling statute, RSA 162-H, would have provided a method and means for the funding of the operations of the Committee. In addition, it can reasonably be found that the Moving Parties are the "applicant" in the context of this docket. To "apply" means "to ask or seek aid,", Websters II New Collegiate Dictionary, Third Edition, which is precisely what the Moving Parties did in filing their Motion with the Committee. When the meaning of the word "apply" is considered, assessing the costs of the action to the Moving Parties as "applicants" is implicit in the Site Evaluation Committee's statute, RSA 162-H:4. Moreover, had the Moving Parties wished to invoke a process that would have required PSNH to pay the fees, they could have initiated a petition process pursuant to RSA 162-H: 2, X-a. The statute requires the Committee to determine whether a Certificate of Site and Facility should be issued for a project if it agrees with two or more petitioners that have undertaken the petition process. See, RSA 162-H:2, II (c); RSA 162-H:2, VII. That process includes obtaining petitions endorsed by 100 or more registered voters of the host community; 100 or more registered voters from abutting communities; or, a petition endorsed by the Board of Selectmen of the host community or two or more abutting communities. See, RSA 162-H: 2, XI. Thus, contrary to the argument of the Moving Parties, there is no "chilling effect" because another avenue was and is available for concerned citizens to bring matters before the Committee in a manner that would impose the Committee's costs, pursuant to RSA 162-H: 10, V, on the owner or proponent of the proposed project. Based upon these considerations, the Committee finds that the costs of the action, including the fees of Committee Counsel, the fees for the court reporter, and the secretarial fees shall be borne by the Moving Parties, jointly and severally, and paid in full within thirty (30) days of receipt of the final invoice.

Conclusion

Having considered all of the evidence presented by the parties, the stipulation, and PUC Docket No. 08-145, the Committee finds that:

1. The Turbine Upgrade Project and the Scrubber Project are separate and distinct from each other.
2. The Scrubber Project is not a sizable addition to the Merrimack Station facility.
3. The Turbine Upgrade Project is not a sizable addition to the Merrimack Station facility.
4. A Certificate of Site and Facility is not required for either project.
5. The Committee's costs in the form of legal fees, court reporter fees and secretarial fees are properly assessed to the Moving Parties.

Therefore, the Motion for Declaratory Ruling is hereby DENIED and the Moving Parties, on a joint and several basis, shall pay the Committee's costs, including legal fees, court reporter fees and secretarial fees, in this docket as specified in this Order.

By Order of the Site Evaluation Committee, this 10th day of August, 2009.

Thomas Burack, Chairman
Site Evaluation Committee

Clifton Below
Dissent with regard to assessment of costs only.
Clifton Below, Commissioner
NH Public Utilities Commission

Glenn Normandeau, Executive Director
NH Fish & Game Department

Harry Stewart, Director Water Division
Department of Environmental Services

Brook Dupee, ~~Commissioner~~
Department of Health & Human Services

Robert Scott, Director Air Resources
Department of Environmental Services

George Campbell, Jr., Commissioner
NH Department of Transportation

Michael Harrington, Staff Engineer
NH Public Utilities Commission

SITE EVALUATION COMMITTEE
DOCKET NO. 2009-01
RE: MERRIMACK STATION
MOTION FOR DECLARATORY RULING

Dissent of Vice-Chairman Getz

The question I address here is a narrow jurisdictional one, that is: Does the Public Service Company of New Hampshire Scrubber Project at the Merrimack Station in Bow constitute a "sizeable addition" to an existing facility pursuant to RSA 162-H:5, I, and therefore require a certificate from the Site Evaluation Committee?

With respect to the law, RSA 162-H:5 provides little guidance as to what constitutes a sizeable addition and the Committee has considered the issue so infrequently in the past that it has not developed an extensive body of opinions on which to rely. With respect to the facts, there is no real dispute between the parties as to the dimensions and cost of the Scrubber Project. The dispute centers on applying the law to the facts to determine whether the Scrubber Project equates to a sizeable addition.

Public Service Company of New Hampshire contends, among other things, that the Scrubber Project will not increase the generation capacity of the facility, that it will be built within the confines of the existing site, and that there is no change in the use of the site. It focuses on the square footage or footprint of the Scrubber Project relative to the footprint of the buildings, structures, equipment and associated facilities at the Merrimack Station, including the fly ash disposal area, cooling canal, leaching fields, rail bed and roadways. PSNH calculates that the footprint of the Scrubber Project is less than 1% of the footprint of Merrimack Station.

The Moving Parties emphasize the cost of the addition and introduce the dimension of height to the equation and focus on the cubic feet or volume of the major component structures of the Scrubber Project relative to the volume of the major existing three-dimensional structures of Merrimack Station (i.e., eliminating leaching fields, roadways, etc). Moving Parties Exhibit 9 suggests that on this basis the volume of the Scrubber Project is 56% of the volume of the Merrimack Station. However, the Moving Parties concede that they cannot attest to the accuracy of their calculation because they were relying solely on information presented in the stipulation of facts, which was incomplete for their purposes.

The Scrubber Project is costly, estimated at $457 million, and it is large, with a base area or footprint of 314,618 square feet (more than five football fields) and a maximum height of 445 feet for the chimney (40% higher than the existing 317-foot smokestack at Merrimack 2). In judging whether the Scrubber Project is sizeable, I interpret the statute to require a comparison of the relative size of the addition to the existing facility. I find that PSNH's focus on relative footprints, however, obscures the comparison between Merrimack Station as it existed and the Scrubber Project addition

because it gives too much credit to existing, effectively two-dimensional features such as roads, rail bed, leaching fields, etc., and it discounts the heights of the new structures.

In the declaration of purpose set forth in RSA 162-H:1, the Legislature stated that it is essential 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." In RSA Chapter 674, concerning Local Land Use Planning, the Legislature at 674:16, under Grant of Power, states:

I. For the purpose of promoting the health, safety, or the general welfare of the community, the local legislative body of any city, town, or county in which there are located unincorporated towns or unorganized places is authorized to adopt or amend a zoning ordinance under the ordinance procedures of RSA 675:2-5. The zoning ordinance shall be designed to regulate and restrict:

(a) The height, number of stories and size of buildings and other structures;

(b) Lot sizes, the percentage of a lot that may be occupied, and the size of yards, courts and other spaces;

(c) The density of population in the municipality: and

(d) The location and use of buildings, structures and land used for business, industrial, residential, or other purposes.

RSA 674:16 suggests that a fundamental element of land use planning concerns the "height, number of stories and size of buildings and other structures;" not merely the footprint.

The testimony in this proceeding demonstrates that the use of the site will not change and that the Scrubber Project will be built within the confines of the existing site. The testimony also demonstrates that the capacity of the facility will not increase, but the language of RSA 162-H:6, I does not plainly limit the Committee's jurisdiction to additions of capacity. In my view, the relative size of the addition is the determinative factor in this case. In that regard, an analysis such as PSNH's that relies heavily on footprint as a measure of whether an addition is sizeable is incomplete. The Moving Parties' analysis, which emphasizes height, volume and essentially the three-dimensional profile of the addition in relation to similar existing structures, appears to better reflect the purpose of land use planning. Therefore, I conclude that the Scrubber Project is a sizeable addition to Merrimack Station and I believe this conclusion is borne out by a visual comparison of Exhibits B and D of the stipulation of facts, which PSNH's witness testified is an accurate depiction of the various structures.

Thomas B. Getz
Chairman
New Hampshire Public Utilities Commission
August 10, 2009

Appeals Process

Any person or party aggrieved by this decision or order may appeal this decision or order to the New Hampshire Supreme Court by complying with the following provisions of RSA 541

R.S.A. 162-H: 11 Judicial Review. – Decisions made pursuant to this chapter shall be reviewable in accordance with RSA 541.

R.S.A. 541:3 Motion for Rehearing. - Within 30 days after any order or decision has been made by the commission, any party to the action or proceeding before the commission, or any person directly affected thereby, may apply for a rehearing in respect to any matter determined in action or proceeding, or covered or included in the order, specifying in the motion all grounds for rehearing, and the commission may grant such rehearing if in its opinion good reason for the rehearing is stated in the motion.

R.S.A. 541:4 Specifications. - Such motion shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable. No appeal from any order or decision of the commission shall be taken unless the appellant shall have made application for rehearing as herein provided, and when such application shall have been made, no ground not set forth therein shall be urged, relied on, or given any consideration by the court, unless the court for good cause shown shall allow the appellant to specify additional grounds.

R.S.A. 541:5 Action on Motion. – Upon the filing of such motion for rehearing, the commission shall within ten days either grant or deny the same, or suspend the order or decision complained of pending further consideration, and any order of suspension may be upon such terms and conditions as the commission may prescribe.

R.S.A. 541:6 Appeal. Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the decision on such rehearing, the applicant may appeal by petition to the supreme court.