

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.**

**January 15, 2010**

**ORDER DENYING MOTIONS FOR REHEARING**

On November 25, 2009, the New Hampshire Site Evaluation Committee (Committee) convened to consider a Motion for Rehearing filed by the Moving Parties in this docket (Motion), along with a Motion for Rehearing and Petition for Review filed by Peter Bonnano and others (Petition). After a public consideration and deliberation, the Committee voted to deny the Motion and the Petition. This Order memorializes the reasons underlying the Committee's denials.

**Procedural History**

On August 10, 2009, the Committee issued an Order denying the Motion of the Moving Parties for a Declaratory Ruling. The Committee's Order denying the Motion for Declaratory Ruling came after the Committee held an evidentiary hearing on June 26, 2009. At that hearing, the parties provided a partial stipulation of facts. In addition to the stipulation of facts received from the parties, the Committee also heard the testimony of William Smagula, Director of Generation for PSNH. The Moving Parties presented no witnesses. On July 7, 2009, the Committee publicly met and publicly deliberated on the merits of the Motion for Declaratory Ruling. 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 sizeable additions to the Merrimack Station facility. The Committee also found that there was no need to determine whether or not the provisions of RSA 125-O:11-18 preempted the provisions of RSA 162-H:5, I, which pertains to sizeable additions to existing facilities. In short, the Committee determined that neither the Turbine Replacement Project nor the Scrubber Project constituted sizeable additions to existing facilities and, therefore, Committee review was unnecessary. Finally, the Committee determined that the costs incurred by the Committee, including legal fees, secretarial fees and court reporter fees, should be assessed to the Moving Parties. On September 9, 2009, the Moving Parties moved for rehearing pursuant to RSA 541-A:3 and New Hampshire Administrative Rule, Site 202.29. On the same date, the Committee received a document entitled "Motion for Rehearing and Petition for Review" by Peter Bonnano and others.

#### **Motion for Rehearing filed by the Moving Parties**

In the Motion for Rehearing filed by the Moving Parties, it is alleged that the Committee's determination that the Scrubber Project was not a sizeable addition was unsupported by the facts and contrary to the law. The Moving Parties assert that the Committee failed to place appropriate weight on the cost of the project (\$457,000,000.00); failed to consider the size of the project in three dimensions and dismissed the fact that PSNH undertook modifications to Merrimack Station (increasing capacity to 17.75 megawatts) for the specific purpose to provide power to the Scrubber Project. The Moving Parties also allege that it was contrary to law for the Committee to opine that there would not be unreasonable adverse impacts on public health, safety and the environment. In making its arguments, the Moving Parties rely,

in part, on public statements made by PSNH, and also in part on recent press clippings regarding the size of the project.

The Moving Parties also sought rehearing on the issue of attorney's fees. The Moving Parties claim that the Order is contrary to law because they are not the "Applicant" in the sense that they are not seeking to construct an energy facility, and that the term only applies to an "Applicant" who is seeking to build or add on to an energy facility. The Moving Parties argue that PSNH is the only party that can be considered to be an Applicant under the statute and the administrative rules of the Committee. The Moving Parties also claim that the award of attorney's fees exceeded the statutory authority granted to the Committee. The Moving Parties argue that the Committee does not have authority to award fees against them under RSA 162-H:4, II. The Moving Parties also argue that there is no inherent authority to award fees and the Committee only has such powers as are granted to it by the statute.

### **The Bonnano Petition**

The Bonnano Petition contains a request for reconsideration and a request that the Committee review the project as a sizeable addition to an existing facility pursuant to RSA 162-H:5. The Bonnano Petition asserts that the project is sizeable based upon the size of the new "smoke stack." The Bonnano Petition supports its claim with a photograph of the stack, and asserts that the height of the stack is 445 feet and alleges that it is the tallest structure in the State of New Hampshire. The Bonnano Petition also claims that "the plain meaning of the word 'size' refers to volume in three dimensions." The Bonanno Petition also asserts that size must be measured "in three dimensions." The Bonnano Petition also repeats the claims of the Moving Parties about the need to review economic and environmental impacts, including the discharge of mercury into the Merrimack River. In addition, the Bonnano petitioners claim that their pleading



constitutes a petition as that term is defined by RSA 162-H:2, thus requiring the Committee to consider whether the Scrubber Project requires a Certificate of Site and Facility on a separate legal basis.

### **PSNH Objection**

PSNH filed a combined objection to the Motion and to the Petition.

In opposing the Motion and the Petition, PSNH asserts that the factual record unequivocally supports the finding that the Scrubber Project is not a sizeable addition to an existing facility. PSNH asserts that the Moving Parties conceded, during the proceedings, that environmental considerations do not bear on the question of whether an addition to an existing facility is considered to be sizeable. PSNH also argues that this Committee has never relied upon the consideration of volume in determining whether an addition to a facility was sizeable and asserts that the Moving Parties simply “invented” that standard which should be eschewed by the Committee, as it would constitute rulemaking outside of the requirements of RSA 541-A. PSNH also asserts that the “volume evidence” sought to be introduced by the Moving Parties was simply unreliable. In response to the motion, PSNH also asserts that the cost of the project should not be a determinative factor and that there is no increase in the electric production of the facility as a result of the Scrubber Project. PSNH also argues that the attorney’s fees were properly assessed to the Moving Parties, as the Moving Parties met the plain definition of the term “applicant” as contained in the statute.

### **Standard of Review**

Any order or decision of the Committee may be the subject of a motion for rehearing or of an appeal in the manner prescribed by statute. RSA 541:2. A request for rehearing may be requested by “any party to the action or proceeding before the commission, or any person

directly affected thereby.” RSA 541:3. The motion for rehearing must specify “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.” *Id.* Any such motion for rehearing “shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable.” RSA 541:4. “The purpose of a rehearing is to direct attention to matters said to have been overlooked or mistakenly conceived in the original decision, and thus invites reconsideration upon the record which that decision rested.” Dumais v. State of New Hampshire Personnel Commission, 118 N.H. 309, 311 (1978) (internal quotation and citation omitted). A rehearing may be denied when the Commission either finds no good reason or no good cause. The Commission may deny a rehearing when the entity requesting the rehearing fails to explain why the “new evidence” was not presented at the original hearing. *See, O’Loughlin v. New Hampshire Personnel Commission*, 117 N.H. 999, 1004 (1977); Appeal of Gas Service, Inc., 121 N.H. 797, 801 (1981).

## **Discussion**

### **A. Bonnano Petition Standing**

At the outset, it is important to determine whether Peter Bonnano and the individuals who signed the Bonnano Petition have standing to participate on rehearing in this docket. RSA 541:3 allows a motion for rehearing to be filed by any party to the proceeding or any person “directly affected” by the order. Mr. Bonnano and his co-petitioners assert three separate levels of being directly affected. Some live within view of the “smokestack” and claim the devaluation of their property; some use the river for recreational purposes; and some claim that they are affected as ratepayers who claim they will suffer from rate increases as a result of the project. Devaluation of property based upon the operation of a power plant in close proximity to

residential properties does constitute a direct effect for the purpose of a motion for re-hearing. *See, In Re Londonderry Neighborhood Coalition*, 145 NH 201, 203 (2000). The second category of petitioner asserted to be directly affected consists of those who use the river for recreational purposes. While this category is more amorphous, it tends to be more akin to homeowners in proximity than to future ratepayers. The third claim of direct injury, the potential of future rate increases, has been rejected by the Supreme Court in non-ratemaking cases before the PUC on two occasions. *See, Appeal of Stonyfield Farms*, \_\_\_ NH \_\_\_ (Decided August 5, 2009); *Appeal of Campaign for Ratepayers Rights*, 142 NH 629 (1998). In both cases, the Court found that the interest claimed to be affected, increased electric rates, would only occur in a subsequent ratemaking case and, therefore, did not directly affect the appellant and each appeal was dismissed. In this case, it is apparent that a large number of the Bonnano petitioners satisfy the standing requirement on the basis that that they assert that their property will be devalued and are thereby “directly affected” by the addition to the facility.

Through their counsel, the Bonnano petitioners also asserted that the Petition should require the Committee to review the project for a certificate of site and facility under RSA 162-H: 2, VII (g). Counsel for the Bonnano Petitioners argued that the Scrubber Project is electric generating station equipment and associated facilities and, therefore, the Bonnano Petition is a “new” petition. However, counsel misconstrues RSA 162-H: 2, VII, (b). The Scrubber Project is associated with the facility, but the facility is a pre-existing facility and is, therefore, more appropriately considered as an addition to the pre-existing facility. *See*, RSA 162-H:5, I and II. Moreover, the petition process envisioned by RSA 162-H: 2, VII, requires that petitions from at least two categories of petitioners be filed. In this case, the Committee has received only one such petition.



### **B. Bonnano Petition - Substantive Arguments**

In their Petition, the Bonnano petitioners claim that the Scrubber Project is a sizeable addition to the existing Merrimack Station facility. In support of this claim, they offer a photograph of the stack constructed at the site and argue that at 445 feet, the stack is the “tallest structure in New Hampshire.” They also suggest that the Committee erred in not considering size “in three dimensions.” Nothing within the Bonanno Petition constitutes good cause for rehearing. The Committee was fully apprised of the size of the Scrubber Project and was provided by the parties with stipulations pertaining to the size of the various components of both the existing facility and the Scrubber Project. *See*, Stipulation of the Parties, p. 2-3; Stipulated Exhibits, G – H. The stipulation pertaining to the size of various components of the Scrubber Project included height dimensions for most, if not all, components of the existing facility and the Scrubber Project including the new stack. *See*, Stipulation of the Parties, p. 2-3, Stipulated Exhibit G-H. While the Committee was not concerned with “volume”, it was fully apprised of the height of all of the components of the existing facility of the Scrubber Project, and considered the height of the project in determining that the Scrubber Project was not a sizeable addition in relation to the existing facility. The Committee heard testimony and reviewed exhibits pertaining to the size of the existing facility and the Scrubber Project in three dimensions. The Committee did not overlook evidence in the record or mistakenly determine that the Scrubber Project was not a sizeable addition in relation to the existing facility. This finding is both lawful and reasonable and, therefore, there is no good cause to grant the relief requested in the Bonnano Petition. Therefore, the Bonnano Petition is denied.

### **C. Moving Parties' Motion for Rehearing**

At the outset of our consideration of the Moving Parties Motion for Rehearing, it should be reiterated that the Committee found the testimony of William Smagula to be credible in his description of why the Scrubber Project and the Turbine Replacement Project were separate projects. Mr. Smagula testified that the increase in output afforded by the Turbine Replacement Project (17.5MW) was not achieved for the purpose of accommodating the Scrubber Project. Accepting Mr. Smagula's testimony, the Committee found that the projects were independent of each other. Nothing in the Motion persuades us to change that finding.

As indicated above, the Committee was fully apprised of the size of both the existing facility and the Scrubber Project in three dimensions, including the height of the structures. Calculation of a volumetric formula is not necessary for the Committee to determine whether a new structure is a sizeable addition. However, height is an issue that should be considered by the Committee. The Committee did, in fact, consider existing heights within the facility and the heights that would be reached by the new structures. After considering those heights, the Committee determined that the Scrubber Project was not a sizeable addition in relation to the existing facility. Nothing in the Moving Parties' Motion for Rehearing demonstrates that the Committee was mistaken or overlooked evidence in the record. The finding of the Committee was both reasonable and lawful.

The Moving Parties also seek rehearing based upon the cost of the Scrubber Project. While the Committee heard evidence of the cost of the project, there is no clear yardstick against which that cost may be compared in this case. Under the circumstances in this docket, cost simply cannot be used as a measure of whether or not the Scrubber Project is a sizeable addition to an existing facility.



The Moving Parties also claim that the Committee erred in considering the statutory factors set forth at RSA 162-H: 16, in its analysis determining that the Scrubber Project was not a sizeable addition to Merrimack Station. However, the Moving Parties misunderstand the nature in which the observations about RSA 162-H:16 were made. In its Order, the Committee endeavored to first determine what the term “sizeable addition” means in the absence of a statutory definition. Consistent with the rules of statutory construction, the Committee considered both the plain language definition of the term and the overall purpose of the statute. In determining the purpose of the statute, the Committee was required to look at the statute as a whole, including those findings that are at the heart of the determinations normally considered by the Committee. These considerations assist in divining the purpose of the statute and, therefore, inform the Committee’s determination of the definition of the term “sizeable addition.” The observations made by the Committee in its order at page 10-11 are, in fact, all attributable directly to the record in this proceeding. The Moving Parties’ unsubstantiated claim that the Scrubber Project may potentially result in the discharge of mercury into the Merrimack River was simply not supported by the evidence presented at the hearing.

Finally, the Moving Parties repeat their claim that the costs of the proceedings cannot be chargeable to them. However, the arguments made in the Motion present nothing new on the determination made by the Committee and do not amount to good cause to grant rehearing. The Moving Parties, some of whom are actually business competitors of PSNH, clearly sought the aid of the Committee and, therefore, qualify as the “applicant” in this docket. The order assessing costs to the Moving Parties was not based on matters that were overlooked or mistakenly conceived by the Committee. The order assessing costs was both lawful and reasonable and does not warrant rehearing.

### Conclusion

For the reasons set forth above, the relief sought by Peter Bonnano and his fellow petitioners is denied. Similarly, the Motion for Rehearing filed by the Moving Parties is denied.



Thomas Burack, Chairman  
Site Evaluation Committee



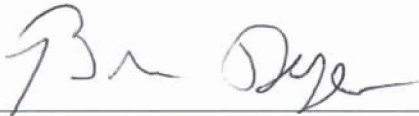
Glenn Normandeau, Executive Director  
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Robert Scott, Director – Air Resources Div.  
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Harry Stewart, Director – Water Division  
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Brook Dupee, ~~Commissioner~~  
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