

DE 00-210
DE 00-211

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

**Petitions for Valuation of Certain Hydro-Electric Facilities
Order Addressing Issues Raised at Pre-Hearing Conference**

O R D E R N O. 23,596

December 12, 2000

APPEARANCES: O'Neill, Grills & O'Neill, PLLP, by Peter H. Grills, Esq. for City of Berlin and City of Manchester; Gerald M. Eaton, Esq. for Public Service Company of New Hampshire; Upton, Sanders & Smith, LLP by Robert Upton II, Esq. for Town of Bow, Town of Hillsborough, Town of Gorham, City of Franklin and New Hampton Village Precinct; Tom Ryan for Local 1837, International Brotherhood of Electrical Workers; Office of Consumer Advocate by Michael W. Holmes, Esq. for residential ratepayers; and Donald M. Kreis, Esq. for the Staff of the New Hampshire Public Utilities Commission.

I. BACKGROUND AND PROCEDURAL HISTORY

On September 29, 2000, the City of Berlin and the City of Manchester (collectively, Petitioners) filed with the New Hampshire Public Utilities Commission (Commission) a joint petition for a determination of the value of two hydro-electric facilities owned by Public Service Company of New Hampshire (PSNH): the J. Brodie Smith Station in Berlin (Smith Station) and the Amoskeag Station in Manchester (Amoskeag Station). The Commission assigned Docket No. DE 00-210 to the Amoskeag Station proceeding and Docket No. DE 00-211 to the request for valuation of Smith Station.

The Petition invokes Section 5 of Chapter 249 of the

Session Laws of 2000, which provides as follows:

Option for Municipalities Purchasing Certain Electric Facilities.
Municipalities which seek to purchase PSNH hydro-electric small scale electric facilities, as defined in RSA 374-D:1, may with the consent of the governing body, prior to October 1, 2000, petition the commission pursuant to RSA 38:9, prior to holding the vote of qualified voters provided for in RSA 38:3, RSA 38:4, or RSA 38:5, for a determination of the fair market value of the facility in the event that the municipality and PSNH are unable to agree to a price to be paid for the facility. The cost of the determination shall be at the expense of the requesting municipality. The Commission should select an independent, qualified asset valuation specialist to conduct the asset valuation process. If this option is chosen, all votes required by RSA 38:3, RSA 38:4, or RSA 38:5 must be held prior to the expiration of the time limit required for the ratification vote under RSA 38:13.

2000 N.H. Laws 249:5. Chapter 249 is entitled "An Act relative to final authorization of electric rate reduction financing and commission action" and, in general, is the measure in which the 2000 Legislature approved (with modifications) the proposed PSNH Restructuring Settlement Agreement that the Commission considered and approved in Docket No. DE 99-099. The Commission's approval of the PSNH Restructuring Settlement Agreement is presently on appeal to the New Hampshire Supreme Court.

The PSNH Restructuring Settlement Agreement calls for PSNH to divest itself of its electric generation assets through public sale. As it was originally presented to the Commission, the Restructuring Settlement Agreement provided that municipalities interested in acquiring PSNH's hydro-electric assets could enter into purchase agreements with PSNH, prior to the public sale. We made certain modifications to the Restructuring Settlement Agreement as it related to this issue, responding inter alia to the suggestion of municipalities that the Agreement as originally drafted did not give them a meaningful opportunity to pursue acquisition. See *PSNH Proposed Restructuring Settlement*, Order No. 23,443 (April 19, 2000), slip op. at 228-231. Thereafter, the Legislature enacted Chapter 249, further conditioning the PSNH Restructuring Settlement Agreement and, in the section quoted *supra*, providing municipalities with an opportunity to move forward with the acquisition process set forth in RSA Chapter 38 without having completed the full ratification process contemplated by that chapter. See RSA 38:3, 38:4 and 38:5 (providing for approval of relevant municipal governing body and, ultimately, municipal voters prior to Commission valuation of facility in question). Under Chapter 38

generally, Commission valuation and, ultimately, condemnation, are remedies available to a municipality when it fails to agree on a price with the owning utility as to the generation facility the municipality wishes to purchase. See RSA 38:9, I.

Smith Station, located on the Androscoggin River in Berlin, is a single-unit, 14.2 megawatt run-of-the-river hydroelectric generating plant, with significant up-river storage. The facility is currently licensed by the Federal Energy Regulatory Commission (FERC) as Project No. 2287-NH. Amoskeag Station, located on the Merrimack River in Manchester, is a three-unit, 17.5 megawatt run-of-the-river hydroelectric generating plant with peaking capability in lower water flow conditions. It is part of the Merrimack Project (Project No. 1893-NH), a three-station development licensed by the FERC.

In their formal request for valuation, the Petitioners aver that, after investigation of plant conditions, feasibility, necessary regulatory approvals, potential environmental liabilities and fair market value, Berlin wishes to acquire the Smith Station and Manchester wishes to acquire the Amoskeag Station. Berlin's Board of

Mayor and Alderman authorized the instant petition on July 19, 2000; the Manchester City Council took the same action on September 5, 2000. According to the Petitioners, they have advised PSNH of their intent to acquire the two hydro-electric facilities but "PSNH has been unable to enter into negotiations . . . due to its perceived uncertainty as to the process and procedure for the divestiture of its generation assets. As a result, Manchester and Berlin have been unable to agree to a price with PSNH to be paid for Amoskeag or Smith." Petition at 5.

The Petition explicitly requests that the two valuations be conducted as a consolidated proceeding. According to the Petitioners, both municipalities seek the same or similar relief, and consolidation would allow them to share costs associated with the proceeding. In the view of the Petitioners, consolidation would also make for efficient use of the Commission's time and that of other parties because the Petitioners intend to use the same experts and consultants, and expect to employ the same valuation methodologies.

The Commission issued an Order of Notice, duly published in a newspaper with statewide circulation, setting a Pre-Hearing Conference for November 30, 2000 and requiring any

party seeking to intervene in the proceeding to file a petition by November 27, 2000. The Commission received a timely petition to intervene filed jointly on behalf of the Towns of Bow, Hillsborough, and Gorham, the City of Franklin and the New Hampton Village Precinct (collectively, Municipal Intervenors). On November 21, 2000, the Office of Consumer Advocate (OCA) advised the Commission that it would be appearing on behalf of residential ratepayers pursuant to RSA 363:28.

On the evening of November 29, 2000, the Petitioners transmitted to the Commission via facsimile a written Pre-Hearing Conference Statement and a response to the Municipal Intervenors' petition to intervene. The Commission conducted the Pre-Hearing Conference as scheduled on November 30, 2000. In addition to the Petitioners, PSNH, the Municipal Intervenors, OCA and the Staff of the Commission (Staff), Tom Ryan of Local 1837, International Brotherhood of Electrical Workers (IBEW), appeared and made an oral request for intervenor status on behalf of the IBEW.

II. PETITIONS TO INTERVENE

There were no objections to either the Municipal Intervenors' timely petition to intervene or the oral request made at the Pre-Hearing Conference by IBEW. In their written

submission of November 29, and at the Pre-Hearing Conference itself, the Petitioners raised certain issues relating to factual assertions in the Municipal Intervenors' request for intervenor status. Further, IBEW made clear that its intervention request grows out of its interest in assuring that the employee protection provisions of the PSNH Restructuring Settlement Agreement are applied to any municipalities acquiring PSNH hydro-electric facilities. This engendered discussion at the Pre-Hearing Conference of whether those provisions are, in fact, relevant to this proceeding.

Because the rights, duties, privileges, immunities or other substantial interests of both the Municipal Intervenors and IBEW may be affected, and because the interests of justice as well as the orderly and prompt conduct of the proceedings would not be impaired by allowing the requested interventions, see RSA 541-a:33, the petitions for intervenor status were granted at the Pre-Hearing Conference.

III. PRELIMINARY POSITIONS OF THE PARTIES

Following the discussion of the intervention requests at the Pre-Hearing Conference, the Commission invited the parties to state preliminary positions on the issues in the subject dockets.

1. City of Berlin and City of Manchester

In their written Pre-Hearing Statement, the Petitioners noted that the City of Berlin and the City of Manchester are not in the identical situation as to the acquisition of the relevant hydro-electric facility within their borders. According to the Petitioners, the Berlin City Council has approved the acquisition of Smith Station by the two-thirds vote specified in RSA 38:3, and on Election Day in November the city's voters also approved the proposal as contemplated by the statute. Therefore, according to the Petitioners' Pre-Hearing Statement, Berlin intends to proceed with RSA 38 acquisition proceedings "contemporaneously with the initiation of proceedings under Chapter 249." Petitioners' Pre-Hearing Conference Statement at 2. The Petitioners aver that Berlin is presently in the 60-day reply period contemplated by RSA 38:7, having provided formal notice to PSNH of its wish to purchase Smith Station. The Petitioners further indicate that Manchester plans to submit the question of acquiring Amoskeag Station to the city's voters pursuant to RSA 38:3 in September 2001 at the time of the city's regular primary election. Petitioners wish to structure the procedural schedule for these dockets in a manner that allows Manchester to take this vote in September 2001 while still complying with the requirement in RSA 38:13

that such ratification take place "[w]ithin 90 days of the final determination of the price to be paid for the plant and property to be acquired." Accordingly, Petitioners proposed a procedural schedule calling for the submission of Prefiled testimony in April 2001 with merits hearings from May 28 to 31, 2001.

As already noted, the Petitioners indicated that they favor consolidation of the two dockets for purposes of administrative efficiency and cost-minimization. In essence, the Petitioners proposed that the case be handled in the manner typically adopted by the Commission in contested proceedings, with each party - including the Commission Staff, providing written prefiled testimony of its witnesses that is then subjected to discovery and, ultimately, to cross-examination at hearing. The Petitioners proposed that, at hearing, witnesses first provide testimony concerning the general methodologies used to value the two facilities, thereafter providing testimony as to the specific valuation of each plant.

The Petitioners contend that the employee protection provisions of the PSNH Restructuring Settlement Agreement are not relevant to this proceeding because it is being conducted under RSA 38. According to the Petitioners, section 5 of

Chapter 249 is in the manner of a "private" law that inures to the benefit of municipalities without subjecting them to the provisions of the Restructuring Settlement Agreement that the Legislature took up elsewhere in Chapter 249. Counsel for the Petitioners indicated that Berlin's city manager has expressed an intent to abide by the collective bargaining agreement between PSNH and IBEW, should Berlin ultimately acquire Smith Station.

The Petitioners requested that the Commission add the Adobe Acrobat (or *.pdf) format to those that are approved as electronic versions of Commission-filed documents pursuant to Puc 202.08. According to the Petitioners, this would alleviate the problem experienced in other proceedings of persons in the hearing room working from differently formatted versions of the same document.

The Petitioners drew the Commission's attention to RSA 38:9, III, which require the Commission to "determine the amount of damages, if any, caused by the severance of the plant and property proposed to be purchased from the other plant and property of the owner." With regard to electric utilities, RSA 38:9, III further provides that these damages shall be limited to the value of such plant and property and the cost of direct remedial requirements, such as new through-connections in

transmission lines, and shall exclude consequential damages such as stranded investment in generation, storage or supply arrangements which shall be determined as provided in RSA 38:33.¹

In light of this provision, and in light of the general statutory authority contained in RSA 38:9 for the Commission to set the value for the facilities in question, the Petitioners ask the Commission to require PSNH to state in its prefiled testimony (1) the value claimed for all plant and property to be acquired by each city, (2) any and all costs claimed as direct remedial requirements under RSA 38:9, and (3) any consequential damages claimed by PSNH under RSA 38:9 and 38:33.

Next, Petitioners drew the Commission's attention to the provision in Chapter 249:5 requiring that the "cost of the determination shall be at the expense of the requesting

¹ RSA 38:33 provides that:

In matters over which the Federal Energy Regulatory Commission does not have jurisdiction, or has jurisdiction but chooses to grant jurisdiction to the state, the commission shall determine, to a just and reasonable extent, the consequential damages such as stranded investment in generation, storage, or supply arrangements resulting from the purchase of plant and property from a utility and shall establish an appropriate recovery mechanism for such damages. The commission need not make such a determination when the municipality and utility agree upon the sale of utility plant and property.

municipality."² In light of this provision, the Petitioners requested that the Commission in its order following the Pre-Hearing Conference provide an estimate of the costs to be assessed against the Petitioners under Chapter 249:5. According to the Petitioners, because these sums will increase the ultimate total cost of acquiring the plants by the municipalities, estimating them will allow the two municipalities to determine early in the process whether it remains worthwhile to press forward with the acquisitions.

2. Public Service Company of New Hampshire

PSNH indicated that it is indifferent as to who ultimately acquires the Smith or Amoskeag stations as long as the acquiring entity or entities are responsible. According to PSNH, its objective is to reap the highest possible price for these assets so as to maximize the reduction in stranded

² This provision has a counterpart in RSA 38:9, IV, which states:

The expense to the commission for the investigation of the matters covered by the petition, including the amounts expended for experts, accountants, or other assistants, and salaries and expenses of all employees of the commission for the time actually devoted to the investigation, but not including any part of the salaries of the commissioners, shall be paid by the parties involved, in the manner fixed by the commission.

costs that would otherwise be recoverable from PSNH customers under the terms of the PSNH Restructuring Settlement Agreement.

PSNH indicated that the instant proceeding is different from a typical valuation under RSA 38 because there is data available on comparable sales and market prices. According to PSNH, it will definitely be necessary for the Commission to fix consequential damages in connection with the valuation of the two plants, which it characterized as the "jewels" of their respective geographical regions. In the view of PSNH, the Company will be able to realize a smaller price for its other hydro-electric facilities in the two regions if Smith Station and Amoskeag Station are not available as part of the package, and in PSNH's opinion the municipalities should have to make up the price differential in the form of consequential damages.

Acknowledging that the Commission's approval of the PSNH Restructuring Settlement agreement is presently on appeal to the New Hampshire Supreme Court, PSNH nevertheless contended that it is not necessary to delay this proceeding to account for the possibility that divestiture might not move forward. According to PSNH, because the Court is considering the appeal on an expedited basis, the judicial proceedings

will yield an answer well before the valuations here are completed.

However, PSNH characterized as "premature" the setting of a procedural schedule for these dockets prior to the Commission's selection of the independent, qualified asset valuation specialist described in Chapter 249:5. PSNH indicated that it was "not crucial" that it be allowed to comment on the Commission's selection, a right PSNH enjoys in connection with the expert the Commission is to engage to conduct asset sales generally. See RSA 369-B:3, IV(b)(13).

With regard to the costs of the valuations, PSNH expressed a concern that the Petitioners might cause the determination to be structured in such a way that the acquisition costs are deducted from the valuation of the plants. According to PSNH, this would illegally result in PSNH's ratepayers subsidizing the municipal acquisition of the two plants.

PSNH indicated that it agreed with the Petitioners' proposal to have the parties submit pre-filed testimony simultaneously. With regard to assessing its damages, PSNH indicated that it needs to know the precise scope of what the municipalities intend to purchase, e.g., the extent to which

the impoundments behind the hydro-electric facilities would be included in the property to be acquired by the two cities.

Finally, PSNH strongly disagreed with the Petitioners' contention that proceedings conducted under Chapter 249:5 are not subject to the terms of the PSNH Restructuring Settlement Agreement.

3. Towns of Bow, Hillsborough, and Gorham, City of Franklin and New Hampton Village Precinct

The Intervenor Municipalities indicated that their intention is simply to observe the proceedings and participate in discovery. They indicated that there may be a more efficient way to conduct these proceedings than has been contemplated by either the Petitioners or PSNH and would be discussing that with the parties.

4. Local 1837, International Brotherhood of Electrical Workers

The IBEW indicated that its purpose in participating in these dockets is to assure that the interests of the employees of the Smith Station and the Amoskeag Station are represented here.

5. Office of Consumer Advocate

The Office of Consumer Advocate (OCA) indicated that its interest here is in assuring that the Smith Station and Amoskeag Station are each sold at the maximum possible price,

thereby providing the greatest offset to PSNH's recoverable stranded cost and reducing ratepayer liability accordingly.

6. Staff

Staff indicated that it would be necessary for the Commission to make an initial determination as to the role of the independent expert to be hired by the Commission under Chapter 249:5. According to Staff, it remains an open question whether this expert should be treated simply as a witness who would present testimony on behalf of Staff or whether the expert serves in an adjudicatory or advisory capacity. As a possible means of conducting a fair process that would minimize costs while yielding an expedited decision, Staff suggested the possibility of having no valuation experts involved beyond the one to be hired by the Commission. Staff also expressed the view that it might not necessarily be appropriate to conduct a consolidated proceeding here, given that the two petitioning municipalities are not completely on the same footing in their discussions with PSNH.

According to Staff, it would not be possible to provide the Petitioners with an estimate at the outset of the proceeding of the Commission-related costs to be borne by the two municipalities. With regard to the format for document

submission, Staff reminded the parties that the Commission's rules currently require that all documents be submitted to the Commission in paper as well as electronic form. Staff urged the Commission to remind the parties that a document is not considered filed with the Commission until the requisite number of hard copies have been delivered to the Commission's offices.

Finally, Staff agreed with PSNH that Chapter 249:5 should not be viewed as independent of the PSNH Restructuring Settlement Agreement that was approved and modified by the Legislature in the process of enacting Chapter 249. According to Staff, the Legislature intended the parties to a valuation under Chapter 249:5 to be bound by the provisions of the Restructuring Settlement Agreement. In the alternative, Staff noted that the Petitioners were parties to the proceedings in Docket No. DE 99-099 and would therefore be bound under principles of administrative res judicata from relitigating any issues here relating to employee protections or other relevant matters decided in that docket. Accordingly, in the view of Staff, the Commission should determine here that the public interest requires any municipal purchasers of PSNH hydro-electric assets to be bound by the employee protection

provisions of the PSNH Restructuring Settlement Agreement.³

IV. PROCEDURAL ISSUES RAISED IN TECHNICAL SESSION

Following the Pre-Hearing Conference, the parties and Staff met for a technical session and discussed procedural issues. The parties and Staff agreed to recommend to the Commission that it hold in abeyance the development of a full procedural schedule for the dockets at this time. Instead, the Parties and Staff recommended that the Commission entertain written briefs, to be filed on or before December 15, 2000, on two issues deemed crucial to the further progress of the dockets: (1) the appropriate role of the "independent, qualified asset valuation specialist" specified by Chapter 249:5 "to conduct the asset valuation process," and (2) the

³ During the discussion of the intervention petitions, there was a colloquy among the parties concerning RSA 38:11, which sets forth in relevant part that, "[w]hen making a determination whether the purchase or taking of utility plant or property is in the public interest under this chapter, the commission may set conditions and issue orders to satisfy the public interest." The Petitioners suggested that the intent of Chapter 249:5 was to make this provision inapplicable. PSNH and Staff disagreed, taking the position that Chapter 249:5 simply permits the municipalities to move forward with the entire process contemplated by RSA 38, including the public interest determination contemplated by RSA 38:11, without first obtaining voter approval as normally required by RSA 38. It was not clear whether the Petitioners continued to press this interpretation of Chapter 249:5 during the ensuing preliminary discussion of the substantive issues raised by the dockets.

binding effect, if any, of the PSNH Restructuring Settlement Agreement on these proceedings. Parties and Staff further agreed to recommend to the Commission that it entertain reply briefs on these subjects on or before December 22, 2000, and that the Commission thereafter issue a ruling on these issues. Those issues aside, there was agreement among the Parties and Staff that it would be appropriate and possible for the Parties and Staff to resolve factual issues and agree on stipulations while the Commission is undergoing the request-for-proposal process precedent to the hiring of its independent expert.

V. COMMISSION ANALYSIS

Under the circumstances, we agree with the Parties and Staff that it is appropriate to resolve certain threshold issues at the outset concerning the role of the independent asset valuation expert we will be engaging as well as the relationship between these proceedings and the PSNH Restructuring Settlement Agreement. We will therefore approve the briefing schedule recommended by the Parties and Staff and, based on those submissions, make a determination on the issues raised therein. At that time, we will also schedule an additional Technical Session to give the parties an opportunity to reconvene for the purpose of developing a

recommendation to the Commission concerning the procedural issues and schedule for the remainder of these dockets.

We agree with the Petitioners that it continues to be appropriate to treat these two dockets as a consolidated proceeding, given the similarity of the issues raised therein. We also adopt Staff's recommendation to admonish the parties that, under Puc 202.07, a filing is not effective unless, inter alia, an original and eight copies have been filed with the Commission. Subject to that caveat, we grant the Petitioners request to permit compliance with Puc 202.08 (concerning the separate requirement for electronic filing) by submitting documents in Adobe Acrobat *.pdf format.

With regard to the request by the Petitioners that we provide them with some kind of estimate of the Commission-related costs to be assessed against them in these dockets, we are sympathetic both to their reasonable wish to be able to estimate their costs as well as the difficulties inherent in estimating the expenses associated with the efforts of Commission Staff. As a practical matter, we believe that the bulk of the expenses to be borne by the Petitioners will be those associated with the independent expert. Thus, in an effort to allay the concerns of the Petitioners, we will advise them at the conclusion of the selection process of the

anticipated expenses associated with the expert. We will also ask Staff to meet with the Petitioners at that time to agree on a basis for providing them, to the extent possible, with a reasonable but non-binding estimate of the other Commission-related expenses the Petitioners will bear in connection with the valuation process.

Based upon the foregoing, it is hereby

ORDERED, that the parties may submit written briefs on or before December 15, 2000, limited to discussion of the two threshold issues described in this order; and it is

FURTHER ORDERED, that the parties may thereafter submit reply briefs on or before December 22, 2000.

By order of the Public Utilities Commission of New Hampshire this twelfth day of December, 2000.

Douglas L. Patch
Chairman

Susan S. Geiger
Commissioner

Nancy Brockway
Commissioner

Attested by:

Thomas B. Getz
Executive Director and Secretary