

STATE OF NEW HAMPSHIRE
before the
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

Docket No. DE 09-033

Public Service Company of New Hampshire's
Petition for Increase in Short Term Debt Limit and to Issue Long Term Debt

BRIEF
OF
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
REGARDING SCOPE OF THE PROCEEDING

I. Introduction

On February 20, 2009 Public Service Company of New Hampshire (“PSNH” or the “Company”) filed a petition for the approval of the issuance \$150 million of long term debt, the mortgaging of property, execution of an interest rate transaction and an increase in the Company’s short term debt limit to 10% of net fixed plant plus a fixed amount of \$60 million. On March 6, 2009, the Commission issued an Order of Notice indicating that the filing raises issues related to RSA 369, the proposed uses of the funds and whether the issuance of \$150 million of long term debt, the execution of an interest rate transaction and an increase in PSNH’s short term debt limit is in the public good.

A prehearing conference was held on March 24, 2009, followed by a technical session. At the technical session, the parties recommended a schedule which included the filing of briefs on the scope of the proceeding by April 10, 2009. The proposed schedule was adopted by the Commission by secretarial letter dated April 1, 2009.

The issues regarding the scope of the proceeding in this docket are twofold. First, there is the overall question regarding whether the Commission is required to conduct a so-called “*Easton* hearing” in this case: an extensive examination of (1) the terms,

condition, and amount of the proposed financing; (2) the effect of successful completion of the proposed financing on the Company's capital structure, and most importantly, (3) the purpose of the proposed financing, including consideration of whether PSNH's Merrimack Station scrubber project is in the public good. Second, even if the Commission were to decide that an *Easton* hearing was appropriate, as a result of the "Scrubber Law" (2006 N.H. Laws Chapter 105) does the Commission have the authority to question whether using funds from this financing application to install the required scrubber technology at Merrimack Station is in the public interest.

PSNH contends that the Commission is not required to conduct an *Easton* hearing in every financing docket, and thus, one is not required here. More significantly, the Commission itself has held, "The Legislature has already made an unconditional determination that the scrubber project is in the public interest."¹ Thus, even if an *Easton* hearing was deemed necessary for this proceeding, the Commission is precluded from considering whether the use of funds from this financing to support the scrubber project is in the public interest.

II. Scope and Purpose of Financing Proceedings Generally

This Commission has jurisdiction over PSNH's financings pursuant to RSA 369:1, which provides that:

A public utility lawfully engaged in business in this state may, with the approval of the commission but not otherwise, issue and sell its stock, bonds, notes and other evidences of indebtedness payable more than 12 months after the date thereof for lawful corporate purposes. The proposed issue and sale of securities will be approved by the commission when it

¹ Order No. 24,898, Docket No. DE 08-103, Sept. 19, 2008, *slip op.* at 12. This Order was affirmed on rehearing by Order No. 24,914, dated Nov. 12, 2008. The Commission's decision in Docket DE 08-103 is pending appeal in the New Hampshire Supreme Court in Docket No. 2008-0897, *Appeal of Stonyfield Farm, Inc.*

finds that the same is consistent with the public good. Such approval shall extend to the amount of the issue authorized and the purposes or purposes to which the securities or 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; provided however, that the provisions of RSA 293:A shall be observed by corporations organized under the laws of this state in respect of the corporate authorization required and of other formalities to be observed.

Although RSA 369:1 provides jurisdiction over utility financings, the New Hampshire Supreme Court has long recognized as public policy that the owners of a utility do not surrender to the Commission their rights to manage their own affairs merely by devoting their private business to a public use. In *Grafton County Electric Light & Power Co. v. State*, 77 N.H. 539 (1915), the Court construed the phrase “public good” within the meaning of a public utilities statute substantially similar to the forerunner of RSA 369:1:

“If it is reasonable that a person or corporation have liberty to take a certain course of action with his or its property, it is....for the public good. It is the essence of free government that liberty not be restricted save for sound reason. Stated conversely, it is not for the public good that public utilities be unreasonably restrained of liberty of action, or unreasonably denied the rights as corporations which are given to corporations not engaged in public service.” *Id.* at 540.

The primary purpose of RSA 369:1 is to avoid overcapitalization, and the prime test is not to permit the capital issues to exceed, at least so much as to affect the public interest materially, the fair cost of the property reasonably requisite for present or future use, plus working capital and any other authorized requirements. *Petition of the N.H. Gas and Electric Company*, 88 N.H. 50, 55 (1936); Charles F. Phillips, The Regulation of Public Utilities, Public Utilities Reports, Inc. (2nd printing, July 1985), at 211. A secondary purpose is control of the capital structure, which can impact the cost of capital and related issues. Phillips at 219-228. The significance of financial regulation is largely

historical, as maturity of the business system, development of uniform systems of account, market and other factors have, for all practical purposes eliminated the financial and accounting abuses of the pre-holding company act era. Phillips at 193, 228.

As a result, the issuance of securities for one or more of the purposes specified by statute² is normally approved by the Commission as a matter of course. A. J. G. Priest, Principles of Public Utility Regulation, (1969) Vol. 2, pp. 470-471. PSNH, for example, has issued over \$600 million in securities since 1991 without a comprehensive inquiry into a proposed financing. Detailed inquiry into a proposed security issuance is the exception, not the rule. *Id.*

III. New Hampshire Supreme Court Guidance Regarding the Scope of Financing Proceedings

The New Hampshire Supreme Court provided guidance regarding the scope of financing proceedings in a series³ of 1980's cases dealing with the Seabrook Nuclear Plant. The Court's message in all of those cases is the same: the Commission has a duty to determine whether, *under all the circumstances*, the financing is in the public good – a determination which includes considerations beyond the terms of the proposed borrowing (emphasis added). *See e.g., Appeal of Roger Easton*, 125 N.H. 205, 208 (1984); *Appeal of Seacoast Anti-Pollution League* (hereinafter “*SAPL I*”), 125 N.H. 465 (1984). Said another way, “a financing in the public good must be one ‘reasonably’ to be permitted

² To acquire property; to construct, expand or improve facilities; to improve or maintain service; to discharge or refund indebtedness; to reorganize or readjust indebtedness or capitalization; for retirement of, or in exchange for, outstanding securities; and for the reimbursement of moneys not obtained by the issuance of securities (citing detailed California statute).

³*Appeal of Public Service Company of New Hampshire*, 122 N.H. 1062 (1982); *Appeal of Roger Easton*, 125 N.H. 205 (1984); *Appeal of Seacoast Anti-Pollution League*, 125 N.H. 465 (1984); *Appeal of Seacoast Anti-Pollution League*, 125 N.H. 708 (1985); *Appeal of Conservation Law Foundation*, 127 N.H. 606 (1986).

under all the circumstances of the case” and the object of the financing must be reasonably required for use in discharging a utility company’s obligation of providing safe and reliable service. *Appeal of Conservation Law Foundation of New England, Inc.*, 127 N.H. 606, 614 (1986).

“When and how an Easton determination must be made will necessarily vary with the circumstances. On the one hand the PUC need not allow relitigation of such a determination when there is no reason to believe that there has been a material change of facts from the time of a prior determination. On the other hand, when there are reasonable grounds to believe that such facts have changed, the commission has a duty to reconsider prior determinations of the public interest that may have been rendered obsolete.” *SAPL I* at 474.

In *Appeal of Public Service Company of New Hampshire*, 122 N.H. 1062 (1982) the Supreme Court also found that the Commission had many options to address *Easton* issues. Most importantly, in *Appeal of PSNH*, the Court found that a combination of (1) the bulk power site evaluation committee approval of Seabrook Station, (2) a clearly enunciated state policy favoring the completion of both Seabrook units, (3) the doctrine of “vested rights” and (4) the existence of the anti-CWIP statute, preventing recovery of the costs associated with cancelled plants, the Commission could not impose sweeping conditions preventing the financing of Seabrook Unit II. *Id.* This case is more directly on point with the current circumstances than *Appeal of Easton*, and is consistent with the Commission’s investigation and order in Docket DE 08-103 regarding the Merrimack scrubber.

Thus, per the cited Supreme Court precedents, an *Easton* hearing is not necessary in every financing docket. This Commission has recognized that fact by foregoing such an *Easton* process in financing proceedings involving PSNH since 1991. As (per *Phillips*) such an inquiry is the exception, not the rule, there is no legal mandate to

conduct an *Easton* inquiry here. The lack of need for such an inquiry is even stronger when the only subject in contention – the Merrimack scrubber project – is outside the bounds of such an inquiry, as discussed below. The Commission can review in the ordinary course the (1) the terms, condition, and amount of the proposed financing, and (2) the effect of successful completion of the proposed \$150 million financing on the Company’s capital structure, without a comprehensive *Easton* review.

IV. The Commission Lacks Authority to Determine Whether the Merrimack Station Scrubber Project is in the Public Interest

The facts and circumstances in this case clearly indicate that an *Easton* inquiry is being sought in this routine finance proceeding for only one reason – the Merrimack Station scrubber project.⁴ The Commission has already

“DECIDED, that, as a result of the Legislature’s mandate that the owner of Merrimack Station install scrubber technology by a date certain, and its finding pursuant to RSA 125-O:11 that such installation of scrubber technology at PSNH’s Merrimack Station is in the public interest of the citizens of New Hampshire and the customers of the station, the Commission lacks the authority to make a determination... as to whether this particular modification is in the public interest..”⁵

Thus, even if an *Easton* hearing was deemed necessary for this proceeding, the Commission is precluded from considering as part of that inquiry whether the use of funds from this financing to support the scrubber project is in the public interest.

RSA 125-O:11, I, enacted in 2006, sets forth the New Hampshire Legislature’s finding that it is in the public interest to achieve significant reductions in mercury

⁴ It should be noted that this financing proceeding is not a prudence review for expenditures made by PSNH in the course of its utility business. The Commission has noted the interplay between these various issues in Order No. 24,898, Docket No. DE 08-103, Sept. 19, 2008, *slip op.* at 11, where it held, “We observe here that the timing of obtaining financing and the resulting effects on rates, terms and conditions of such financing are issues that may fairly be raised in a prudence proceeding.”

⁵ Order No. 24,898, Docket No. DE 08-103, Sept. 19, 2008, *slip op.* at 13.

emissions at the coal burning electric power plants in the state as soon as possible, and that to accomplish this objective, the best known commercially available technology shall be installed at Merrimack Station no later than July 1, 2013. RSA 125-O, II establishes that the best known commercially available technology is a wet flue gas desulphurization system, known as scrubber technology. RSA 125-O, V finds that the installation of scrubber technology will not only reduce mercury emissions significantly, but will do so without jeopardizing electric reliability and with reasonable costs to consumers. RSA 125-O, VIII indicates that the mercury reduction requirements set forth in this subchapter represent a careful balancing of cost, benefits, and technological feasibility and shall be viewed as an integrated strategy of non-severable components. RSA 125-O:13 requires PSNH to install and have operational scrubber technology to control mercury emissions at Merrimack Units 1 and 2 no later than July 1, 2013. RSA 125-O:13, IX provides that PSNH shall report by June 20, 2007 and annually thereafter to the legislative oversight committee on electric utility restructuring, and the chairpersons of the house science, technology and energy committee and the senate energy and economic development committee on the progress and status of installing and operating scrubber technology, including any updated cost information. Finally, RSA 125-O:18 specifies the manner costs associated with the installation of scrubber technology will be recovered in today's competitive market. RSA 125-O makes it clear that the Legislature has performed the *Easton* inquiry in this case, and there is both no jurisdiction and no need for the Commission to revisit the issue.

There is no question that the legislature carefully considered the provisions of RSA 125-O. It is undisputed that PSNH has moved forward with the installation of

scrubber technology and has reported its progress to the Legislature annually as directed by the statute. Furthermore, the Legislature has considered various matters related to the scrubber in the current legislative session and maintains oversight of PSNH's compliance with RSA 125-O. Most recently, on April 8, 2009 the New Hampshire Senate voted 21-1 to defeat SB 152, a bill that sought to re-examine and possibly halt the scrubber project. This vote is an affirmation of the Legislature's commitment to its 2006 mandate to significantly reduce emissions of mercury from PSNH's power plants.

Utilizing alternative options to an *Easton* inquiry noted by the Supreme Court in *Appeal of PSNH*, pursuant to RSA 365:5 and 365:19 the Commission directed PSNH to file by September 12, 2008 a comprehensive status report on its installation plans, a detailed cost estimate for the project, an analysis of the anticipated effect of the project on energy service rates, and an analysis of the effect on energy service rates if Merrimack Station were not in the mix of fossil and hydro facilities operated in New Hampshire. PSNH expeditiously provided the requested information on September 2, 2008.

After consideration of legal issues associated with RSA 125-O and the Commission's oversight of the scrubber project, the Commission found "that the Legislature has presumptively determined the scrubber to be in the public interest,"⁶ and that the Commission's authority is limited to determining at a later time the prudence of the costs of complying with the requirements of RSA 125-O and the manner of recovery of those costs.⁷ That determination is equally applicable to an *Easton* inquiry in this finance proceeding.

⁶ Order No. 24,898, Docket No. DE 08-103, Sept. 19, 2008, *slip op.* at 11.

⁷ *Id.* at 13.

“The Legislature has already made an unconditional determination that the scrubber project is in the public interest”⁸ and required PSNH to install such technology at Merrimack Station. It cannot be in the public interest to condition or prevent PSNH from financing the construction of this project which is mandated by law and undisputedly found by the Legislature to be in the public interest.

Neither the legislative determination that the scrubber is in the public interest nor the statutory requirement that PSNH install scrubber technology to be operational by 2013 can be modified or eliminated via an *Easton* inquiry. The Commission’s own conclusion in Order No. 24,898 is dispositive of this issue:

We conclude that the proper interpretation of the conflicting statutes in this situation is that the Legislature intended the more recent, more specific statute, RSA 125-0:11, to prevail. We do not find it reasonable to conclude that the Legislature would have made a specific finding in 2006 that the installation of scrubber technology at the Merrimack Station is in the public interest, set rigorous timelines and incentives for early completion, and provided for annual progress reports to the Legislature, while simultaneously expecting the Commission to undertake its own review, conceivably arrive at a different conclusion, and certainly add significant time to the process. If we concluded otherwise, we would be nullifying the Legislature’s public interest finding and rendering it meaningless.⁹

Under these circumstances, there is no reason nor authority to conduct an *Easton* type investigation regarding the Merrimack scrubber project.¹⁰

⁸ *Id.* at 12.

⁹ *Id.* at 9 (internal footnote deleted).

¹⁰ As the Commission has held, the statutory mandate for PSNH to install scrubber technology at Merrimack Station is unconditional. *Id.* at 12. Even if the Commission decided to hold an *Easton* inquiry, and if based on such an inquiry the Commission were to prohibit PSNH from using the funds from this financing to pay for scrubber installation costs, the underlying statutory mandate to install the scrubber will remain. Thus, PSNH would be forced to use other, likely less economic means to pay for the scrubber’s construction costs in order to comply with governing law. This would ultimately have a detrimental impact on rates.

V. Conclusion

The Commission's responsibility in this case is to determine whether, *under all the circumstances*, PSNH's proposed \$150 million long term financing is in the public interest. On its face, RSA 125-O undisputedly establishes that the Legislature considered virtually all aspects of the installation of scrubber technology at PSNH's Merrimack Station – including the manner in which prudently incurred scrubber costs would be recovered through rates, and determined it was the preferred option and that its prompt installation is in the public good. The Commission investigated PSNH's installation of scrubber technology at Merrimack Station, and recognized the Legislature's authority to make these findings, as well as the significance of them, in its decisions in Docket DE 08-103.

The Legislature's findings cannot be eliminated or modified via a scrubber focused *Easton* inquiry. Under these circumstances, a comprehensive *Easton* inquiry is not required. However, the Commission can and should conduct its standard inquiry into the (1) the terms, condition, and amount of the proposed financing; and (2) the effect of successful completion of the proposed \$150 million long term financing on the Company's capital structure.

Respectfully submitted

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

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