

BEFORE THE STATE OF NEW HAMPSHIRE

PUBLIC UTILITIES COMMISSION

In the matter of:)
Public Service Company of New Hampshire)
DE 09-033)
Petition for Financing Approval)

Brief of the Office of Consumer Advocate

Dated: **April 10, 2009**

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I. Introduction and Procedural History

On February 20, 2009 Public Service Company of New Hampshire (PSNH) filed a petition requesting Commission approval pursuant to RSA 369 to issue up to \$150 million in long-term debt securities through December 31, 2009, to mortgage its property in connection with the issuance of long-term debt, and to enter into certain interest rate transactions. In its filing PSNH states that the proposed long term debt issuance will be used to refinance its short term debt, to finance anticipated capital expenditures, and to pay for issuance costs. PSNH also seeks authority to increase its short-term debt limit above the ten percent by an additional fixed amount of \$60 million to finance the recent ice storm expenses as well as “generation, distribution and transmission system expenditures.” In addition, PSNH states that it continues to invest in new capital additions and needs funds for working capital, including items such as emergency storm restoration, for which it relies heavily on short-term borrowings.

In the Order of Notice, the Commission stated:

The filing raises, inter alia, issues related to RSA 369, *the proposed uses of the funds* and whether the issuance of up to \$150 million of long-term debt, the mortgaging of property, the execution of an interest rate transaction and a permanent increase in PSNH’s short-term debt limits *are in the public good*.

Order of Notice, March 6, 2009 at p. 2 (emphasis added).

After the prehearing conference on March 24, 2009 the parties held a technical session.¹ During the session it became clear that despite the fact that the filing was made pursuant to RSA 369, the OCA and PSNH disagree about the scope of the Commission’s review, specifically with respect to whether the Commission must consider the uses of the proposed financing in making

¹ The Conservation Law Foundation (CLF) was not present at this session but was later granted intervenor status by the Commission.

its public good determination . As a result, the parties agreed to file briefs so that the Commission could rule on the scope of the review required in this case. This brief provides the OCA's position on this issue.

II. RSA 369:1 requires the Commission to review, for the purpose of determining whether proposed long-term debt is “consistent with the public good,” the use of the proposed long-term debt.

The requirements for the Commission's review of a petition filed pursuant to RSA 369:1 are clear.

The proposed issue and sale of securities [payable more than 12 months after the date of issuance] *will be approved by the commission where it finds that the same is consistent with the public good. Such approval shall extend to the amount of the issue authorized and the purpose or purposes to which the securities or the proceeds thereof are to be applied*, and shall be subject to such reasonable terms and conditions as the commission may find to be necessary in the public interest...².

According to the plain language of this statute, PSNH may not undertake long-term debt financing without the approval of the Commission, and a specific finding that the use of the financing is “consistent with the public good.” Id. See also RSA 369:4 (authorizing the Commission to approve the issuance of long-term debt which in its judgment “is consistent with the public good”).

It is well settled that the Commission's “public good” determination in the context of RSA 369:1 and RSA 369:4 requires consideration of the use of the proposed financing. In Appeal of Easton, the New Hampshire Supreme Court clearly enunciated that the Commission must look “beyond merely the *terms* of the proposed financing.”³ The Court also recognized the legitimacy of the Commission's consideration in this context of whether these planned uses of

² RSA 369:1 (emphasis added).

³ See Appeal of Easton, 125 N.H. 205, 211 (1984) (emphasis in original).

the financing are economically justified compared to other options available to the utility.⁴ Since Easton, the Commission has followed the Court's directives, requiring a review of RSA 369:1 petitions that includes consideration of the proposed use of the financing⁵ and whether the use is economically justified.⁶

Most utilities understand well the requirements of RSA 369:1, as well as the scope of the Commission's review. A common practice at the Commission is for utilities to request financing for major projects in advance of beginning those projects.⁷ In fact, some utilities have specifically requested an "Easton-style" review in their requests for financing approval before undertaking costly projects, knowing that the Commission must make a public interest finding on the *uses* of any proceeds from such financings.⁸ This is the approach that PSNH should also follow.⁹

⁴ See Id. at pp. 212-213 (Court recognized that considering "whether the uses to which the loan will be put can be economically justified compared to other options available" to the utility is a "legitimate mater[] for consideration under RSA chapter 369").

⁵ See, e.g., Hampstead Area Water Company, Petition for Approval of Financing, Order No. 24,864 (June 20, 2008) at p. 3, citing Appeal of Easton, 125 N.H. at 211 ("the Commission looks beyond actual terms of the proposed financing and must also consider the planned use of the proceeds and the effect on rates"); and Pennichuck Water Works, Inc., Petition for Authority to Issue Long Term Debt, Order No. 24,510 (September 2, 2005) at p. 6, citing Appeal of Easton, 125 N.H. at 211 (RSA 369:1 review requires public good determination which involves "looking beyond actual terms of the proposed financing to the use of the proceeds of those funds and the effect on rates to insure the public good is protected").

⁶ Concord Steam Corporation Petition for Approval of Issuance of Securities, Order No. 24, 673 (September 29, 2006) at p. 3, citing similar language from Easton and Appeal of Seacoast Anti-Pollution League, 125 NH 708, 711 (1984) ("[t]he New Hampshire Supreme Court has held that the Commission's role encompasses considerations beyond merely the terms of the financing and extends to the economic justifiability of the object of the financing compared to other options available to the utility.").

⁷ See, e.g., Pittsfield Aqueduct Company, Petition for Authority to Borrow up to \$750,000, Order No. 24,610 (March 31, 2006).

⁸ See, e.g., Petition of Concord Steam for Approval of Transfer of Utility Assets, Distribution System Upgrades and Steam Purchase Agreement, Docket No. DG 08-107, filed August 29, 2008, at p. 6 ("the Company requests that the Commission open a docket to conduct something akin to a so-called Easton review, which is typically conducted as part of a proceeding in which a public utility seeks authority to engage in a financing transaction, particularly where the proceeds of the financing will be used for a significant capital project. In such proceedings, the Commission has traditionally examined the prudence of the proposed use of the proceeds of the financing and the effect of such an expenditure on rates.").

⁹ The OCA believes that with respect to costs related to the Merrimack Station scrubber, PSNH should have sought this review immediately upon learning that the costs of the scrubber project had grown by more than 80%, rather than waiting until now to request an expedited review of financing after beginning construction.

PSNH has wrongly contended that the Court's legal directives and the Commission's well-settled practice for requests filed pursuant to RSA 369:1 does not apply to them in this case. Consequently, the Commission should make clear that the scope of these proceedings includes specific consideration of the planned use of the long-term financing in order to make the requisite public interest determination.

III. RSA 125-O does not negate the requirements of RSA 369.

PSNH will likely argue, as they did in DE 08-103, that the Commission is precluded from reviewing the uses of the proposed financing under RSA 125-O to the extent that the financing relates to the scrubber project at Merrimack Station.¹⁰ This argument is specious. Now that PSNH is requesting authority to issue long-term debt, which is related in part to the scrubber project, the Commission must review whether the terms, use and impact upon rates associated with that financing is consistent with the public good.¹¹

RSA 125-O requires PSNH to reduce mercury emissions by 80% by installing a "scrubber technology" at Merrimack Station no later than July 1, 2013.¹² However, this mandate is conditioned upon PSNH obtaining all necessary approvals of agencies including the Commission. Specifically, "[t]he achievement of this requirement is *contingent* upon obtaining

¹⁰ The Commission opened DE 08-103 to consider whether it had authority to review PSNH's modification to its Merrimack Station, specifically the addition of scrubber technology required by RSA 125-O:13, I. In a legal memorandum, the OCA argued that the Commission had the authority in part pursuant to RSA 369:1 to review the increased costs associated with the scrubber project. The basis for the OCA's position was the practical impossibility that PSNH could complete the scrubber project without long-term financing, given the enormity of the costs involved. In response, PSNH argued that 125-O precluded any review, under any authority, of these modifications. The Commission responded, "[w]ith regard to the question of whether the Commission should conduct an 'Easton' review of the project as part of a request for approval of financing for the project pursuant to RSA 369:1, we note that there is no pending financing approval request before us from PSNH for this project." See Investigation of PSNH's Installation of Scrubber Technology at Merrimack Station, Order No. 24,914 (November 12, 2008), at p. 14.

¹¹ See RSA 369:1, RSA 369:1, and RSA 125-O:13, I..

¹² See RSA 125-O:11, I and II; and RSA 125-O:13, I.

all necessary permits and approvals from federal, state, and local regulatory agencies and bodies.”¹³

The language of RSA 125-O:13, I, is clear; the Commission need look no further than “the plain and ordinary meaning of the words used.”¹⁴ Simply put, PSNH must receive Commission approval under RSA 369:1 and RSA 369:4 prior to securing financing, including that which is needed for projects they undertake in order to comply with RSA 125-O:11 and RSA 125-O:13.

The Legislature promulgated RSA 125-O in June 2006. At that time, RSA 369 was in effect. Therefore, when it enacted RSA 125-O, the Legislature knew or is presumed to have known about RSA 369:1 and RSA 369:4, as well as how the Court and the Commission have defined the scope of the review and approval required by these statutes.¹⁵

In addition, had the Legislature wanted to repeal or limit the effectiveness of RSA 369:1, or RSA 369:4, it could have done so expressly.¹⁶ The Legislature did not do this, nor did it add any language to RSA 125-O exempting PSNH from the previously-existing, well-defined requirements of RSA 369:1, RSA 369:4, or any other statute applicable to PSNH and requiring an approval of the Commission. To the contrary, by requiring PSNH to obtain “all necessary ...

¹³ RSA 125-O:13, I (emphasis added).

¹⁴ See, e.g., Green Crow Corp. v. Town of New Ipswich, 950 A.2d 163, 164-165 (2008) (the Court looks “to the plain and ordinary meaning of the words used in the statute and will not examine legislative history unless the statutory language is ambiguous, consider what the legislature might have said, or add words not included in the statute”).

¹⁵ Presumptions in Aid of Construction, 82 C.J.S. Statutes § 310 (updated June 2008) citing South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998) (the Supreme Court of the United States presumes that Congress is “familiar with all existing laws applicable to the subject matter, whether constitutional, statutory, or common, and intended the statute to harmonize completely with those laws and aid in the effectuation of the general purpose and design of the same”)(other cited cases omitted).

¹⁶ See, e.g., Green Crow Corp. v. Town of New Ipswich, 950 A.2d 163, 166, and 167, N.H. (2008) (the Court concluded that the legislature could have used “Notwithstanding any other provisions of this chapter to the contrary” or similar language to except the applicability of other statutory requirements if it had intended to do so).

approvals” from “state ... regulatory agencies” before taking steps to comply with RSA 125-O:13, I, the Legislature clearly contemplated and required a review by the Commission pursuant to RSA 369:1 and RSA 369:4.

Consistent with this interpretation of RSA 125-O:13, I, the Legislature also stated that in their consideration of “necessary approvals,” agencies such as the Commission “*are encouraged to give due consideration* to the general court’s finding that the installation and operation of scrubber technology at Merrimack Station is in the public interest.”¹⁷ With this language, the Legislature clearly recognized that agencies with jurisdiction over PSNH and its activities, such as the Commission, not only serve a role in the oversight of the scrubber project, but serve a unique role, specific to that agency’s charge. In other words, the Legislature recognized the Commission’s unique duty to protect utility ratepayers, a duty which the Legislature itself has delegated to the Commission.

RSA 125-O:13, I, merely “encourages” the Commission to “consider” the Legislature’s finding that the project is in the public interest in making their own separate determinations. Any suggestion by PSNH that the Commission’s public good determination, as mandated by RSA 369:1 and RSA 369:4, would duplicate the Legislature’s “public interest” finding in RSA 125-O:11, I, overlooks the plain words of RSA 125-O:13, I. Such a suggestion also ignores the simple but important fact that there have been significant developments in the scrubber project since the time that the Legislature reviewed it and made this finding, namely that PSNH estimates that the costs have increased by more than 80%.¹⁸

¹⁷ RSA 125-O:13, I (emphasis added).

¹⁸ See Investigation of PSNH’s Installation of Scrubber Technology at Merrimack Station, Order No. 24,989 (September 19, 2008) at p. 12 (Commission stated, “[w]e are sensitive to the OCA’s point that the cost estimates for

Finally, RSA 125-O must be read in the context of other statutes applicable to PSNH, including RSA 369.¹⁹ It is a long-standing canon of statutory construction that individual sections of a statute are not to be read independently, and instead must be read within a broader context to lead to a reasonable result.²⁰ This is especially true in this case, as RSA 125-O:11 *et seq.* is an environmental statute that applies to a generating plant owned by a regulated public utility. PSNH may not simply apply RSA 125-O in a vacuum, without regard to the overarching set of laws regulating public utilities and protecting ratepayers.²¹

In sum, PSNH must obtain all necessary approvals of the Commission before it may proceed with activities required to comply with RSA 125-O:13, I. Approval of PSNH's long-term financing request pursuant to RSA 369:1 and RSA 369:4 is one such required "necessary approval."

IV. This proceeding may be the last opportunity to review whether certain uses of the financing are consistent with the public good, as required by RSA 369:1 and RSA 369:4.

In Appeal of Seacoast Anti-Pollution League,²² the appellants sought to have the Commission undertake a review of alternatives to the Seabrook power plant during a financing proceeding. The Court held that because the Commission had commenced a separate contemporaneous proceeding to review alternatives, the case was distinguishable from Easton,

the scrubber project have increased approximately 80 percent from \$250 million to \$457 million in a relatively short time.").

¹⁹ See, e.g., In re Pinetree Power, Inc., 152 N.H. 92, 96 (2005) (Court defined "statutory scheme" for purposes of interpreting "public interest" requirement in RSA 369-B:3-a as including the restructuring statute, RSA 374-F).

²⁰ See *id.*, and see Green Crow Corp. v. Town of New Ipswich, 950 A.2d 163, 164-165 (2008) ("We interpret a statute to lead to a reasonable result and review a particular provision, not in isolation, but together with all associated sections' ... 'Our 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.'")(citations omitted).

²¹ It is also important to note that residential ratepayers could be especially impacted as they have fewer (if any) options to leave default energy service and avoid costs related to the scrubber.

²² Appeal of Seacoast Anti-Pollution League, 125 NH 465 (1984).

where “there was only one opportunity for such an inquiry.”²³ Unlike Appeal of Seacoast Anti-Pollution League, and similar to Easton, this financing proceeding represents the last opportunity for the Commission, and ratepayers, to consider alternatives to the use of significant ratepayer dollars in order to meet the mercury reduction requirements of RSA 125-O.

In Appeal of Seacoast Anti-Pollution League, the Commission held that “if the record before us demonstrated that the present financing proceeding provided the only opportunity to assess the alternatives . . . eliminating that inquiry would be inconsistent with our holding in Easton.” Id. That hypothetical is the reality in these proceedings. If the Commission fails to undertake the review required by RSA 369:1 and RSA 369:4, as defined by Easton and its progeny, the Commission and ratepayers will never have an opportunity to engage in any meaningful analysis of whether the PSNH’s planned use of the financing requested is economically justified compared to other options available to the utility.²⁴ Such a result would “effectively eliminate[] a realistic consideration of alternatives,”²⁵ as well as unlawfully contravene Easton.

V. The scope of these proceedings should include a complete review of the proposed use, as well as alternative uses, of PSNH’s proposed long-term financing.

For the reasons set forth above, the OCA respectfully requests that the Commission conduct its “public good” review of PSNH’s proposed financing in accordance with the express requirements of RSA 369:1 and RSA 369:4, as well as the Court’s and the Commission’s interpretations of these requirements. Such a review must include consideration of PSNH’s

²³ Id. at 474.

²⁴ See Id. (the Court held that any other opportunity to review alternatives must be meaningful and realistic). \

²⁵ Id. at 475.

proposed use of the financing proceeds, as well as consideration of alternative uses in order to determine whether PSNH's proposed use is economically justified.

Respectfully submitted,

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