

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 09-033

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Petition for Increase to Short Term Debt Limit and to Issue Long Term Debt

Order Defining Scope of Proceeding

ORDER NO. 24,979

June 19, 2009

I. PROCEDURAL HISTORY

On February 20, 2009, Public Service Company of New Hampshire (“PSNH” or the “Company”) filed a petition for the approval of the issuance of up to \$150,000,000 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 ten percent of net fixed plant plus a fixed amount of \$60,000,000. The Commission issued an Order of Notice on March 6, 2009 scheduling a prehearing conference for March 24, 2009.

On March 10, the Office of Consumer Advocate (OCA) filed a letter stating that it would be participating in the docket on behalf of residential ratepayers pursuant to RSA 363:28. PSNH filed updated attachments to its petition on March 12, 2009. Granite State Electric Company d/b/a National Grid (National Grid) and Conservation Law Foundation (CLF) filed petitions to intervene on March 19, 2009.

National Grid’s petition to intervene was granted at the prehearing conference. PSNH filed an objection to CLF’s motion to intervene on March 24, 2009, prior to the prehearing conference. CLF did not attend the prehearing conference and the Commission stated that it needed additional information from CLF before deciding CLF’s petition to intervene. CLF

provided additional information on April 3, 2009. We find that the information provided by CLF demonstrates that it has an interest affected by this proceeding and we therefore grant its petition to intervene.

Following the prehearing conference, Staff and the parties met in a technical session to establish a procedural schedule. Following the technical session, Staff reported on March 25, 2009, that the OCA took the position that the Commission should conduct an extensive investigation of the terms and conditions of the financing, including whether the use of the proposed funds is in the public good pursuant to RSA 369:1, consistent with the review described by the Supreme Court in *Appeal of Easton*, 125 N.H. 205 (1984). Staff further reported that PSNH asserted that the instant filing is no different than similar petitions where such investigations were not done, and disagreed with broadening the scope of the proceeding. To address this disagreement, Staff and the parties agreed to a procedural schedule that allowed the parties to file briefs on the scope of the proceeding by April 10, 2009. The Commission approved the procedural schedule by a secretarial letter dated April 1, 2009. PSNH, the OCA and CLF filed briefs as scheduled. National Grid and the Staff did not file briefs. On April 16, 2009, the OCA filed a motion for extension of certain discovery deadlines which the Commission addressed in part by a secretarial letter dated April 22, 2009.

On June 4, 2009, CLF submitted a motion seeking to supplement its memorandum of law in which it contends that “new facts” have developed, namely, decisions by the Public Service Commission of Wisconsin and the Federal Energy Regulatory Commission (FERC). PSNH objected to CLF’s motion on June 11, 2009, arguing, among other things, that the actions of the Wisconsin Public Service Commission and FERC “are neither relevant nor material to the pending issue of scope.”

II. POSITIONS OF THE PARTIES

A. Public Service Company of New Hampshire

In its brief, PSNH noted two issues regarding the scope of this proceeding. The first issue being whether the Commission should conduct an *Easton* review – an extensive examination of the terms, conditions and amount of the proposed financing; the effect of the successful completion of the proposed financing on the Company’s capital structure; and the purpose of the proposed financing, including consideration of PSNH’s Merrimack Station pollution control project – to determine if the financing is in the public good. PSNH Brief at 1-2. Second, even if it determines that an *Easton* review is appropriate, whether the Commission has authority to question whether any funds from this financing destined for the pollution control installation at Merrimack Station is in the public interest given the Legislature’s finding that the scrubber installation at Merrimack Station is in the public interest. RSA 125-O:11, I. PSNH Brief at 2.

By way of background, in 2006 the General Court passed Chapter 105, Laws of 2006, later codified as RSA 125-O:11-18 and referred to as the “Scrubber Law,” which states, in relevant part, that PSNH “shall 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, I. The “scrubber technology” referred to is a “wet flue gas desulfurization system” meant to curb the emission of, primarily, mercury from PSNH’s Merrimack Station. RSA 125-O:11, I, II. Significantly, the Legislature also determined that “[t]he installation of such technology is in the public interest of the citizens of New Hampshire and the customers of the affected sources.” RSA 125-O:11, VI.

With respect to the first issue identified by PSNH, it contended that the Commission is not required to conduct an *Easton* hearing in every financing docket, and that one is not required for the instant filing. PSNH Brief at 2. Regarding the second issue, PSNH argued that because the Commission held in *Investigation of PSNH Installation of Scrubber Technology*, Order 24,898 in Docket No. DE 08-103 (Sept. 19, 2008), that the Legislature has already made an unconditional determination that the scrubber installation at Merrimack Station is in the public interest, the Commission is precluded from considering whether the use of the funds from this financing to support that project is in the public good. PSNH Brief at 6-9.

The Company acknowledged that RSA 369:1 gives the Commission jurisdiction over PSNH's financing. PSNH Brief at 3. PSNH opined that the primary purpose of RSA 369:1 is to avoid overcapitalization of a public utility by disallowing capital issues that exceed the fair cost of the property reasonably requisite for present or future use, plus working capital and other requirements. PSNH Brief at 3. PSNH pointed out that, despite the Commission's jurisdiction over utility financings, the New Hampshire Supreme Court has recognized that, as a matter of public policy, utility owners do not surrender to the Commission their right to manage the business merely by devoting their private business to public use. PSNH Brief at 3; *see Grafton County Electric Light and Power Co. v. State*, 77 N.H. 539 (1915).

PSNH also noted that the Supreme Court provided guidance regarding the scope of financing proceedings in a series of cases from the 1980s regarding the Seabrook Nuclear Plant. PSNH Brief at 4; *see Appeal of Public Service Company of New Hampshire*, 122 N.H. 1062 (1982); *Appeal of Easton*, 123 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 (1984); *Appeal of Conservation Law Foundation*, 127 N.H. 606 (1986). According to PSNH, the Court's holdings

in those cases confirm that the Commission has a duty to determine, under all of the circumstances, whether a public utility financing is in the public good, and that such a determination includes considerations beyond the terms of the proposed borrowing. PSNH Brief at 4. Additionally, PSNH stated that the Court made it clear that to be found in the public good the object of the financing must be reasonably required for use in discharging a utility's obligation to provide safe and reliable service. PSNH Brief at 4-5. Nonetheless, PSNH asserted that an *Easton* review is not necessary in every financing docket, and is not needed in the instant proceeding. PSNH Brief at 5-6.

According to PSNH, an *Easton* review is not necessary in this case because the Commission has many options to address *Easton* issues. PSNH Brief at 5; *see Appeal of Public Service Company of New Hampshire*, 122 N.H. 1062 (1982). For example, the Court has found that the combination of: a bulk power site evaluation committee approval of a power plant; a clear state policy favoring completion of the plant; the doctrine of "vested rights;" and the existence of a statutory bar to recovery of costs associated with construction work in progress, barred the Commission from imposing sweeping conditions on the financing of Seabrook Unit 2. *Id.* at 1068-72. PSNH asserted, based upon this case and others, that the Commission need not conduct a comprehensive *Easton* investigation in every financing docket to decide whether a financing is in the public good. PSNH Brief at 5-6. PSNH also noted that the Commission has foregone an *Easton* review of any of the Company's financing proceedings, totaling more than \$600,000,000, since 1991. PSNH Brief at 4.

PSNH stated its belief that an *Easton* inquiry is being sought in this finance proceeding for purposes of reviewing the Merrimack Station scrubber project. PSNH Brief at 4. PSNH claimed, however, that the Commission's investigation and order in Docket No. DE 08-103

Investigation of PSNH Installation of Scrubber Technology, in which the Commission used alternatives to an *Easton* inquiry by initiating an investigation and directing PSNH to file a status report and other detailed information regarding the scrubber installation, constitutes an acceptable alternative to an *Easton* investigation, thus obviating the need for a broad inquiry in the instant docket. PSNH noted that the Commission's review of legal issues in Docket No. DE 08-103 resulted in the conclusion that the Commission is precluded from determining whether the scrubber installation is in the public interest, though the Commission could later determine whether the costs incurred by PSNH in complying with RSA 125-O were prudent and could provide the manner of recovery of such prudent costs. PSNH Brief at 8; RSA 125-O:18; RSA 378:28.

Regarding the use of the proceeds of this financing for the public good, PSNH pointed out that the Commission has already decided that it "lacks the authority to make a determination . . . as to whether this particular modification is in the public interest." Order No. 24,898 (Sept. 19, 2008) at 13. As a result, PSNH contended that even if an *Easton* review is deemed necessary for this proceeding, the Commission is precluded from considering as part of that inquiry whether using funds from this financing to support the scrubber project is in the public interest. PSNH Brief at 6.

PSNH concluded by asserting that the Commission should conduct its standard inquiry into the terms, conditions and amount of the proposed financing and the effect of the successful completion of the proposed \$150,000,000 long term financing on the Company's capital structure. PSNH Brief at 10.

B. Conservation Law Foundation

CLF reiterated that RSA 369:1 and RSA 369:4 require the Commission to determine whether a utility's proposed financing is in the public good, and that such a determination involves a review of facts, including the proposed uses of the funds, beyond the terms of the financing. CLF Memo at 1. CLF pointed out that the Commission's Order of Notice in this docket expressly provides that the docket involves issues related to RSA Chapter 369, the proposed use of the funds, and whether the requested issuance of long-term debt and other relief requested by PSNH are in the public good. CLF Memo at 1. In its memorandum, CLF stated that RSA 125-O:11-18 are not intended to shield from review PSNH's financing in connection with the installation of scrubber technology, or any other proposed use of the funds. CLF Memo at 2.

In addition, CLF pointed out that some of the funds are destined for uses at Merrimack Station apart from installation of the scrubber technology. CLF Memo at 2. CLF stated that the post-modification output of Merrimack Station will increase by a factor that has not yet been determined, and that PSNH is working to extend the operating life of the facility resulting in emission increases for sulfur dioxide, nitrogen dioxide, carbon dioxide and particulates over the 2006-2007 baseline measurements. CLF Memo at 3-7. According to CLF, this would lead to increased air pollution with resulting adverse health effects, including respiratory illness and premature death. CLF Memo at 4.

CLF noted that in 2008 PSNH spent at least \$11,400,000 on modifications to Merrimack Station including the installation of a new turbine and generator. CLF Memo at 7. According to CLF, these costs, and the costs associated with capital improvements at Merrimack Station in the aggregate, raise substantial questions about whether the public good is served by "continuing to

pour hundreds of millions of dollars into Merrimack Station.” CLF Memo at 7. CLF stated that the Commission has a duty to review these costs. CLF Memo at 7.

According to CLF, there are alternatives to continuing long-term reliance on Merrimack Station that are economically, technically and environmentally feasible. CLF Memo at 7-8. CLF opined that currently available feasible alternatives to Merrimack Station’s continued operation include purchasing power from the market, energy efficiency savings, conversion of the facility to permit the burning of biomass, the addition of renewable generating resources, building a new combustion turbine or a combined cycle facility at Merrimack Station, and transmission upgrades. CLF Memo at 8.

CLF concluded by stating that the Commission should conduct an *Easton* review of PSNH’s proposed financing that includes a determination whether the proposed uses of the funds would serve the public good. CLF Memo at 9.

C. Office of Consumer Advocate

In its brief, the OCA stated that, pursuant to RSA 369:1, the Commission must review the proposed use of the long-term debt to determine whether the issuance of such debt is consistent with the public good. OCA Brief at 2. The OCA stated that *Easton* also requires the Commission to consider whether the planned uses of the financing are economically justified. OCA Brief at 3. The OCA opined that PSNH should follow the practice of other utilities and request approval of financing before undertaking costly capital projects. OCA Brief at 3.

Further, OCA stated that RSA 125-O:11-18 do not preclude the Commission from reviewing the uses of the proposed financing to determine whether the financing is in the public good to the extent that the financing relates to the scrubber project at Merrimack Station. OCA Brief at 4. According to the OCA, the public good finding required by RSA 369:1 is one of the

“necessary permits and approvals” PSNH must obtain pursuant to RSA 125-O:13, I, to proceed with the installation of the scrubber technology at Merrimack Station. OCA Brief at 4-5. The OCA said that because RSA 369:1 was in effect at the time RSA 125-O:11-18 were enacted, it is presumed that the Legislature knew that PSNH needed to obtain the Commission’s approval for financing before investing in the scrubber installation. OCA Brief at 5.

The OCA noted that RSA 125-O:13, I, states that agencies, such as the Commission, are encouraged to give “due consideration” to the Legislature’s finding that the installation and operation of the scrubber technology at Merrimack Station is in the public interest in their consideration of necessary permits and approvals. OCA Brief at 6. The OCA points out that because the Legislature only “encouraged” the Commission to consider its public interest finding, RSA 125-O:13, I, the Commission is not precluded from making its own determination as to whether the issuance of long-term debt is in the public good pursuant to RSA 369:1. OCA Brief at 6.

Finally, the OCA stated that this proceeding may be the last opportunity for the Commission to review whether certain uses of the requested financing are consistent with the public good, and to consider whether there are alternatives to the use of ratepayer dollars in order to meet the mercury reduction requirements of RSA 125-O:11-18. OCA Brief at 8. Should the Commission fail to review the financing, OCA contended that “the Commission and ratepayers will never have an opportunity to engage in any meaningful analysis of whether the PSNH’s [*sic*] planned use of the financing requested is economically justified compared to other options available to the utility.” OCA Brief at 8. In conclusion, the OCA requested that the Commission conduct its public good review of PSNH’s proposed financing in accordance with RSA 369:1 and RSA 369:4, as well as the Court’s and the Commission’s interpretations of these

requirements, including consideration of PSNH's proposed use of the financing proceeds, and consideration of alternative uses in order to determine whether PSNH's proposed use is economically justified. OCA Brief at 8-9.

III. COMMISSION ANALYSIS

As a threshold issue we are asked to clarify the scope of review of PSNH's financing request. Our determination of the public good in connection with utility financings is governed by RSA 369:1, and the cases interpreting that section. Before addressing the arguments regarding the appropriate scope of review for the current PSNH financing request, we find it useful to review a series of cases cited by the parties to this proceeding.¹

In 1982, the Supreme Court decided *Appeal of Public Service Company of New Hampshire*, 122 N.H. 1062 (1982), an appeal from the Commission's decision that, among other things, determined that PSNH could use the proceeds from stock issuances for the completion of one unit of the Seabrook Nuclear Plant, but not for construction of a second unit. *Id.* at 1065. After noting the Commission's authority to review the issuance of securities, as well as the limitations on that authority defined by statute, *id.* at 1066, the Court concluded that "under the facts of this case [the Commission] has no direct or implied authority to impose the sweeping conditions set forth in its July 16 decision." *Id.* at 1072. The Commission had based its decision to impose conditions limiting the use of funds to the completion of one unit upon its conclusions that PSNH faced substantial financial difficulties in completing the plant, and that limiting the use of funds would strengthen its financial posture. *Id.* at 1064-65. According to the Court, however, the imposition of such broad conditions would "effect what the law terms an 'inverse condemnation.'" *Id.* at 1071. That is, because the conditions would interfere with PSNH's

¹ We observe here that the actions of the Wisconsin Public Service Commission and FERC cited in CLF's June 4, 2009 motion provide nothing that would assist us in our consideration of the extent of the Commission's authority under New Hampshire law.

ability to manage its money as appropriate to construct the plant, they amounted to a taking. *Id.* at 1070-71; *see also N.H. Const.* pt. I, art. 12. The Court also noted that while the Commission lacked authority to order PSNH to use the money in a particular way, it was “nevertheless still free to attach reasonable conditions to any future financings under RSA 369:1 as it properly finds to be necessary in the public interest.” *Appeal of Public Service Company of New Hampshire*, 122 N.H. at 1072 (quotation omitted).

In *Appeal of Easton*, 125 N.H. 205 (1984), the New Hampshire Electric Cooperative (Coop) sought Commission approval of a financing to fund its share of the construction costs of Seabrook. In a prior order, the Commission had approved the Coop’s acquisition of a 2.17% interest in Seabrook. *Id.* at 209. The Coop then sought approval for additional borrowing to further fund its interest in Seabrook. *Id.* at 208. However, cost estimates for completion of Seabrook had escalated substantially between the time the Commission approved the Coop’s acquisition, and the time of the Coop’s subsequent financing request. *Id.* at 209.

After it became apparent that the parties and intervenors did not agree on the scope of the review of the additional funding request, the Commission undertook to define the scope. *Id.* at 208-09. The Commission defined the scope of review narrowly, limiting it to the amount of the financing and the reasonableness of the costs and terms of the financing. *Id.* at 209. After completion of the case, the intervenors appealed, seeking, in part, a new determination of the appropriate scope of the proceeding. *Id.* at 209-10. In reviewing the parties’ positions, the Court observed that the cases interpreting RSA 369:1 did not clearly support any particular position, but that they:

[A]ttempt[ed] to strike a balance between the commission’s authority and management’s prerogative. It is clear that although the scales tip in favor of one or the other depending upon the specific facts and issues of each case, the PUC has a role in determining whether a proposed financing is in the public good, and

that role encompasses consideration beyond merely the *terms* of the proposed financing.

Id. at 211.

The Court then attempted the same balancing it observed as having been employed in prior cases. In conducting its analysis, the Court noted that the intervenors sought to have the Commission:

determine if the capitalization of their utility is jeopardized and whether a cap on expenses or other conditions should be attached. In other words, is the Co-op's 2.17 percent ownership interest in Seabrook at present estimated costs in the public interest? These are all legitimate matters for consideration under RSA chapter 369.

Id. at 212. Because the scope of review was to be broader than defined by the Commission, the Court held that under RSA Chapter 369 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." *Id.*

Following this decision, the Supreme Court was again asked to review a Commission decision relative to the financing of the Seabrook plant. *See Appeal of Seacoast Anti-Pollution League*, 125 N.H. 465 (1984) (*SAPL I*). There, the Commission, in light of *Easton*, determined that it could make a broader inquiry into PSNH's financing request, and it defined the relevant areas of inquiry. *Id.* 472-73. This was to be one stage of a multi-stage financing plan for PSNH. *Id.* at 474. Rather than conduct a full inquiry at that time, however, the Commission determined that due to certain exigencies it would defer the inquiry, thus narrowing the scope of review. *Id.* at 473. The intervenors appealed the Commission's decision to narrow the scope of inquiry arguing that it was required to conduct a more thorough review. *Id.* at 473-74. The Court upheld the Commission's determination, and in so doing concluded that:

When and how such a [public good] 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. When such reasonable grounds exist, the PUC cannot refuse to make the required inquiry by postponing it until after a financing decision that would render it academic.

Id. at 474. Furthermore, the Court found that if the record had demonstrated that the present financing would be the only opportunity to assess alternatives, an order eliminating the review would violate *Easton*. *Id.* Because, however, there would be another opportunity for the Commission to scrutinize the proposed financing, the Court found that narrowing the scope of the review was permissible in that it would not render any future review merely academic. *Id.*

In *Appeal of Seacoast Anti-Pollution League* 125 N.H. 708 (1984) (*SAPL II*), the Court addressed what had been left open in *SAPL I*. There, the Commission, acting on the narrowed scope of review defined in *SAPL I*, opted to approve the second-step financing subject to certain conditions. *Id.* at 712-13. The intervenors appealed arguing, in part, that the Commission had erroneously limited its consideration of the public good by failing to consider the effects of the financing on the long-term status of PSNH's capital structure and on the rates to be charged to customers. *Id.*

Initially, the Court rejected any claim that the Commission's review was inherently infirm on the grounds that the review had been defined by *Easton* and any limitations to the review had been sustained in *SAPL I*. *Id.* at 714. The Court concluded that under the circumstances of the case where, of the amount financed, only a small amount would go to new construction, and, in fact, in comparison to the overall investment the amount would be "very small," a full *Easton* review could be deferred to a later time. *Id.* at 714-15. Also, the Court

pointed to the need for the financing to be approved quickly in order to allow PSNH to continue to operate and to prevent PSNH from going bankrupt. *Id.* at 715. The Court reiterated the requirement for the Commission to “determine the relative economic desirability of allowing or disallowing the company’s continuing participation in the construction of the first Seabrook reactor, before it rules on the anticipated third . . . financing request.” *Id.* at 718.

Finally, in *Appeal of Conservation Law Foundation*, 127 N.H. 606, 612 (1986), the Court addressed the Commission’s decision relative to the third step in PSNH’s proposed financing of the Seabrook plant, and which had been the result of a full *Easton* review. There, the Commission had approved the financing subject to numerous conditions. *Id.* at 612-13. In its review, after reaffirming its conclusions in *Easton* and its progeny, the Court noted that *Easton* requires consideration of whether the financing is reasonably required for the provision of safe and reliable utility service, whether the company’s plans are economically justified when measured against any adequate alternatives, and whether the capitalization sought is so high that the utility will not be able to give its customers adequate service at reasonable rates. *Id.* at 615. More particularly, the Court held that the Commission could not approve the financing except on the basis of findings that the company would have a need for its share of the power generated by the one completed unit, that the company’s participation in the completion of that unit would be preferable to any alternatives for obtaining that power, and that the company could support the resulting capitalization with reasonable rates. *Id.* Ultimately, the Court upheld the Commission’s determination after a review of the thorough and complete record developed in the course of the Commission’s proceedings. *Id.* at 619, 622, 625, 627, 633.

The principal distinction between the financing in this case and the prior Seabrook financing cases for the Coop and PSNH discussed above is that each of the prior cases involved

management decisions by the utility, when faced with a range of possible supply options. At various points, those management decisions involved whether to continue to construct and operate the Seabrook plant or to pursue other power supplies. Such decisions on supply options had the effect of altering or limiting the need for financing. *See, e.g., Appeal of Easton*, 125 N.H. at 210 (Coop's financing request had altered due to its decision to devote some funds to the purchase of an ownership interest in other projects). In other words, those management decisions reflected an inherent management prerogative to choose a course of action. In the instant case, by contrast, the scrubber installation at Merrimack Station does not reflect a utility management choice among a range of options. Instead, installation of scrubber technology at the Merrimack Station is a legislative mandate, with a fixed deadline. *See* RSA 125-O:11, I, II; RSA 125-O:13, I. The Legislature, not PSNH, made the choice, required PSNH to use a particular pollution control technology at Merrimack Station, and found that installation is "in the public interest of the citizens of New Hampshire and the customers of the affected sources." RSA 125-O:11, VI.

Further distinguishing this case is the fact that the Legislature pre-approved constructing a particular scrubber technology at Merrimack Station by finding it to be in the public interest and thereby removing that consideration from the Commission's jurisdiction. *See Investigation of PSNH's Installation of Scrubber Technology at Merrimack Station*, Order No. 24,898 at 13; *Investigation of PSNH's Installation of Scrubber Technology at Merrimack Station*, Order No. 24,914 at 12. As a result, the regulatory paradigm that applies to the Merrimack scrubber installation is fundamentally different from the regulatory paradigm that applied to Seabrook. The Legislature has also retained oversight of the scrubber installation including periodic reports on its cost. *See* RSA 125-O:13, IX. Furthermore, the Commission has only those powers

delegated to it by the Legislature, *see Appeal of Public Service Co. of N.H.*, 122 N.H. at 1066, and, by statute, the Commission's regulatory oversight here is limited to after-the-fact determinations of whether costs incurred by PSNH in complying with RSA 125-O:11-18 are prudent. RSA 125-O:18. If the Commission determines such costs are prudent, PSNH may recover those costs through its default service charge. RSA 125-O:18.

As a result of these statutory mandates, we conclude that the Commission's review of the financing to be used for construction of the scrubber technology at Merrimack Station cannot serve to undo the statutory purpose set out in RSA 125-O:11-18. Given this legislative framework, the scope of our review of the current PSNH financing request does not extend to questions of whether or not PSNH should construct the scrubber technology at Merrimack Station, or whether there are available alternatives to installing that technology. Finally, we find it inconceivable that the Legislature would countenance a situation where it had determined that the installation of this specific scrubber technology is in the public interest, but that the Commission could nonetheless determine that financing used for that very purpose is not in the public good.

One significant factual similarity exists between the Seabrook cases and the current docket, however. In both, the estimated cost of the project escalated significantly. *See Appeal of Conservation Law Foundation*, 127 N.H. at 649 (charting the escalating costs of the Seabrook plant). In this case, estimates presented to the Legislature prior to passage of RSA 125-O:11-18, listed the cost of the installation of the scrubber technology at approximately \$250,000,000. Updated cost estimates provided by PSNH in late 2008 were approximately \$457,000,000. As a result, CLF and OCA argue that the Commission must revisit the public interest finding. Such a change in fact might be sufficient to trigger a new review if the Commission had made an earlier

finding about the costs of the scrubber, *see SAPL I*, 125 N.H. at 474. However, it was the Legislature who determined that the scrubber technology is in the public interest and, therefore, any modification or rescission of that finding logically rests with that body. Consequently, we may not revisit or review the finding.

As noted, OCA argues that financing approvals pursuant to RSA 369:1, such as the instant matter, are among the permits and approvals anticipated by RSA 125-O:13, I. For reasons already mentioned, however, we conclude that the Legislature's finding that the scrubber installation is in the public interest is congruent with and necessarily subsumes a finding under RSA 369:1 pursuant to *Easton* that the use of the proceeds of the financing for the construction of the scrubber is for the public good. Our analysis and conclusion in this regard is similar to our analysis and conclusion in Docket No. DE 08-103. We simply do not find that the Legislature intended for the Commission to be able to permissively undermine a legislative finding through a review of a financing request under RSA Chapter 369.

With regard to OCA's arguments that this is the last time we will have a meaningful opportunity to review PSNH's installation of the scrubber technology at Merrimack Station, as discussed above we do not have the jurisdiction to determine whether the use of PSNH's financing proceeds for the installation of the scrubber is for the public good. We cannot arrogate to ourselves authority that the Legislature has reserved to itself. Presumably, the Legislature was in a position to assess alternatives through the legislative process that culminated in RSA 125-O:11, VI.

In every financing docket, the Commission undertakes a review of a company's request to determine whether it comports with the relevant statutory and decisional standards, including *Easton*. *See, e.g., Hampstead Area Water Co., Inc.*, Order No. 24,728 (Feb. 2, 2007); *Pittsfield*

Aqueduct Co., Order No. 24,827 (March 3, 2008); *Concord Steam Corp.*, Order No. 24,673 (Sept. 29, 2006). Irrespective of whether any challenge is raised to a company's proposed financing, the Commission must analyze all the circumstances, including whether the financing terms, and the resulting impact on capital structure and customer rates, are reasonable and in the public interest, and whether the proposed uses for the financing proceeds are in the public good. See RSA 369:1; *Appeal of Easton*, 125 N.H. at 212; *Pittsfield Aqueduct Co.*, Order No. 24,739 (April 13, 2007). This is so even when *Easton* is not specifically invoked, see, e.g., *Public Service Company of New Hampshire*, Order No. 24,505 (Aug. 19, 2005), and even where the parties have agreed to the benefits of the financing, see, e.g. *Public Service Company of New Hampshire*, Order No. 24,328 (May 21, 2004). Accordingly, we reject PSNH's argument that an *Easton* review is not applicable in this case.

At the same time, however, we find that the scope of our *Easton* review in this instance is limited by the Legislature's finding that the scrubber is in the public interest. As a result, in this financing docket we will consider the economic impact of the proposed financing, its effect on PSNH's capital structure, and its potential impact on rates but it is not within the scope of our authority to consider whether the use of the financing proceeds for the scrubber is for the public good or whether there are reasonable alternatives to the scrubber. In describing the scope of our review in this case as not encompassing matters related to the propriety of the scrubber installation, we note that we have an open docket, DE 08-103, in which we are monitoring PSNH's costs of construction of the scrubber technology at Merrimack Station. In that docket we will consider the prudence of PSNH's actions during the construction of the scrubber, including whether it avails itself of the variance procedure under RSA 125-O:17 in the event of escalating costs.

Based upon the foregoing, it is hereby

ORDERED, that in our review of PSNH's financing request in this docket we shall not consider evidence concerning whether the use of the financing proceeds for the scrubber is for the public good or whether there are reasonable alternatives to installation of a wet flue gas desulphurization system at PSNH's Merrimack Station; and it is

FURTHER ORDERED, that the participants in this docket submit a proposed procedural schedule for the remainder of this proceeding no later than June 24, 2009.

By order of the Public Utilities Commission of New Hampshire this nineteenth day of June, 2009.


Thomas B. Getz
Chairman


Graham J. Morrison
Commissioner


Clifton C. Below
Commissioner

Attested by:


Debra A. Howland
Executive Director

