

BEFORE THE STATE OF NEW HAMPSHIRE

PUBLIC UTILITIES COMMISSION

DE 09-033 Public Service Company of New Hampshire
Petition for Financing Approval

OFFICE OF CONSUMER ADVOCATE'S
MOTION FOR REHEARING OF ORDER NO. 25,021

The Office of Consumer Advocate (OCA) respectfully requests that the New Hampshire Public Utilities Commission (Commission) rehear and reconsider Order No. 25,021. In support, the OCA states the following facts and law:

1. On October 5, 2009 the Commission issued Order No. 25, 021 (“Financing Approval Order”) in Docket No. DE 09-033.
2. RSA 541:3 provides that motions for rehearing are due within 30 days after the issuance of an Order by the Commission. The Commission grants rehearing when good cause is shown, in order to correct an unlawful or unreasonable decision. RSA 541:3. *See* Northern Utilities, Inc. and EnergyNorth Natural Gas, Inc. d/b/a National Grid NH, 2007 Summer Season Cost of Gas Proceeding, Investigation of Indirect Gas Costs, Order No. 24,901 (September 25, 2008) (granting rehearing in part).
3. The Financing Approval Order approved PSNH’s February 20, 2009 request 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.
4. RSA 369 requires that:

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.....

RSA 369:1 (emphasis added). Similarly, RSA 369:4 authorizes the Commission to approve the issuance of long-term debt which in its judgment “is consistent with the public good.”

5. In its filing, PSNH stated that the proposed long term debt issuance would be used to refinance its short term debt, to finance anticipated capital expenditures, and to pay for issuance costs.¹
6. With its Petition, PSNH filed the testimony of Mr. Randy A. Shoop, Vice President and Treasurer of Northeast Utilities Services Company and PSNH, subsidiaries of Northeast Utilities (“NU”). Mr. Shoop works at NU’s corporate headquarters in Connecticut. *See* Direct Testimony of Randy A. Shoop (“Shoop Testimony”), February 20, 2009, at p. 3.
7. Mr. Shoop’s testimony was limited to the financial aspects of the proposal. With respect to the uses of the funds, Mr. Shoop referred only generally to PSNH’s need for financing for “new capital additions” and for its “growing capital expenditure program.” *See* Shoop Testimony at p. 4, line 7 and page 6, line 19. However, Mr. Shoop’s testimony contained no specific information about the proposed uses of the funds, or what any of the “new capital additions” were. PSNH offered no other witnesses in support of its Petition.
8. In the Order of Notice in the case the Commission stated:

¹ PSNH also sought authority to increase its short-term debt limit above the 10% set by Puc Rule 307.05 by an additional amount of \$60 million.

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).

9. After the prehearing conference on March 24, 2009 the parties held a technical session.² During the session it became clear that despite the fact that the filing was made pursuant to RSA 369, the OCA and PSNH disagreed 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 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.
10. On April 10, 2009 PSNH, the OCA, and Conservation Law Foundation ("CLF") filed briefs on the scope of the Commission's review in the docket. The OCA's brief argued that RSA 369, New Hampshire Supreme Court cases interpreting the statute, and prior Commission orders require a review of the uses of the funds, a so-called *Easton* review. See DE 09-033 Brief of the OCA, April 10, 2009. PSNH argued that an *Easton* review was not required.
11. On June 19, 2009 the Commission issued Order No. 24,979 defining the scope of the proceeding ("Scope Order"). The Commission ruled that it was required to perform an *Easton* review for uses of the proposed financing proceeds for all projects other than the scrubber at Merrimack Station. The Commission stated, with respect to any other projects to be financed with the long-term debt:

² The Conservation Law Foundation (CLF) was not present at this session but was later granted intervenor status by the Commission.

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.

Scope Order at p. 17-18 (emphasis added).

12. On August 11, 2009 a final hearing was held in the case.³ At the hearing Mr. Shoop testified on behalf of the Company, but failed to present any further information about the use of the funds in his testimony.
13. At the hearing, PSNH made several data responses in the case Hearing Exhibits, essentially supplementing its case through discovery. Exhibit 3, for example, is a compilation of eight separate data requests, including PSNH's response to OCA Set 1 Data Request Number 2 ("OCA 01-002").
14. OCA 01-002 asks the following question:

³ On July 24, 2009 CLF filed a motion to compel responses to data requests to which PSNH had objected. PSNH filed an objection to CLF's motion on August 3, 2009. Despite this outstanding discovery dispute, the final hearing was held on August 11, 2009. As the Commission noted in its Financing Approval Order, CLF objected to this and the OCA agreed, stated that CLF had not exhausted its remedies with respect to the discovery dispute prior to the final hearing. See Financing Approval Order at pp. 8 and 10. The Commission also noted in the finance approval order that "We will address CLF's motions for rehearing of Order No. 25,001 denying CLF's motion to compel PSNH's response to certain data requests when the time for motions for rehearing of this order has elapsed, in order to provide for a more efficient appellate process."

On p. 6 of Mr. Shoop's testimony he refers to the company's "growing capital expenditure program." Please describe in detail this program and what projects are included within the program.

15. In response to the OCA's data request, Mr. Shoop provided twelve pages of spreadsheets listing the 2009 Construction Budgets for PSNH for generation, distribution and transmission project. *See* Hearing Exhibit 3, pp. 8-19. The cost of the listed projects totals \$294,118,812.
16. The list of projects provided in response to OCA 01-002 contains no details about the purpose of each project, how each project will be used, or why each project is needed.⁴
17. No other witnesses testified at the hearing, and no other evidence was offered to sustain the Company's burden of proof that the uses of the long term debt are consistent with the public good. *See* Puc 203.25.
18. The record contains no evidence that any of the projects to be funded with the \$150,000,000 in long-term debt are necessary for PSNH to continue to provide safe and adequate service.
19. The record contains no basis for an analysis by the Commission of whether PSNH's request for approval of long term debt is authorized by RSA 369:1.
20. Despite this, in the Financing Approval Order the Commission stated that it had "reviewed the filing" and determined that it was "consistent with the public good." The Commission went on to state:

Further, identification of the various capital projects to be undertaken with these funds for the distribution, transmission and generation segments of PSNH's business supports a finding that the purposes, uses or objectives of the financing are reasonably required by PSNH to discharge its obligations as an electric utility.

⁴ Another part of Exhibit 3 provides PSNH's Data Response to OCA 02-007, which asked questions about eleven items listed in PSNH's Data Response to OCA 01-002. The responses in OCA 02-007 are also not sufficient to fulfill the requirements of the review and analysis required by RSA 369.

Financing Approval Order at 12. (emphasis added).

21. The Commission erred when it found that PSNH's mere identification of the projects to be undertaken with the funds from the proposed long-term financing is enough for the Commission to make the requisite findings under RSA 369. This ruling by the Commission is inconsistent with both its own Scope Order and with as the interpretations by the New Hampshire Supreme Court and the Commission of the scope of review required by this statute.
22. The Commission also failed to require the proper alternatives analysis for the approval of long-term debt. In its Order, the Commission found that "issuance of long-term debt is economically justified given the alternatives of (1) further increasing short-term debt or (2) funding operations with equity" Financing Approval Order at 12.
23. 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 proposed utility financing. In *Appeal of Easton*, the New Hampshire Supreme Court held that the Commission must look "beyond merely the *terms* of the proposed financing."⁵ The Court also recognized the legitimacy of the Commission's consideration in this context of whether these planned uses of the financing are economically justified compared to other options available to the utility.⁶ Importantly, the Commission's review must look at alternatives to the uses of the funds, not merely alternative financing approaches.

⁵ See *Appeal of Easton*, 125 N.H. 205, 211 (1984) (emphasis in original).

⁶ 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").

24. Since *Easton*, the Commission has sometimes followed the Court’s directives, requiring a review of RSA 369:1 petitions that includes consideration of the proposed use of the financing⁷ and whether the use is economically justified.⁸
25. Many New Hampshire 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.⁹ 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.¹⁰
26. 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 do not apply to them in this case. Despite the Company’s statements that its financing request is “routine”¹¹ and that “it is not possible for PSNH to identify the long-term proceeds with specific capital

⁷ 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”).

⁸ See, e.g., *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.”).

⁹ See, e.g., *Pittsfield Aqueduct Company*, Petition for Authority to Borrow up to \$750,000, Order No. 24,610 (March 31, 2006).

¹⁰ 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.”)

¹¹ See Hearing Transcript, August 11, 2009, p. 9, lines 16-20.

expenditures”¹² the Commission simply may not authorize the borrowing without this information, and without having conducted the public good analysis required by the statute and the case law.

27. PSNH has also claimed that it can not specify the uses of the long-term debt because it is merely utilizing the long-term debt to refinance short-term debt. *See* Hearing Exhibit 3, p. 2, PSNH Response to OCA 01-005. PSNH’s argument is inconsistent with the plain language of RSA 369:1 and RSA 369:4. Also, the Commission’s approval of this approach will undermine the purposes and policies underlying the requirements of RSA 369:1 and 369:4.
28. Specifically, the failure to undertake this review sends the message to PSNH, as well as to other utilities, that they can avoid the requirements and the review required under RSA 369 and *Easton* by simply using short term debt to finance projects, and then seeking approval to refinance this short term debt with long-term financing. Because the Commission did not analyze the purposes and uses of the investment made with the short-term debt, the purposes and uses of this debt will never be considered.
29. This proceeding is the Commission’s and ratepayers’ only opportunity to review whether the uses of the financing are consistent with the public good, as required by RSA 369:1 and RSA 369:4. Though a “prudence” review will take place when the Company proposes to include the costs related to projects in future rates, when these projects are “used and useful,” that review is an after-the-fact review that occurs too late for a review of alternatives. Moreover, a “prudence” review is very different from the RSA 369 *Easton* review.

¹² *See* Hearing Exhibit 3, p. 3, PSNH Response to OCA 03-001.

30. “Prudence is ‘essentially . . . an analogue of the common law negligence standard . . . [and] judges an investment or expenditure in the light of what due care required at the time an investment or expenditure was planned and made’”¹³ It is an after-the-fact review.
31. Recent “prudence” reviews involving PSNH’s Default Energy Service rate, the rate through which the Company recovers all prudently incurred costs,¹⁴ including its return on its generation plants, of providing energy service to its customers who do not choose a competitive supplier, show that disallowances resulting from such prudence reviews are typically minor.¹⁵ More importantly, such reviews do not analyze the need for the projects – any such attempt to do so would be futile, as the investment has already been made at that time.
32. 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*.”¹⁶ 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

¹³ *Re Public Service Company of New Hampshire*, NH PUC 645, 654 (Order No. 20,280, October 25, 1991).

¹⁴ See RSA 369-B:3, IV(b)(1)(A), which allows PSNH to recover its “actual, prudent and reasonable costs” through the price of default service.

¹⁵ Examples of recent disallowances relate to replacement power costs for outages, not for investments that were found to be imprudent. See, e.g., Order No. 24,931 (January 16, 2009), in which PSNH agreed to forego recovery of \$8,145 (out of a total cost of over \$600,000,000 for PSNH to provide energy service for calendar year 2007); and Order No. 24,805, (December 7, 2007), in which PSNH agreed to forego recovery of \$3,953. In each case PSNH agreed to the disallowances recommended by the Commission Staff in a Settlement Agreement that was approved by the Commission.

¹⁶ *Id.*

the utility.¹⁷ Such a result would “effectively eliminate[] a realistic consideration of alternatives,”¹⁸ as well as unlawfully contravene *Easton*.

33. In this case, because there was no analysis of alternatives, and no specific details about the purposes and uses of the projects funded by the long-term debt, there is insufficient evidence in the record upon which to base a determination that the proposed uses are consistent with the public good.

34. 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 Supreme Court’s and the Commission’s interpretations of these requirements. Such a review must include consideration of PSNH’s proposed uses of the financing proceeds in order to determine whether those proposed uses of the funds are in the public interest, and necessary for the utility to provide safe and adequate service.

Wherefore, the OCA respectfully requests that the Commission provide the following relief:

- A. Rehear and reconsider its approval of PSNH’s long-term debt financing request;
- B. Require PSNH to provide the information necessary for the Commission to undertake the review required under RSA 369 and *Easton*; and
- C. Grant such other relief as justice requires.

¹⁷ See *Id.* (the Court held that any other opportunity to review alternatives must be meaningful and realistic). \

¹⁸ *Id.* at 475.

Respectfully submitted,

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Certificate of Service

I certify that on this date a copy of this document was provided to all persons on the service list in this docket.

Date: November 4, 2009



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