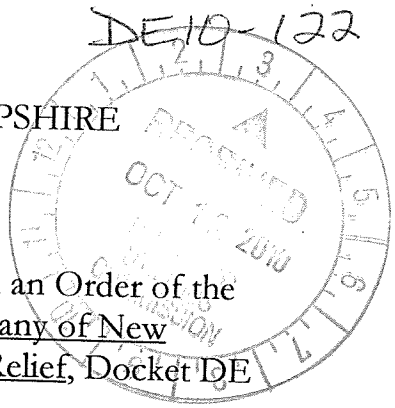
DE 10-122



SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

Docket No.

In the Matter of the Appeal of the New Hampshire Sierra Club from an Order of the New Hampshire Pubic Utilities Commission in Public Service Company of New Hampshire, Petition for Approval of Long-Term Debt and Related Relief, Docket DE 10-122

APPEAL

New Hampshire Sierra Club [NHSC], in accordance with Rule 10, Rules of the Supreme Court of New Hampshire hereby appeals Order No. 25,143, issued September 10, 2010, by the Public Utilities Commission in DE 10-122, which Order denied the Motion of NHSC for Reconsideration of the July 20, 2010, Public Utilities Commission denial of the NHSC Petition for Intervention.

1. Parties.

Appellant.

New Hampshire Sierra Club, 40 North Main Street, Concord, NH 03301 represented by Arthur B. Cunningham, PO Box 511, 79 Checkerberry Lane, Hopkinton, NH 03229, 603-746-2196 [o]; 603-491-8629 [c]

Other parties.

Public Service Company of New Hampshire, 780 North Commercial Street, PO Box 330, Manchester, NH 03105-0330 represented by Catherine E. Shively, Senior Counsel, 780 North Commercial Street, PO Box 330, Manchester, NH 03105-0330;

Office of Consumer Advocate, 21 South Fruit Street, Suite 18, Concord, NH 03301-2429 represented by Meredith Hatfield, Office of Consumer Advocate, 21 South Fruit Street, Suite 18, Concord, NH 03301-2429;

2. Orders Sought to be Reviewed.

Public Utilities Commission Order No. 25,143, September 10, 2010, Denying New Hampshire Sierra Club Motion for Reconsideration, in DE-122, Petition for Approval

of Issuance of Long-Term Debt and Related Relief.[1]; Public Utilities Commission Order No. 25,131, dated July 20, 2010, Order Following Pre-hearing Conference, in DE 10-122, Petition for Approval of Long-Term Debt and Related Relief.[2]

3. Questions for Review with Background.

Background. Appellants, NHSC and its members and friends, some of whom are ratepayers, are entitled to the protections and benefits of 42 USC 7401 et seq., the Clean Air Act and RSA 125-O et seq., the New Hampshire Multiple Pollutant Reduction Program. These laws are intended to protect the public, including the appellants, from the adverse health effects of air pollution. Appellants have, or may in the future, suffer direct and actual health adverse affects and injury from air pollution as defined in the Clean Air Act and the New Hampshire Multiple Pollutant Reduction Program.

Question 1. Do the protections and benefits of the Clean Air Act and the New Hampshire Multiple Pollutant Reduction Program qualify as a right, privilege and substantial interest so as to permit appellants to intervene in Public Utilities Commission docket DE 10-122 within the meaning of RSA 541-A: 32, I?

Background. RSA 369:1 requires the Public Utilities Commission make a determination that the issuance and sale of debt instruments is consistent with the public good. This Court has ruled that the primary concern of the Public Utilities Commission, in the exercise of its RSA 369:1 responsibilities regarding utility capitalization, is the protection of the consuming public. Appeal of Easton, 125 N.H. 205 [1986]. The scope of the Public Utilities Commission responsibility is to determine whether the financing will provide safe and reliable service; whether the financing is economically justified when measured against adequate alternatives; and, whether the proposed capitalization would be supportable. Appeal of Conservation Law Foundation, Appeal of Consumer Advocate, 127 N.H. 606 [1986]. This Court held, at page 614:

> "....Accordingly, we emphasize that the express statutory concern for the public good comprises more than the terms and conditions of the financing itself [citing Easton, supra], and we held that the commission was obligated to determine whether the object of the financing was reasonably required for use in discharging a utility's obligation, which is to provide safe and reliable service. Moreover, we specifically decided that the commission was obliged to determine whether the company's plans to

[1] Appendix 3.
[2] Appendix 6.

accomplish that object were economically justified when measured against any adequate alternatives; and, whether the capitalization resulting from the company's plans would be supportable...." [emphasis added]

Question 2. Should the law that the proposed financing provide safe and reliable service require a Public Utilities Commission finding, based upon an examination of the projects sought to be financed, that the projects are safe, reliable and compliant with the Clean Air Act and New Hampshire Multiple Pollutant Reduction Program?

Question 3. Should the law that the proposed financing be economically justified when measured against adequate alternatives require a Public Utilities Commission finding, based upon an examination of the facts regarding the costs of pollution control for the projects sought to be financed, and an assessment of anticipated statutory, regulatory and judicial decisions regarding the costs of pollution control?[3]

Question 4. Should the law that the proposed financing be supportable to ensure that expenses do not escalate beyond rate support require a Public Utilities Commission finding, based upon an examination of the facts regarding the costs of pollution control for the projects sought to be financed, and an assessment of anticipated statutory, regulatory and judicial decisions regarding the costs of pollution control?

Background. This Court has ruled that it may review the evidentiary record before the Public Utilities Commission regarding the projects sought to be financed to ensure that the Commission has given due consideration to each of the pertinent factors upon which the responsible derivation of policy and the resolution of opposing interests must rest. Appeal of Conservation Law Foundation, supra.

Question 5. Do the pleadings and testimony presented by PSNH in support of its proposal for the projects sought to be financed satisfy the public good requirement of RSA 369:1 as articulated by this Court in Appeal of Easton, supra, and Appeal of Conservation law Foundation, supra?[4]

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[3] NHSC Motion for Reconsideration, page 5, Appendix .The EPA, by court order, is required to promulgate new air toxic rules for coal fired power plants for all air toxics, not just mercury. On December 7, 2009, EPA issued a final ruling that greenhouse gases, including CO2, endanger the public health and welfare and are subject to regulation. These requirements will increase pollution control costs.

[4] The substance of the NHSC Petition to Intervene and the Motion for Reconsideration both address the paucity of facts in the PSNH pleadings and testimony regarding its pollution control costs, both current and anticipated. NHSC specifically asserted that it must be permitted full discovery of the facts regarding pollution control costs at Merrimack Station, including, the projected costs of permitting obligations under the CAA and RSA 125-O. Motion for Reconsideration, page 5, Appendix 1.

Background. NHSC, during the course of Clean Air Act and New Hampshire Multiple Pollutant Reduction Program litigation with PSNH before the New Hampshire Department of Environmental Services-Air Resources Council, discovered three studies commissioned by PSNH that prove that PSNH engaged in a comprehensive examination of generation upgrade, debottlenecking and life extension projects for Merrimack Station. *The studies suggest that PSNH has, or will, engage in generation upgrade, de-bottlenecking and life extension projects that exceed the legislative "public interest" determination of RSA 125-O:11-18.* The studies include Merrimack Station Unit 2 Boiler Replacement Feasibility Study, November 2004, by Burns & McDonnell; Preliminary Permit Plan Analysis-Critical Path Issues, Multi-Pollutant Control Strategy Options, July 26, 2005, by GZA; and, Sargent & Lundy, Merrimack Boiler Study, February 1, 2007. The Burns & McDonnell report explored replacement of the MK2 boiler. The exhaustive Sargent & Lundy study examined, in detail, the balance of plant projects that may permit MK2 to produce up to an additional 20 MW of generation. The GZA report noted that a "cursory review of the MK2 annual current emission rates shows that a very small increase in actual emissions (less than 1%) is all that would be needed to exceed NSR significant emission levels". Any plant project that increases emissions carries with it serious Clean Air Act implications, including the necessity of upgrading very expensive pollution control equipment.[5] [6]

Question 6. RSA 369-B:3-a provides that PSNH may modify its generation capacity only if the Public Utilities Commission finds that is in the public interest of retail customers. Should the public good determination required by RSA 369:1 and RSA 369-B:3-a for the projects sought to be financed require an examination of facts regarding generation upgrade projects at Merrimack station that exceed the legislative public interest determination of the public good in RSA 125-O:11-18?

Background. PSNH filed its Petition for Approval of Issuance of Long-Term Debt and Related Relief on May 3, 2010. The Public Utilities Commission, on July 20, 2010, in Order 25,131, issued an accelerated procedural schedule that established the merit hearing date on September 13, 2010, at 10:00 a.m.[7]

Question 7. Does the accelerated procedural schedule provide adequate time for a full and fair examination of the public good of this very large financing proposal by NHSC and other interested members of the public?

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[5] NHSC Motion for Reconsideration, pages 4-5, Appendix 1. NHSC submitted these studies to the Public Utilities Commission in informational docket for the scrubber installation DE 08-103. The studies were sequestered by PUC staff without NHSC permission.

[6] PSNH, in DE 10-121, PSNH Reconciliation of Energy Service and Stranded Costs for 2009, has stated that the MK 2 turbine project has increased generating capacity by 20 MW.

[7] NHSC Motion for Reconsideration, page 7, Appendix 1. NHSC objected to the procedural schedule as noted in Order No. 25,131, page 2, Appendix 6.

4. Applicable Law. RSA 541-A: 32[8]; RSA 369:1[9]; Appeal of Easton, 125 N.H. 205 [1984][10]; Appeal of Conservation Law Foundation, 127 N.H. 606 [1986][11]; and, RSA 369-B: 3-a.[12]

5. Statement of the Case.

On May 3, 2010, PSNH filed its Petition with the Public Utilities Commission, docketed as DE 10-122, seeking authority to issue up to $600,000,000 of long term debt with maturities of up to 40 years, secured by mortgage[s] on plant equipment. In amended testimony, PSNH reduced the request to issue long term debt instruments to $500,000,000. The Petition also sought authority to extend the company authority to issue short term debt. The limit of short term debt is 10% of net fixed plant, plus $60,000,000. PSNH testimony was that the short term debt limit would exceed $300,000,000 based on the net fixed plant calculation. The Petition also requested authority for long term borrowing pursuant to an unsecured revolving credit agreement. The revolving credit agreement had not been finalized as of the date of the filing. PSNH testimony was that the revolving credit agreement borrowing limit was expected to be $300,000,000.

The Petition and PSNH testimony by witness Susan B. Weber was silent on the projects sought to be financed by the borrowings. PSNH offered no evidence that identified what plant or equipment would be mortgaged to secure the long term borrowings. Public Utilities Commission staff entered a list of projects into evidence, but, did not provide specific evidence regarding the projects sought to be financed by the borrowings.

The coupon rate on the $500,000,000 long term borrowing was to be capped at 400 basis points [4.00%] over a fixed rate benchmark [i.e., applicable Treasury Bond], or a floating rate benchmark [i.e., London Inter-bank Offer Rate (LIBOR)], capped at 400 basis points [4.00%].

PSNH did not propose an interest rate cap on the $300,000,000 + short term borrowings or the $300,000,000 borrowings from the revolving credit agreement.

[8] Appendix 7.
[9] Appendix 8.
[10] Appendix 9.
[11] Appendix 10.
[12] Appendix 11.

The Public Utilities Commission held the hearing on the merits of the Petition on September 13, 2010, three days after denying the NHSC Motion for Reconsideration of its Petition to Intervene.

NHSC filed its Petition to Intervene and its Motion for Reconsideration based upon the grave concerns of its members and friends that PSNH has engaged in generation upgrade, de-bottlenecking and life extension projects at Merrimack Station that violate the Clean Air Act and the New Hampshire Multiple Pollutant Reduction Program. The judgment of NHSC was that the Public Utilities Commission was bound by RSA 369:1 to make a public good determination that included a careful examination of PSNH compliance with the environmental laws enacted to protect the public health. NHSC, because of its grave concerns regarding the 50 year old, coal fired Merrimack Station and its compliance with pollution control laws decided to challenge PSNH permits issued by New Hampshire Department of Environmental Services- Air Resources Division.

On March 18, 2009, NHSC filed a Notice of Appeal in Docket No. 09-10, Air Resources Council, Public Service Company of New Hampshire, Temporary Permit TP 0008, asserting, *inter alia*, that: 1]. PSNH violated the Clean Air Act because it failed to make application for and obtain the permits required by 42 USC 7475 and 42 USC 7503, referred to as PSD/NSR permits, for the replacement of the MK2 turbine and the balance of plant projects; and, 2] the Temporary Permit TP-0008, contained substantial and impermissible flaws detailed in the NHSC comments filed on January 23, 2009. The gravamen of this NHSC assignment of error was that the permit was legally flawed with respect to the hazardous air pollutant mercury [Hg] because the permit does not comply with Clean Air Act 42 USC 4212 and RSA 125-O: 11-18.

On September 20, 2010, the Air Resources Council denied the NHSC appeal. The NHSC Motion for Reconsideration is pending.

On March 25, 2010, NHSC filed a Notice of Appeal, in Docket No.10-06, Air Resources Council, to the issuance of the PSNH Merrimack Station, Proposed Title V Operating Permit FY 96-TV048, asserting *inter alia* that: the Title V Permit should be vacated because the NHDES-ARD administrative record is devoid of facts demonstrating that PSNH has complied with Clean Air Act, including 42 USC 7411, 42 USC 7475 and 42 USC 7503, the provisions requiring NSPS, NSR and PSD permitting, together with corresponding improvements in control technologies, for NOx and particulates; that the Title V is legally flawed with respect to the hazardous air pollutant mercury [Hg] because it does not comply with Clean Air Act 42 USC 4212 and RSA

125-O:11-18; and, that the Final Regional Haze SIP and the Title V Permit does not contain appropriate BART emission limits.[13]

This appeal is scheduled for merit hearing on February 13, 2011.

NHSC asked the Public Utilities Commission, in its Petition to Intervene, to not only make a finding that PSNH provide safe and reliable service as required by RSA 369:1 and Appeal of Conservation Law Foundation, *supra*, but also, to allow full discovery and the introduction of evidence of each and every fact regarding the costs of environmental compliance at the 50 year old Merrimack Station, including, but not limited to, the projected costs of permitting obligations under the Clean Air Act and the New Hampshire Multiple Pollutant Reduction Program.

NHSC also asked the Commission, in its review of the public good, to permit examination of and the introduction of evidence regarding the costs for new and revised pollution standards for air toxics and coal combustion waste. The EPA, by court order, is required to promulgate new air toxic rules from coal fired power plants for *all* toxics, not just mercury, by November 11, 2011. The greenhouse gas issue looms large. On December 7, 2009 EPA issued a final ruling that greenhouse gases [including CO2] endanger public health and welfare, and, are therefore, subject to regulation. Climate change legislation is pending before Congress.

This Court ruled in Appeal of Conservation Law Foundation, *supra*, that the Public Utilities Commission must determine whether the object of the financing was reasonably required to discharge a utility's obligation to provide safe and reliable service; whether the plan was economically justified when measured against adequate alternatives; and, whether the capitalization resulting from the plans was supportable.

The NHSC Petition to Intervene and Motion for Reconsideration ask that the Public Utilities Commission do no less. The public health concerns regarding the pollution emitted from the aging, 50 year old, coal fired Merrimack Station, and the high and growing costs of pollution controls demand that the Commission fully and transparently address the public good.

6. Jurisdiction. RSA 541:6.

7. Basis for the Appeal. The Clean Air Act and the New Hampshire Multiple Pollutant Reduction Program were enacted to protect the public from the adverse health affects of pollution. Merrimack Station is a 50 year old, coal fired power plant that is defined

[13] Merrimack Station is the largest single contributor to regional haze in New Hampshire.

by the Clean Air Act as a major source of regulated pollutants, including sulfur dioxide [SO2]; nitrogen oxides [NOx]; particulate matter [PM]. Merrimack Station is a major source of toxic air pollutants, including mercury [Hg]. The health impacts of these pollutants cause substantial and irreparable injury.

A decision by this Court that the Public Utilities Commission must examine the Clean Act and New Hampshire Multiple Pollutant Reduction Program compliance of the projects sought to be financed, as part of the public good determination required by RSA 369:1 is an issue of general importance in the administration of justice.

8. Preservation of Error on the Record. Each and every question presented in this appeal has been properly preserved of record.

10/12/10

Respectfully submitted,

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No.18301

Certificate of Service

Appellant served a copy of this Appeal on the parties and attorneys as set forth at paragraph 1. above.

Arthur B. Cunningham

APPENDIX

1. New Hampshire Sierra Club Motion for Reconsideration

2. Public Service Company of New Hampshire Objection to New Hampshire Sierra Club Motion for Reconsideration

3. Public Utilities Commission, Order No. 25,143, Order Denying New Hampshire Sierra Club Motion for Reconsideration

4. Petition for Intervention of the New Hampshire Sierra Club

5. Public Service Company of New Hampshire Objection to New Hampshire Sierra Club Petition to Intervene

6. Public Utilities Commission, Order No. 25,131, Order Following Prehearing Conference

7. RSA 541-A:32, Intervention

8. RSA 369:1 Authority to Issue Securities

9. Appeal of Easton, 125 N.H. 205 [1984]

10. Appeal of Conservation Law Foundation, 127 N.H.606 [1986]

11. RSA 369-B:3-a Divestiture of PSNH Generation Assets

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DE 10-122

No. 001

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
PETITION FOR APPROVAL OF LONG AND SHORT TERM DEBT

NEW HAMPSHIRE SIERRA CLUB
MOTION FOR RECONSIDERATION

New Hampshire Sierra Club [NHSC], in accordance with RSA 541:3 and RSA 541:4, respectfully moves that the Public Utilities Commission [Commission] reconsider its Order of July 20, 2010, denying the New Hampshire Sierra Club standing to intervene in this docket.

INTRODUCTION

RSA 541:4 provides that a reconsideration Motion must fully set forth every ground upon which it is claimed that a decision or order complained of is unlawful or unreasonable. The Commission has held that such a showing may be made by the identification of matters that were "overlooked or mistakenly conceived." Verizon New Hampshire Wire Center Investigation, DT 05-083, DT 06-112, citing Dumais v. State, 118 N.H. 309 [1978].

The Commission, in its July 20, 2010, Order, mistakenly conceived the thrust of the NHSC Petition to Intervene and erroneously denied its Petition to Intervene.

The primary concern of the Commission, in the exercise of its RSA 369:1 responsibilities regarding utility capitalization, is the protection of the consuming public. Appeal of Easton, 125 N.H. 205 [1984]. The scope of the Commission's responsibility was it evaluates utility financing requests is to determine whether the financing will provide safe and reliable service which is economically justified when measured against adequate alternatives; and, whether the proposed capitalization would be supportable. Appeal of Conservation Law Foundation. Appeal of Consumer Advocate, 127 N.H.606 [1986].

NHSC asked to intervene in this financing docket in order to ensure that the Commission fully addressed the mandate of RSA 369:1. The New Hampshire Multiple Pollutant Control Program and the Clean Air Act are intended to protect the public from the adverse health affects of pollution. Violations of those statutes have substantial health consequences. A utility that violates those statutes is not providing safe and reliable service. Compliance with pollution control laws for coal fired power plants has serious and substantial costs. The Commission has the responsibility to assess those costs when

measured against alternatives. The costs of pollution control for antiquated coal fired power plants such as Merrimack Station are growing, uncertain and are likely to escalate beyond rate support. The Commission has the responsibility to determine whether the operating, maintenance and capital costs of pollution control will exceed cost estimates.

NHSC brings many years of experience in the enforcement of pollution control law; advising the public of the health effects and damage to the environment of pollution; and, aggressively advocating for compliance with the law.

The Commission, and the consuming public, would benefit from NHSC participation in this docket.

The consuming public would also benefit if the Commission would vacate the accelerated, summary procedural schedule adopted on July 20, 2010, and provide for a schedule that would allow full, fair, transparent, and wide participation in and discussion of this very large financing proposal.

RSA 541:4 SPECIFICATIONS

RSA 369:1 requires that the Commission, before it authorizes the issuance of debt securities, must make findings that the amount and objects of the proposed financing will be in the public good, goes to whether the object of the financing was reasonably required for use in discharging a utility's obligation, whether the utility's plans to accomplish that object were economically justified when measured against adequate alternatives, and whether the capitalization resulting from the utility's plans would be supportable. Appeal of Easton, *supra*; Appeal of Conservation Law Foundation. Appeal of Consumer Advocate, *supra*. A reviewing Court may review the evidentiary record to assure that reasoned consideration has been given to each of the pertinent factors upon which the responsible derivation of policy and resolution of opposing interests must rest. The New Hampshire Supreme Court, in Appeal of Conservation Law Foundation, stated at page 614:

> "...Accordingly we emphasize that the express statutory concern for the public good comprises more than the terms and conditions of the financing itself [citing Easton, *supra*], and we held that the commission was obligated to determine whether the object of the financing was reasonably required for use in discharging a utility's obligation, which is to provide safe and reliable service .... Moreover, we specifically decided that the commission was obliged to determine whether the company's plans to accomplish that object were economically justified when measured against any adequate alternatives; and whether the

capitalization resulting from the company's plans would be supportable. ..." [Emphasis added].

The Commission denial of the NHSC Petition to Intervene, if sustained, will prevent full, reasoned consideration of each of the pertinent factors upon which responsible policy and the resolution of opposing factors as follows:

1. Petition of Pubic Service Company of New Hampshire [PSNH] for Approval of up to $600,000,000 of Long Term Debt Securities is impermissibly flawed because it does not satisfy the public good mandate of RSA 369:1.

The PSNH Petition for approval of debt securities and the direct testimony of Susan B. Weber filed in support of the Petition does not address or provide facts supporting the essential public good criteria required by RSA 369:1. The Petition and the Weber testimony do not, as required by Appeal of Conservation Law Foundation, *supra*: a] provide the object of the financing and whether the financing is reasonably required in discharging its obligation to provide safe and reliable service; b] whether the PSNH plans are economically justified when measured against adequate alternatives; and, c] whether the capitalization resulting from PSNH plans would be economically supportable.

2. RSA 369:1 requires that PSNH comply with the law to ensure that it is acting in the public good by providing safe and reliable service.

a. NHSC, in its Petition to Intervene, set forth facts challenging PSNH compliance with RSA 125-O and the Clean Air Act.

In April- May, 2008, Public Service Company of New Hampshire [PSNH] replaced the MK2 turbine at its Merrimack Station generating plant without the public permitting process required by the Clean Air Act.

On March 18, 2009, NHSC filed a Notice of Appeal in Docket No. 09-10, Public Service Company of New Hampshire, Temporary Permit TP 0008, asserting, *inter alia*, that: 1]. PSNH violated the Clean Air Act because it failed to make application for and obtain the permits required by 42 USC 7475 and 42 USC 7503, referred to as PSD/NSR permits, for the replacement of the MK2 turbine and the balance of plant projects; and, 2] the Temporary Permit TP-0008, contained substantial and impermissible flaws detailed in the NHSC comments filed on January 23, 2009. The gravamen of this NHSC assignment of error was that the permit was legally flawed with respect to the hazardous air pollutant mercury [Hg] because the permit does not comply with Clean Air Act 42 USC 4212 and RSA 125-O:11-18.

On March 25, 2010, NHSC filed a Notice of Appeal, in Docket No.10-06, to the issuance of the PSNH Merrimack Station, Proposed Title V Operating Permit FY 96-

TV048, asserting *inter alia* that: the Title V Permit should be vacated because the NHDES-ARD administrative record is devoid of facts demonstrating that PSNH has complied with Clean Air Act, including 42 USC 7411, 42 USC 7475 and 42 USC 7503, the provisions requiring NSPS, NSR and PSD permitting, together with corresponding improvements in control technologies, for NOx and particulates; that the Title V is legally flawed with respect to the hazardous air pollutant mercury [Hg] because it does not comply with Clean Air Act 42 USC 4212 and RSA 125-O:11-18; and, that the Final Regional Haze SIP and the Title V Permit does not contain appropriate BART emission limits.[1]

Clean Air Act 42 USC 7661d provides for an administrative appeal to the Administrator, United States Environmental Protection Agency, Region 1, if a party is not satisfied with the Air Resources Council disposition of the issues raised in a Title V appeal.

NHSC fully intends to file appeals to adverse decisions by the Air Resources Council.

b. RSA 369-B: 3-a requires that the Commission make a public good determination before PSNH may modify its generating capacity.

During the course of the ARC appeal 09-10, NHSC discovered three studies commissioned by PSNH that prove that PSNH engaged in a comprehensive examination of generation upgrade and life extension projects for Merrimack Station. The studies include Merrimack Station Unit 2 Boiler Replacement Feasibility Study, November 2004, by Burns & McDonnell; Preliminary Permit Plan Analysis-Critical Path Issues, Multi-Pollutant Control Strategy Options, July 26, 2005, by GZA; and, Sargent & Lundy, Merrimack Boiler Study, February 1, 2007. The studies suggest that PSNH has, or will, engage in generation upgrade, de-bottlenecking and life extension projects that exceed the legislative "public interest" determination of RSA 125-O:11-18. The Burns & McDonnell report explored replacement of the MK2 boiler. The exhaustive Sargent & Lundy study[2] examined, in detail, the balance of plant projects that may permit MK2 to produce up to an additional 20 MW of generation. The GZA report noted that a "cursory review of the MK2 annual current emission rates shows that a very small increase in actual emissions (less than 1%) is all that would be needed to exceed NSR significant emission levels".

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[1] Merrimack Station is the largest single contributor to regional haze in New Hampshire. Very importantly, on August 16, 2010, the Air Resources Council, at its regular monthly meeting, discussed the proposed new text of Chapter Env-A 2300, Mitigation of Regional Haze. EPA, in early 2010, rejected an earlier proposed New Hampshire Regional haze rule as lacking enforceable emission limits. At the August 16, 2010, meeting, William H. Smagula, Director-Generation, PSNH, admitted to the Air Resources Council that the proposed Regional Haze rule will require significant changes at Merrimack Station and will increase costs to customers. Mr. Smagula also stated that PSNH has done a study of those costs.

[2] The copy produced by PSNH pursuant to NHDES-ARC Order was the 4th, heavily redacted version.

Any plant project that increases emissions carries with it serious Clean Air Act implications, including the necessity of upgrading very expensive pollution control equipment.[3]

The Commission must conduct a full enquiry into generation upgrade at Merrimack Station to make the public good determination to ensure safe and reliable service required by RSA 369:1 and RSA 369-B:3-a.

3. The Commission, in order to make the finding that PSNH will provide safe and reliable service as required by RSA 369:1 and Appeal of Conservation Law Foundation, *supra*, must permit full discovery and the introduction of evidence of each and every fact regarding the costs of environmental compliance at the 60 year old Merrimack Station, including, but not limited to, the projected costs of permitting obligations under RSA 125-O and the Clean Air Act.[4]

The cost projections should include not only the costs of permitting obligations and the operating and capital costs to install and maintain pollution control equipment, but also a careful assessment of anticipated statutory, regulatory and judicial decisions.[5]

The Commission must, in the interest of the public good, permit examination of and the introduction of evidence regarding the costs for new and revised pollution standards for air toxics and coal combustion waste. The EPA, by court order, is required to promulgate new air toxic rules from coal fired power plants for *all* toxics, not just mercury, by November 11, 2011. The greenhouse gas issue looms large. On December 7, 2009 EPA issued a final ruling that greenhouse gases [including CO2] endanger public health and welfare, and, are therefore, subject to regulation. Climate change legislation is pending before Congress.

NOx is a particularly demanding problem for PSNH. NOx is a component of ozone. A large part of southern New Hampshire is in non-attainment for ozone which means that the control of NOx emissions must meet more stringent control standards. MK 2 is a BART eligible EGU under the Regional Haze SIP which means that emissions must meet a more stringent standard that, by the August 16, 2010, Air Resources Council admission of William H. Smagula, Director-Generation, PSNH, will have costs for ratepayers. [See footnote 1] MK2 is a wet bottom cyclone boiler, built in 1968, with very high uncontrolled NOx emission rates due, in large part, to the very high heat release for the boiler and very high full load furnace exit gas temperature. The MK2

[3] NHSC submitted these studies to the Public Utilities Commission in informational docket DE 08-103. The studies were sequestered by PUC staff without NHSC permission. See Puc 201.04.

[4] The Public Utilities Commissions of other states permit comprehensive examination of the facts and costs of pollution control compliance. See, for example, State of Arkansas Public Services Commission Docket # 09-042-U, link: http://www.apscservices.info/efilings/docket_search_results.asp?CaseNumber=09-042-U&Aff=yes.

[5] PSNH has consistently objected to NHSC efforts to obtain cost information for pollution control compliance. See DE 10-121.

NOx uncontrolled emission rate is a much higher rate than most uncontrolled boilers and is higher than most cyclones. Andover Technology Partners, Case Studies, April 23, 1998. NHSC Exhibit B-11, ARC 09-10.

There are similar concerns for the control of particulate matter and sulfur dioxide and other pollutants.

PSNH has abandoned its efforts to control mercury by the activated carbon injection technique.[6] The failure of this process has raised substantial concern that the flue gas desulphurization [FGD] system under construction at Merrimack Station will not reduce mercury to the level mandated by RSA 125-O.

4. The Commission, in order to ensure that the proposed capitalization satisfies RSA 369:1, must examine whether the financing is economically justified when measured against adequate alternatives.

The cost of pollution controls at aged coal fired power plants such as Merrimack Station is substantial and growing. The Commission must evaluate the economic desirability of the continued operation of the plant. The evaluation must be conducted in light of RSA 378:30-a, the anti-CWIP statute. Appeal of Public Service Company of New Hampshire, 125 N.H. 46 [1984].

PSNH has asked the Commission to approve financing exceeding a billion dollars. $600,000,000 of that financing will have maturities of up to 40 years. Extending the life of a very dirty, 60 year old coal fired power plant another 40 years is an extremely unwise choice economically.[7]

5. The Commission must examine the very serious issue of the financial supportability of the proposed capitalization to ensure that expenses do not escalate beyond rate support.

It is certain that the costs of pollution control for coal fired power plants will escalate. Climate change legislation and regulatory action has increased costs to PSNH for its greenhouse gas emissions.[8] Air toxics, including mercury, are subject to intense, more stringent emission limitations. PSNH compliance with current pollution controls is under attack. The litigation will have very severe cost consequences to PSNH if it is ordered to add pollution control equipment.

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[6] In accordance with the testimony of William H. Smagula, Director-Generation, PSNH, at the March 15, 2010, hearing in ARC 09-10 before the Air Resources Council.

[7] For example, the natural gas plant in Londonderry, NH may be an alternative.

[8] New Hampshire is a RGGI state.

Customer migration has become a problem for PSNH, has caused rate increases, and is the subject of a current Commission docket. [DE-10-160]. Energy efficiency programs have lowered demand. [DE 10-12]. Because of environmental concerns and cost saving measures, the public demand for renewable energy is growing.

The Commission must demand that the PSNH support its capitalization proposal with competent evidence of future rate implications. " ...Rather, the commission's responsibility is to determine whether at later ratemaking proceeding a reasonable rate can be set that will allow the company to support the capitalization that will result from use of the proceeds of the proposed financing...." Appeal of Conservation Law Foundation, *supra*, page 676.

In Commission docket DE 09-035, PSNH acknowledged that its investments and expenses are increasing as its revenues are stagnating or declining. PSNH admitted that given the age and condition of the plant, the need for replacements and upgrades to its system is growing. [Order No. 25,123, page 30]. The Commission stated that it will be called upon to confirm whether plant additions will be used and useful and in service and to find whether recovering the associated costs will be allowable. [Order, page 32]

NHSC, by its Petition to Intervene, is asking that the Commission include pollution control costs in the rate making analysis.

6. The Commission must vacate the procedural schedule it adopted on July 20, 2010, in Order No. 25,131. The procedural schedule is arbitrary and unreasonably short to allow the Commission to develop the full evidentiary record necessary to support the findings required by RSA 369:1.

Wherefore, NHSC respectfully demands that it be permitted full intervention in this docket; that the Commission vacate the procedural schedule; fix a procedural schedule that will permit full examination of the public good of the financing proposal; and, for whatever other relief proper in the premises.

8/18/10

Respectfully submitted,

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gilfavor@comcast.net

No.18301

Certificate of Service

Petitioner served notice of the filing of this Motion pursuant to rule.

Arthur B. Cunningham

THE STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

Public Service Company of New Hampshire
Petition for Approval and Long Term and Short Term Debt

Docket No. DE 10-122

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE'S OBJECTION TO NEW HAMPSHIRE SIERRA CLUB'S MOTION FOR RECONSIDERATION

Pursuant to Rule Puc §203.07(f), Public Service Company of New Hampshire (hereinafter "PSNH" or "the Company") hereby objects to the undated Motion for Reconsideration ("Motion") filed by the Sierra Club's New Hampshire Chapter ("NHSC"). By that Motion, NHSC "demands" that it be permitted full intervention in this docket. NHSC's Motion does not allege sufficient good reason for rehearing or reconsideration; therefore it should be denied. RSA 541:3; Rule Puc §203.33.

In support of this Objection, PSNH says the following:

1. This docket involves PSNH's request for authority to issue certain long-term debt. The Commission found in Order No. 25,131, dated July 20, 2010, (the "Order"), that NHSC had "not stated a right, duty, privilege, immunity or other substantial interest that would be affected by the outcome of this proceeding." Order, *slip op.* at 5. The Commission also found that it "cannot find that the interests of justice are served by allowing NHSC to intervene in PSNH's financing proceeding to re-litigate PSNH's compliance with air emissions requirements." *Id.* at 6. Finally, the Commission further found that NHSC's participation as an intervenor in this docket "would impair the prompt and orderly conduct of this proceeding." *Id.* The Commission's legal analysis leading to these conclusions was detailed and comprehensive. All of the grounds for rehearing contained in the Motion were previously carefully reviewed and considered by the Commission when it denied NHSC's petition to intervene in Order No. 25,131.

2. Pursuant to RSA 541:3, the Commission may grant rehearing or reconsideration when the motion states good reason for such relief. Good reason may be shown by identifying specific matters that were either "overlooked or mistakenly conceived" by the deciding tribunal. *Dumais v. State*, 118 N.H. 309, 311 (1978). A successful motion does not merely reassert prior arguments and request a different outcome. *See Campaign for Ratepayers Rights,* 145 N.H. 671, 674 (2001); *Connecticut Valley Electric Co.*, 88 NH PUC 355, 356 (2003); *Public Service Company of New Hampshire,* Docket No. 07-108, Order No. 24,966, *slip op.* at 5 (May 1, 2009).

3. A careful review of the Motion reveals that the grounds set forth for reconsideration have been previously raised by NHSC and addressed in the Order, or are mere reformulations of previous arguments.[1] NHSC merely reiterates, *inter alia*, its claims that: the Commission must consider compliance with environmental laws as part of this financing proceeding; that PSNH has failed to comply with RSA 125-O and the Clean Air Act; that PSNH failed to obtain permits required for the replacement of the Merrimack Unit 2 HP/IP turbine; that the N.H. Department of Environmental Services' issuance of a Title V Operating Permit was done in error; that PSNH has, or will, engage in generation upgrade, de-bottlenecking and life extension projects that exceed the legislative "public interest" determination of RSA 125-O:11-18; etc. NHSC's Motion is the classic reassertion of prior arguments with a request for a different outcome and therefore fails to meet the RSA 541:3 rehearing requirement that "good reason for the rehearing be stated in the motion."

4. The interests of the State in promoting environmental protection and in achieving reductions in the environmental and health impacts of electricity generation have already been addressed by the New Hampshire Legislature in RSA 125-O:11, I, which specifically found that the installation of scrubber technology at Merrimack Station is in the public interest, and by the New Hampshire Public Utilities Commission

[1] In the Motion's discussion of environmental matters, NHSC has alleged certain factual matters that are not relevant to this Objection to that Motion. PSNH has not addressed those allegations herein due to their irrelevance. Such decision not to address those allegations should not be viewed as a waiver of the right to contest those matters nor as an admission.

("NHPUC") in Docket No. DE 08-103, *Investigation of PSNH's Installation of Scrubber Technology at Merrimack Station,* albeit not to NHSC's satisfaction. NHSC has also raised its environmental issues in a variety of other forums. NHSC's lack of satisfaction with the results achieved to date in such other forums does not create standing before this Commission to re-hear matters outside of the scope of this proceeding and outside of the Commission's jurisdiction..

5. Furthermore, NHSC's participation in this docket, with attempts to expand the scope of the proceeding to bring environmental concerns into the case, its non-relevant discovery, its demand that the Commission vacate the procedural schedule adopted on July 20, 2010, and other scheduling constraints will clearly impair the orderly and prompt conduct of the proceedings. *See,* RSA 541-A:32, I, c. For example, at the June 29, 2010 technical session, NHSC suggested that testimony, technical session and hearing dates tentatively scheduled in August and September be delayed until unspecified dates in the October to November time frame, and potentially indefinitely, to allow for the completion of various environmental proceedings and anticipated actions of environmental regulators. The Commission has adopted a reasonable schedule to maximize the Company's flexibility vis-à-vis the markets and ensure cost effective financing.

WHEREFORE PSNH respectfully requests that, for the reasons set forth in its original decision in Order No. 25,131 and above, the Commission deny NHSC's Motion for Reconsideration.

Respectfully submitted,

Public Service Company of New Hampshire

August 25, 2010

By: Catherine E. Shively

Catherine E. Shively, Senior Counsel
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CERTIFICATE OF SERVICE

I hereby certify that, on the date written below, I caused the attached "PSNH's Objection to New Hampshire Sierra Club Motion for Reconsideration" dated August 25, 2010 in NHPUC Docket No. DE 10-122 to be served pursuant to N.H. Code Admin. Rule Puc §203.11.

August 25, 2010

Catherine E. Shively

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DE 10-122

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Petition for Approval of Issuance of Long-Term Debt and Related Relief

Order Denying New Hampshire Sierra Club Motion for Reconsideration

ORDER NO. 25,143

September 10, 2010

This docket involves the request of Public Service Company of New Hampshire (PSNH) for approval, pursuant to RSA 369:1, to borrow up to $500 Million in long term debt.[1] PSNH proposes to incur the debt in two increments over the course of the next two years, 2011 and 2012. The New Hampshire Sierra Club (NHSC) petitioned to intervene in this docket on June 24, 2010, and, on July 20, 2010, the Commission issued Order No. 25,131 (Order) that denied NHSC's intervention. NHSC filed a motion for reconsideration of the Commission's denial of its request to intervene on August 18, 2010.

The Order denied the motion to intervene because: (1) NHSC failed to state a right, duty, privilege, immunity or other substantial interest that would be affected by the outcome of this proceeding pursuant to RSA 541-A:32, I; and (2) allowing NHSC to use this docket to re-litigate PSNH's compliance with air emissions requirements or conduct discovery for materials that have not been provided in other forums would not serve the interests of justice pursuant to RSA 541-A:32, II. Order at 5-6.

[1] PSNH's original request for authority to borrow up to $600 million was modified in the Amended Direct Testimony of Susan B. Weber filed on July 23, 2010.

The Order also defined the scope of the proceeding as "the terms of the financing, the amount of the financing, the effect on rates and on the capital structure and debt/equity ratio for PSNH, and a review of whether the proposed use of the proceeds is in the public good." Order at 7.

I. POSITIONS OF THE PARTIES

A. New Hampshire Sierra Club Motion for Reconsideration

NHSC's motion does not address how its rights, duties, privileges, immunities or substantial interests are affected by the outcome of this proceeding and instead concentrates on "the thrust of" its petition to intervene as it relates to the scope of the proceeding. Motion at 1. NHSC argues that PSNH's provision of safe and reliable service pursuant to RSA 374:1 includes an obligation to comply with the New Hampshire Multiple Pollutant Control Program and the Clean Air Act. NHSC suggests that PSNH may be violating those statutes, without referencing any such finding by a court or agency with jurisdiction over such compliance and argues that the public interest finding required by RSA 369:1 mandates an extensive review of PSNH's environmental compliance at its Merrimack Station Plant. Motion at 1-2. According to NHSC, the Commission's determination of public interest under RSA 369:1 should consider PSNH's estimated costs of current and future environmental compliance as well as whether alternatives to such expenditures exist. Motion at 2.

NHSC argues that PSNH is considering generation upgrades, de-bottlenecking and life extension projects at Merrimack Station that exceed the public interest standard set out in RSA 125-O:11-18. Motion at 4. NHSC also argues that the Commission should examine whether a generation upgrade at Merrimack Station complies with both RSA 369:1 and 369-B:3-a (dealing with plant modifications). Motion at 5.

NHSC discusses a number of specific air pollutants and associated environmental standards and argues that the Commission should explore PSNH's plans and costs for compliance with each of those emissions standards at Merrimack Station. NHSC urges the Commission to determine probable future costs of environmental compliance and likely impacts on future rates. Motion at 6-7. Finally, NHSC asks that the Commission vacate the procedural schedule in this docket and fix an alternative procedural schedule which will allow NHSC and others to fully examine all of the issues described in its motion.

B. Public Service Company of New Hampshire's Objection

According to PSNH, NHSC has not made any new arguments and instead has only repeated arguments made in its original petition to intervene. PSNH asserts that NHSC has attempted to expand the scope of this financing docket to include an extensive review of PSNH's environmental compliance. PSNH argues that the public interest and environmental concerns have already been dealt with in RSA 125-O. PSNH concludes that NHSC's attempts to expand the scope and to delay the procedural schedule will impair the orderly and prompt conduct of the proceedings and urges the Commission to deny NHSC's motion.

II. COMMISSION ANALYSIS

Pursuant to RSA 541:3, the Commission may grant rehearing or reconsideration when the motion states good reason for such relief. Good reason may be shown by identifying specific matters that were either "over-looked or mistakenly conceived" by the deciding tribunal. *Dumais v. State*, 118 N.H. 309, 311 (1978). A successful motion for rehearing does not merely reassert prior arguments and request a different outcome. *Connecticut Valley Electric Co.* 88 NH PUC 355, 356 (1978). To the extent new evidence is proffered as a basis for rehearing, the

motion for rehearing should explain why such evidence could not have been presented in the original hearing. *O'Loughlin v. N.H. Personnel Commission*, 117 N.H. 999, 1004 (1977).

A careful review of NHSC's motion for reconsideration leads us to conclude that, with respect to intervention, it has failed to identify specific matters that were overlooked or mistakenly conceived and it has similarly failed to state other good reason why it should be granted intervention. NHSC raises certain arguments for the first time in its motion for reconsideration that relate primarily to the scope of the proceeding rather than to the question of intervention.

We have already found, based upon NHSC's original petition for intervention, as well as its statements at the prehearing conference, that it has not demonstrated that its rights, duties, privileges, immunities or other substantial interests are affected by the outcome of this proceeding. Order at 5. *See* RSA 541-A:32, I. Since NHSC has not made any additional arguments on this point in its motion for reconsideration, we find no reason to change our ruling on this issue.

With regard to whether to grant discretionary intervention pursuant to RSA 541-A:32, II, we found that, as regards this proceeding, NHSC's proposal to determine PSNH's compliance with applicable air emissions standards, which is beyond the Commission's authority, does not serve the interests of justice and that granting intervention to allow NHSC to conduct discovery for materials not provided in another forum, as it stated was a purpose of its intervention, would impair the prompt and orderly conduct of the proceeding. Order at 6-7. Furthermore, NHSC's motion merely repeats arguments concerning air emissions standards and its intention to use the proceeding to challenge PSNH's compliance with environmental laws. Motion at 1-4 and 6.

With regard to the scope of the proceeding, for the first time in its motion for reconsideration NHSC does articulate some of the standards for review of proposed financings under RSA 369:1 that have been developed though case law and presents an outline of arguments that it would want to develop in relation to those standards if granted intervention. NHSC's arguments principally center on PSNH's compliance with environmental air emissions standards – current, under development, and that might be forthcoming. NHSC now ties the environmental compliance issues originally raised with questions of current and future costs of compliance and potential future rate impacts of such potential compliance obligations.

As we have stated in relation to past PSNH financing requests, "[o]ur consideration of the rate impact of PSNH's proposed financing is limited to the rate impacts associated with the financing." *Public Service Company of New Hampshire*, Order No. 25,050 (December 8, 2009). We will examine the uses of the proposed financing and will consider potential rate impacts of the financing as required by the facts of this proceeding. However, these new arguments by NHSC do not specify matters that were overlooked or mistakenly conceived in our original decision based on the record before us at that time, nor does NHSC suggest why such arguments could not have been made in their original petition for intervention or at the prehearing conference.

Finally, while NHSC does not repeat its proposal that this proceeding be left open with no ruling until such time as environmental compliance litigation is resolved in other forums (Prehearing conference transcript at 10, lines 4-11, and 12, lines 6-11), NHSC's motion does demand that the procedural schedule be vacated and asserts that a considerably longer process is needed. Motion at 2, 5 and 7, Thus, NHSC's motion for reconsideration does not support a determination that its intervention would not impair the orderly and prompt conduct of the

proceeding. For the reasons set forth above, we affirm our earlier ruling that NHSC's intervention in this docket should be denied. *See* RSA 541-A:32, II.

Based upon the foregoing, it is hereby

ORDERED, NHSC's request for reconsideration is denied.

By order of the Public Utilities Commission of New Hampshire this tenth day of September, 2010.

Thomas B. Getz
Chairman

Clifton C. Below
Commissioner

Amy L. Ignatius
Commissioner

Attested by:

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Docket #: 10-122 Printed: September 09, 2010

FILING INSTRUCTIONS: PURSUANT TO N.H. ADMIN RULE PUC 203.02(a),

WITH THE EXCEPTION OF DISCOVERY, FILE 7 COPIES (INCLUDING COVER LETTER) TO:

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Docket #: 10-122 Printed: September 09, 2010

INTERESTED PARTIES

RECEIVE ORDERS, NOTICES OF HEARINGS ONLY

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

. 004

DE 10-122

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
PETITION FOR APPROVAL OF LONG AND SHORT TERM DEBT

PETITION FOR INTERVENTION OF THE NEW HAMPSHIRE SIERRA CLUB

New Hampshire Sierra Club [NHSC], pursuant to the Order of Notice issued by the Public Utilities Commission on June 1, 2010, respectfully petitions to intervene in the captioned case.

STANDING

NHSC, a duly organized Chapter of the Sierra Club, is a non-profit organization whose over 4000 volunteer members in New Hampshire are dedicated to securing a pollution free and healthy environment. The Sierra Club mission statement is: "To explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and, to use all lawful means to carry out these objectives."

Each and every appellant named herein is entitled to the protections and benefits of 41 USC § 7401 et seq. the Clean Air Act and RSA 125-O et seq. New Hampshire Multiple Pollutant Reduction Program, and have, and will in the future, suffer direct and actual adverse affects and injury from air pollution as defined in the Clean Air Act and the New Hampshire Multiple Pollutant Reduction Program.

The individual appellants, members and friends of the New Hampshire Sierra Club, many of whom are PSNH ratepayers, are as follows:

Tyra H. Allgrove, 18 Spring Cove Rd #106, Nashua, NH, 03062, 603-320-6579;
Jim Allmendinger, 88 Province Rd, Strafford, NH, 03884, 603-664-5392;
Barbara Amos, 65 A Laurel Hill Rd., Hollis, NH, 03049, 603-465-7555;
Jerry, Amos, 65 A Laurel Hill Rd., Hollis, NH, 03049, 603-465-7555;
David W. Anderson, 111 Porpoise Way, Portsmouth, NH, 03801, 603-617-0679;
Melissa Bernardin, 20 Fayette St, Concord, NH, 03301, 603-219-0099;
David Borden, PO Box 167, New Castle, NH, 03854, 603-436-4132;
Catherine Corkery, 97 High St, Penacook, NH, 03303, 603-491-1929;
Jerry Curran, 44 Buckridge Dr, Amherst, NH, 03031, 603-673-7996;
Gail Denemark, 37 The Flume, Amherst, NH, 03031, 603-672-1747;

Kurt Ehrenberg, 281 Wallis Road, Rye, NH, 03870, 603-498-2275;
Catherine Goldwater, 149 Broad St, Hollis, NH, 03049, 603-219-0099;
Kary Jencks, 3 Molly Stark Lane, New Boston, NH, 03870, 603-487-2024;
Michael Kaelin, 105 Curtis Brook Rd., Lyndeboro, NH, 03082, 603-654-5948;
Elaine Kellerman, 1406 Alton Woods Dr, Concord, NH, 03301, 913-522-1769;
Dennis Kepner, 105 Mill Rd, Hampton, NH, 03842, 603-926-3051;
Susan Kepner, 105 Mill Rd, Hampton, NH, 03842, 603-926-3051;
Scott Nichols, 227 Shaker Rd., New London, NH, 03257, 603-661-4796;
Cindy Reed, 27 Lovers Lane Rd, Chichester, NH, 03258, 603-798-3712;
Nan Stearns, 31 Fells Drive, Amherst, NH, 03031, 603-673-3730; and,
Pete Stearns, 31 Fells Drive, Amherst, NH 03031 603-673-3730.

MEMORANDUM

In April- May, 2008, Public Service Company of New Hampshire [PSNH] replaced the MK2 turbine at its Merrimack Station generating plant without the public permitting process required by the Clean Air Act.

On March 18, 2009, NHSC filed its Notice of Appeal in Docket No. 09-10, Public Service Company of New Hampshire, Temporary Permit TP 0008, asserting, *inter alia*, that: 1]. PSNH violated the Clean Air Act because it failed to make application for and obtain the permits required by 42 USC 7475 and 42 USC 7503, referred to as PSD/NSR permits, for the replacement of the MK2 turbine and the balance of plant projects; and, 2] the Temporary Permit TP-0008, contained substantial and impermissible flaws detailed in the NHSC comments filed on January 23, 2009. The gravamen of this NHSC assignment of error was that the permit was legally flawed with respect to the hazardous air pollutant mercury [Hg] because the permit does not comply with Clean Air Act 42 USC 4212 and RSA 125-O:11-18.

The Air Resources Council, in Docket 09-10, determined that NHSC had standing to bring its appeal.

During the course of this appeal, NHSC discovered three studies commissioned by PSNH that prove that PSNH engaged in a comprehensive examination of generation upgrade and life extension projects for Merrimack Station. The studies include Merrimack Station Unit 2 Boiler Replacement Feasibility Study, November 2004, by Burns & McDonnell; Preliminary Permit Plan Analysis-Critical Path Issues, Multi-Pollutant Control Strategy Options, July 26, 2005, by GZA; and, Merrimack Boiler Study, February 1, 2007. The studies suggest that PSNH has, or will, engage in generation upgrade, de-bottlenecking and life extension projects that exceed the legislative "public interest" determination of RSA 125-O:11-18.[1] The Burns &

[1] The subject of Public Utilities Commission docket DE 08-103.

McDonnell report explored replacement of the MK2 boiler. The exhaustive Sargent & Lundy study[2] examined, in detail, the balance of plant projects that may permit MK2 to produce up to an additional 20 MW of generation. The GZA report noted that a "cursory review of the MK2 annual current emission rates shows that a very small increase in actual emissions (less than 1%) is all that would be needed to exceed NSR significant emission levels". Any plant project that increases emissions carries with it serious Clean Air Act implications, including the necessity of upgrading very expensive pollution control equipment.[3]

The litigation in Docket 09-10 has been marred by serious and substantial errors of law by the Air Resources Council, including: 1] limiting the scope of the appeal to the narrow question of whether the MK 2 turbine replacement without proper consideration of the Clean Air Act NSR/PSD permitting issues; and, 2] refusal to hear the Clean Air Act 42 USC 4212 and RSA 125-O:11-18 claims regarding the hazardous air pollutant mercury[4].

Docket 09-10 is not only replete with legal error, but has been tainted by official misconduct that goes to the essential integrity of the New Hampshire environmental appeal process. That concern has been the conduct of Acting Presiding Officer Raymond Donald. NHSC, during the course of the appeal, filed four separate Requests for Information as authorized by rule. PSNH refused to provide a single document, claiming confidentiality. Mr. Donald, demonstrating clear bias in favor of PSNH, denied, without reading the NHSC filings, the first three of the NHSC Requests for Information. It was only after NHSC pointed out to Mr. Donald that PSNH had relied on the Sargent & Lundy report in official filings in both the Air Resources Division and the Public Utilities Commission, that he ordered PSNH to produce the study. [5]

In October, 2009, NHSC discovered that Mr. Donald was a former PSNH employee; that he had filed inadequate financial disclosure with the New Hampshire Secretary of State; and, that he failed to disclose his PSNH employment history notwithstanding repeated NHSC Motions to Disqualify him based on his manifest bias. It was only after a NHSC reminder to PSNH counsel of their duty of candor to the tribunal was Mr. Donald' employment disclosed.

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[2] The copy produced by PSNH pursuant to NHDES-ARC Order was the 4th, heavily redacted version. NHSC has a Motion pending in 09-10 ARC to produce all, un-redacted versions of the study.

[3] NHSC submitted these studies to the Public Utilities Commission in informational docket DE 08-103. The studies were sequestered by PUC staff without NHSC permission. See Puc 201.04.

[4] The refusal of the Air Resources Council to hear the mercury issues is inexplicable. The putative PSNH reason for Temporary Permit TP-0008 [scrubber] is to reduce mercury emissions as mandated by RSA 125-O:11-18.

[5] Mr. Donald granted the Fourth NHSC Request, which resulted in the PSNH production of the heavily redacted 4th version of the Sargent & Lundy study which PUC staff sequestered in DE 08-103.

After the Air Resources Council issues its final order, NHSC will appeal the errors of law and ask the New Hampshire Supreme Court to scrutinize the conduct of Mr. Donald, which has poisoned the entire process.

In early 2009, after NHSC filed its 09-10 appeal to TP-0008, the United States Environmental Protection Agency, Region 1, Boston, Massachusetts, filed a data request on PSNH pursuant to Clean Air Act 42 USC 7414. The comprehensive 114 request asks for documents relating to Merrimack Station, including information regarding plant modifications, generation upgrades and life extension projects. PSNH filed extensive objections to the request, claiming confidential business information [CBI].[6] Region 1, as of June 22, 2010, over a year after its 114 request, has not yet completed its CBI review.[7]

On March 25, 2010, NHSC filed its Notice of Appeal, in Docket No.10-06, to the issuance of the PSNH Merrimack Station, Proposed Title V Operating Permit FY 96-TV048, asserting *inter alia* that: the Title V Permit should be vacated because the NHDES-ARD administrative record is devoid of facts demonstrating that PSNH has complied with Clean Air Act, including 42 USC 7411, 42 USC 7475 and 42 USC 7503, the provisions requiring NSPS, NSR and PSD permitting, together with corresponding improvements in control technologies, for NOx and particulates; that the Title V is legally flawed with respect to the hazardous air pollutant mercury [Hg] because it does not comply with Clean Air Act 42 USC 4212 and RSA 125-O:11-18; and, that the Final Regional Haze SIP and the Title V Permit does not contain appropriate BART emission limits.[8]

Clean Air Act 42 USC 7661d provides for an administrative appeal to the Administrator, United States Environmental Protection Agency, Region 1, if a party is not satisfied with the Air Resources Council disposition of the issues raised in a Title V appeal. NHSC fully intends to file an appeal if the Air Resources Council errs in the appeal process.

Both Air Resources Council cases, 09-10 and 10-06, are pending.

NHSC plans to pursue its legal remedies until such time PSNH provides all the information that will permit a full and fair determination, on the merits, of whether or not it has complied with its responsibilities under the Clean Air Act and the New Hampshire Multiple Pollutant Reduction Program.

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[6] NHSC filed a FOIA on Region 1 which resulted in the Burns & McDonnell and GZA reports. NHSC will press its FOIA claims, including appeals if necessary, once Region 1 completes its CBI review.

[7] Region 1 advises that the data request and CBI review is the largest it has ever undertaken.

[8] Merrimack Station is the largest single contributor to regional haze in New Hampshire.

NHSC will ask the Public Utilities Commission to do no less before it authorizes this multi million dollar funding request.

In accordance with RSA 541-A:32 and Puc 203.17, NHSC is entitled to intervene in this docket. The rights, duties, privileges, immunities and other substantial interests of NHSC and its members and friends may be affected by this proceeding.

NHSC intervention will not impair the interests of justice and nor the prompt conduct of the proceedings. On the contrary, justice will be served by the conduct of a full, open and transparent examination of the facts regarding PSNH compliance with the Clean Air Act and the New Hampshire Multiple Pollutant Reduction Program.

Wherefore, NHSC requests that it be authorized to intervene in this docket, together with whatever other relief may be proper in the premises.

Respectfully submitted,

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No.18301

Certificate of Service

Petitioner served notice of the filing of this Petition pursuant to Puc 203.17.

Arthur B. Cunningham

THE STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

№ . 005

Public Service Company of New Hampshire
Petition for Approval and Long Term and Short Term Debt

Docket No. DE 10-122

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE'S OBJECTION TO NEW HAMPSHIRE SIERRA CLUB'S PETITION FOR INTERVENTION

Public Service Company of New Hampshire ("PSNH") hereby objects to the New Hampshire Sierra Club's Petition to Intervene filed on June 24, 2010 in the above-captioned proceeding. The New Hampshire Sierra Club has no substantial interest and hence no standing in this proceeding, and will impede the orderly conduct of this proceeding by raising issues irrelevant to the issues in this docket. Either ground is sufficient to deny the Petition under RSA 541-A:32. In support of its Objection, PSNH says the following:

1. The New Hampshire Sierra Club is the New Hampshire chapter of a national non-profit organization "dedicated to securing a pollution free and healthy environment", some members of which appear to be PSNH residential ratepayers. Petition at 1. In its Petition, the New Hampshire Sierra Club recites the procedural history of various environmental proceedings and appeals before the New Hampshire Department of Environmental Services ("NHDES"), the New Hampshire Air Resources Council ("ARC") and the Environmental Protection Agency ("EPA"), indicates that it plans to pursue its legal remedies in these proceedings and apparently argues that as a result, the rights, duties, privileges and immunities and other substantial interests of the New Hampshire Sierra Club and its members and friends may be affected by this finance proceeding. Petition at 5. The New Hampshire Sierra Club fails to indicate what its substantial interest may be, or how they may be affected by this case. The Petition has failed to allege what rights, duties, privileges, immunities or other substantial interests may be affected by this proceeding or that New Hampshire Sierra Club qualifies as an intervenor under any provision of law as required by RSA 541-A:32, I(b).

2. In the *Appeal of Stoneyfield Farm, Inc.*, an appeal arising out of Commission Docket No. DE 08-103 (the "Scrubber Investigation"), a case in which the New Hampshire Sierra Club participated as amicus curiae, the New Hampshire Supreme Court determined that for ratepayers to have standing, they must suffer immediate or direct injury. The New Hampshire Sierra Club is thus clearly aware of this requirement, yet has failed to indicate what exactly its substantial interest may be or specifically how it is affected by this finance proceeding. Because the New Hampshire Sierra Club has no substantial interest and will not suffer any immediate or direct injury, it has no standing in this case.

3. The New Hampshire Sierra Club argues that justice will be served by the conduct of a "full, open and transparent examination of the facts regarding PSNH compliance with the Clean Air Act and the New Hampshire Multiple Pollutant Reduction Program" (Petition at 5) in this finance proceeding, and that its intervention will not impair the interests of justice nor the prompt conduct of the proceeding. Thus, New Hampshire Sierra Club clearly states its intent to use the New Hampshire Public Utilities Commission ("NHPUC") as a forum for addressing issues currently in litigation in other, more appropriate, environmental forums. The NHDES, the ARC and the EPA, not the NHPUC, have jurisdiction over PSNH compliance with the Clean Air Act and the New Hampshire Multiple Pollutant Reduction Program. The New Hampshire Sierra Club's unabashed admission that it hopes to turn an economic regulatory proceeding into an environmental investigation is precisely the type of intervention that will impair the orderly and prompt conduct of the proceeding and not serve the interests of justice, and may be denied pursuant to RSA 541-A:32, I(c).

4. In DE 09-033, PSNH's most recent financing, the Commission determined that as a result of the Legislature's mandate that PSNH install scrubber technology at Merrimack Station and finding that such installation is in the public interest, the Commission lacks authority to make a determination pursuant to RSA 369-B:3 as to whether the scrubber is in the public interest, and that its authority was limited to

determining at a later time the prudence of the costs of complying with the statutory requirements and the manner of recovery for prudent costs. The New Hampshire Sierra Club apparently seeks to re-litigate this issue, which will impair the orderly and prompt conduct of the proceeding and not serve the interests of justice. RSA 541-A:32, I(c).

5. In the event the Commission determines to grant the New Hampshire Sierra Club's Petition to Intervene, the Commission should clearly set forth the scope of the proceeding and impose conditions on the intervention to prevent the New Hampshire Sierra Club from turning a finance proceeding into an investigation and "data mining" with respect to PSNH's environmental compliance, over which NHDES, the ARC and the EPA – not the NHPUC - have and are currently exercising jurisdiction.

WHEREFORE PSNH respectfully requests the Commission issue an order denying the Petition for Intervention of the New Hampshire Sierra Club and to order such further relief as may be just and equitable.

Respectfully submitted,

Public Service Company of New Hampshire

6/29/10

June 29, 2010

By: Catherine E. Shively

Catherine E. Shively
Senior Counsel
780 North Commercial Street
Post Office Box 330
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(603) 634-2326

CERTIFICATE OF SERVICE

I hereby certify that, on the date written below, I caused Public Service Company of New Hampshire's Objection to New Hampshire Sierra Club's Petition for Intervention to be served pursuant to N.H. Code Admin. Rule Puc §203.11.

6/29/10
June 29, 2010

Catherine E. Shively

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DE 10-122

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Petition for Approval of Issuance of Long-Term Debt and Related Relief

Order Following Prehearing Conference

ORDER NO. 25,131

July 20, 2010

APPEARANCES: Catherine E. Shively, Esq. on behalf of Public Service Company of New Hampshire; New Hampshire Sierra Club by Arthur B. Cunningham, Esq.; Office of Consumer Advocate by Meredith A. Hatfield, Esq. on behalf of residential ratepayers; and Suzanne G. Amidon, Esq. on behalf of Commission Staff.

I. PROCEDURAL BACKGROUND

On May 3, 2010, Public Service Company of New Hampshire (PSNH or Company) filed a petition seeking authority to: issue up to $600 million in aggregate principal amount of long-term debt securities through December 31, 2010, mortgage its property in connection with the issuance of long-term debt, enter into interest rate transactions to manage interest risk, engage in long-term borrowing pursuant to an unsecured revolving credit agreement, and extend its current short-term debt limit of 10% of net fixed plant plus a fixed amount of $60 million. In support of its petition, the Company filed the testimony of Susan B. Weber. The Company also filed a motion for extension of time to file certain information required to be filed by N.H. Code Admin. Rules Puc 308.11(b) with respect to the new unsecured revolving credit agreement.

The Commission issued an order of notice on June 1, 2010, scheduling a prehearing conference on June 29, 2010 and establishing deadlines for the filing of petitions to intervene.

The Office of Consumer Advocate (OCA) filed a letter with the Commission on June 4, 2010, stating its intent to participate in this docket. On June 24, 2010, the New Hampshire Sierra Club (NHSC) filed a petition to intervene. On June 29, PSNH filed an objection to NHSC's petition to intervene. The prehearing conference was held as scheduled on June 29, 2010.

Following the prehearing conference, a technical session was held. Staff filed a report on the technical session on June 30, 2010, including a proposed procedural schedule, as follows

Data Requests to PSNH	July 9, 2010
Responses from PSNH	July 16, 2010
Technical Session	July 26, 2010 at 9:00 a.m.
2nd Round of Data Requests	August 4, 2010
Responses to 2nd Round	August 11, 2010
Staff and Intervenor Testimony	August 20, 2010
Technical Session	September 2, 2010 at 9:00 a.m.
Hearing on the Merits	September 14, 2010 at 10:00 a.m.

Staff noted that NHSC disagreed with the last three dates in the proposed procedural schedule contained in the letter, including the proposed hearing date of September 15, 2010. In addition, Staff informed the Commission that PSNH would be filing an amendment to the petition.

II. POSITIONS OF THE PARTIES REGARDING NHSC'S PETITION TO INTERVENE

In its petition, NHSC stated that it is a duly organized chapter of the Sierra Club, a non-profit organization whose members are dedicated to securing a pollution-free and healthy environment. The petition stated that, in April-May 2008, PSNH replaced the turbine at Merrimack Station without the public permitting process required by the Clean Air Act. NHSC filed a notice of appeal in a proceeding at the Air Resources Council (ARC) (Docket No. 09-10), asserting among other things that PSNH had violated the Clean Air Act by failing to apply for

and obtain permits required under 42 U.S.C. 7475 and 42 U.S.C. 7503 in connection with the turbine replacement, and that the temporary permit (TP-0008) issued by the ARC contained "substantial and impermissible flaws." NHSC Petition to Intervene at 2.

The petition went on to say that in the course of its appeal before the ARC, NHSC discovered three studies commissioned by PSNH regarding Merrimack Station 2. According to NHSC, these studies proved that PSNH had engaged in a "comprehensive examination of generation upgrade and life extension projects for Merrimack Station." *Id.* The petition describes what NHSC calls "serious and substantial errors of law by the Air Resource Council" and alleges "official misconduct" by the presiding officer of the ARC. *Id.* at 3.

NHSC also referred to its notice of appeal filed in Docket No. 10-06 at the ARC related to defects NHSC claims are contained in the Title V Operating Permit issued by the New Hampshire Department of Environmental Services to PSNH for Merrimack Station. *Id* at 4. NHSC asserted that it would "pursue its legal remedies until such time [as] PSNH provides all the information that will permit a full and fair determination, on the merits, of whether or not it has complied with its responsibilities under the Clean Air Act and the New Hampshire Multiple Pollutant Reduction Program. NHSC will ask the Public Utilities Commission to do no less before it authorizes this multi million dollar funding request." *Id.* at 4-5.

At the prehearing conference, NHSC reiterated that it had "serious ongoing concerns and ongoing litigation with respect to the environmental compliance of projects at Merrimack Station." Prehearing Conference Transcript of June 29, 2010 (Tr. June 29, 2010) at 8. NHSC said it should be able to participate in this docket to ensure that proceeds from the financing are used for proper corporate purposes and not "in violation of the Clean Air Act or the New

Hampshire Multiple Pollutant Control Act." *Id.* at 9. NHSC, in response to a question, said that the Commission should leave the financing proceeding open until the cases pending before the ARC in Dockets No. 09-10 and 10-06 are resolved. *Id.* at 10.

NHSC further stated that it was not "data diving" in this docket but was simply trying to follow the law to get discovery into the potential violations of the Clean Air Act. *Id.* In response to a Commission inquiry as to whether NHSC was not able to conduct discovery in the forums where litigation is pending, NHSC said that the Commission has the authority to investigate the destination of the financing proceeds "[a]nd if the destination of these funds go to plant projects that violate the Clean Air Act, that's basically our [NHSC's] concern." *Id.* at 11.

When asked whether the refurbishing of the turbine at Merrimack Station was the principal concern, a matter previously ruled on, NHSC agreed that the Commission ruled on that issue in Docket No. 08-145 but claimed that the Commission did not look at whether the "turbine is going to increase emissions beyond the Clean Air Act thresholds that trigger [new source review] permitting." *Id.* at 11-12. While NHSC conceded that the Commission is not the appropriate forum to determine whether the Company is in violation of the Clean Air Act, it repeated its request that the Commission "defer ruling and determining on the authorities here until those Clean Air Act issues, those New Hampshire Pollution Control Act issues are fully and fairly resolved on the merits." *Id.* at 12. NHSC went on to say that it cannot resolve those issues without access to materials that PSNH claims are confidential, and that PSNH had impeded discovery in the proceedings at the ARC and the EPA. *Id.* at 13-14.

PSNH objected to NHSC's petition to intervene. In its written objection, PSNH argued that NHSC has no substantial interest and therefore no standing in this proceeding and that its

participation will impede the orderly conduct of this proceeding by raising issues irrelevant to the issues in this docket. PSNH asserted that either ground is sufficient to deny the petition under RSA 541-A:32. At hearing, PSNH said that the petition recites a number of NHSC's activities in environmental dockets and then concludes that, because of those activities, NHSC is entitled to intervene in this docket. PSNH reiterated that NHSC did not have any substantial interests in this proceeding and that, if NHSC were allowed intervention, it would impact the orderly conduct of these proceedings. Tr. June 29, 2010 at 7.

The OCA and Staff took no position on NHSC's petition to intervene.

III. COMMISSION ANALYSIS

A. NHSC Petition to Intervene

Pursuant to RSA 541-A:32, I (b) and (c), the Commission shall grant a petition to intervene if the petition states facts demonstrating that the petitioner's rights duties, privileges, immunities or other substantial interests may be affected by the proceeding, and the Commission determines that the interests of justice and the orderly and prompt conduct of the proceedings would not be impaired by allowing the intervention. In addition, pursuant to RSA 541-A:32, II, the Commission has the discretionary authority to grant a petition to intervene if it would be in the interest of justice and would not impair the orderly and prompt conduct of the proceedings. We have carefully reviewed and considered NHSC's petition and its statements at the prehearing conference and conclude that NHSC has not stated a right, duty, privilege, immunity or other substantial interest that would be affected by the outcome of this proceeding. The petition, therefore, does not meet the necessary criteria for intervention under RSA 541-A:32, I.

Next, we consider whether it would serve the interests of justice if NHSC were granted intervention pursuant to RSA 541-A:32, II. NHSC's petition focuses on a discussion of proceedings initiated by NHSC at the ARC challenging the permits issued to PSNH pursuant to the authority of the New Hampshire Department of Environmental Services. Following this discussion and NHSC's analyses of reports it obtained through proceedings at the ARC and the EPA, NHSC opines that the Commission should make sure that PSNH is in compliance with the Clean Air Act and the New Hampshire Multiple Pollutant Reduction Program in connection with this financing docket. Because the ARC, the agency with competent jurisdiction over PSNH's compliance with applicable environmental laws, is hearing NHSC's appeals regarding NHSC's principal concern, *i.e.*, whether PSNH in compliance with the Clean Air Act and the New Hampshire Multiple Pollutant Reduction Program, we cannot find that the interests of justice are served by allowing NHSC to intervene in PSNH's financing proceeding to re-litigate PSNH's compliance with air emissions requirements.

NHSC's petition to intervene appears as well to be an attempt to acquire discovery from PSNH that it has not been able to obtain through the ARC or EPA proceedings. At the prehearing conference, NHSC complained of problems it has had in obtaining discovery from PSNH at the ARC. NHSC said that it wanted a full and fair hearing of the merits regarding PSNH's compliance with the Clean Air Act "in a venue that's fully and fairly going to permit us to get access to materials and confidential materials". *Id.* at 14. Granting a petition to intervene to allow NHSC to conduct discovery for materials that were not provided in another forum, and which relate to issues beyond the scope of this proceeding as described below, would impair the

prompt and orderly conduct of this proceeding. Accordingly, we find no basis under RSA 541-A:32, II to grant NHSC's petition to intervene in the instant docket.

B. Scope of Proceeding

Pursuant to RSA 369:1, public utilities engaged in business in this State may issue evidence of indebtedness payable more than 12 months after the date thereof only if the Commission finds the proposed issuance to be "consistent with the public good." Analysis of the public good consideration 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. *See Appeal of Easton*, 125 N.H. 205, 211 (1984). The scope of this docket includes the terms of the financing, the amount of the financing, the effect on rates and on the capital structure and debt/equity ratio for PSNH, and a review of whether the proposed use of the proceeds is in the public good. This filing does not propose funding for a specific project but for the Company's capital investments, generally.

The Commission has previously noted that "certain financing related circumstances are routine, calling for more limited Commission review of the purposes and impacts of the financing, while other requests may be at the opposite end of the spectrum, calling for vastly greater exploration of the intended uses and impacts of the proposed financing." *Public Service Company of New Hampshire*, Order No. 25,050 (December 8, 2009) at 14. In this case we will grant a period of discovery and hearing on the financing request.

PSNH has asked for authority to issue debt over a period of 24 months, which is different from PSNH's previous petitions that have requested authority for a period of 12 months. In addition, we note that the amount of the financing authority requested is $600 million although

the total of the projected issuances is $435 million. As indicated by Staff's report of technical session, PSNH intends to amend its filing to address concerns raised at the prehearing conference about the need for over $150 million in excess authority as compared with the proposed issuances. We direct PSNH to amend its filing, no later than July 23, 2010, to address these concerns and explain the Company's reasons for the additional 12 months to issue the debt securities.

C. PSNH Motion For Extension Of Time To File Information

The Company filed a motion for extension of time to file certain information required to be filed by N.H. Code Admin. Rules Puc 308.11(b) with respect to the new unsecured revolving credit agreement. In that motion, the Company indicated that it expected the final terms of the new unsecured revolving credit agreement to be available on or before July 1, 2010. To date, however, the final terms have not been filed with the Commission. We will grant the extension until July 23, 2010 when PSNH shall file the information omitted in is initial filing.

Based upon the foregoing, it is hereby

ORDERED, New Hampshire Sierra Club's petition to intervene is hereby DENIED; and it is

FURTHER ORDERED, that the proposed procedural schedule is adopted with the exception of the hearing date, which shall be September 13, 2010 at 10:00 a.m.; and it is

FURTHER ORDERED, that the scope of the proceeding will be as described herein.

By order of the Public Utilities Commission of New Hampshire this twentieth day of July, 2010.

Thomas B. Getz (RNS)
Chairman

Clifton C. Below (RNS)
Commissioner

Amy L. Ignatius
Commissioner

Attested by:

Debra A. Howland
Executive Director

TITLE LV
PROCEEDINGS IN SPECIAL CASES

CHAPTER 541-A
ADMINISTRATIVE PROCEDURE ACT

007

Section 541-A:32

541-A:32 Intervention. –

I. The presiding officer shall grant one or more petitions for intervention if:

(a) The petition is submitted in writing to the presiding officer, with copies mailed to all parties named in the presiding officer's notice of the hearing, at least 3 days before the hearing;

(b) The petition states facts demonstrating that the petitioner's rights, duties, privileges, immunities or other substantial interests may be affected by the proceeding or that the petitioner qualifies as an intervenor under any provision of law; and

(c) The presiding officer determines that the interests of justice and the orderly and prompt conduct of the proceedings would not be impaired by allowing the intervention.

II. The presiding officer may grant one or more petitions for intervention at any time, upon determining that such intervention would be in the interests of justice and would not impair the orderly and prompt conduct of the proceedings.

III. If a petitioner qualifies for intervention, the presiding officer may impose conditions upon the intervenor's participation in the proceedings, either at the time that intervention is granted or at any subsequent time. Such conditions may include, but are not limited to:

(a) Limitation of the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition.

(b) Limitation of the intervenor's use of cross-examination and other procedures so as to promote the orderly and prompt conduct of the proceedings.

(c) Requiring 2 or more intervenors to combine their presentations of evidence and argument, cross-examination, and other participation in the proceedings.

IV. Limitations imposed in accordance with paragraph III shall not be so extensive as to prevent the intervenor from protecting the interest which formed the basis of the intervention.

V. The presiding officer shall render an order granting or denying each petition for intervention, specifying any conditions and briefly stating the reasons for the order. The presiding officer may modify the order at any time, stating the reasons for the modification.

Source. 1994, 412:1, eff. Aug. 9, 1994.

TITLE XXXIV
PUBLIC UTILITIES

No. 008

CHAPTER 369
ISSUANCE OF STOCK AND OTHER SECURITIES; GENERAL PROVISIONS

Section 369:1

369:1 Authority to Issue Securities. – 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 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; 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.

Source. 1911, 164:14. 1913, 145:14. 1915, 115:1. PL 241:1. RL 291:1. 1951, 203:45 par. 1, eff. Sept. 1, 1951.

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Appeal of Easton, 125 N.H. 205, 480 A.2d 88 (N.H. 1984)

125 N.H. 205 (N.H. 1984)

125 N.H. 205

Appeal of Roger EASTON.

Appeal of Consumer Advocate Michael HOLMES.

Appeal of Gary McCOOL (New Hampshire Public Utilities Commission).

Nos. 84-188, 84-204 and 84-207.

Supreme Court of New Hampshire.

July 13, 1984

[125 N.H. 207] Roger L. Easton, by brief and orally, pro se.

[125 N.H. 208] Michael L. Holmes, by brief and orally, as Consumer Advocate.

Gary McCool, by brief and orally, pro se.

Hall, Morse, Gallagher & Anderson, Concord (Mayland H. Morse, Jr., Concord, on the brief and Thomas Morse, Concord, orally), for New Hampshire Elec. Co-op., Inc.

Gregory H. Smith, Atty. Gen., and Larry M. Smukler, Concord (Bruce E. Mohl, Asst. Atty. Gen., on brief and orally), for New Hampshire Public Utilities Com'n.

Douglas I. Foy (orally), and Armond M. Cohen, Boston, Mass., for Conservation Law Foundation of New England, Inc.

DOUGLAS, Justice.

This is an appeal from the Public Utilities Commission's approval of another financing request made necessary by the rapidly increasing costs and uncertainty surrounding the Seabrook nuclear generating project (Seabrook). We are asked to clarify the scope of financing proceedings pursuant to RSA chapter 369.

On November 18, 1983, the New Hampshire Electric Cooperative, Inc. (Co-op), in accordance with RSA 369:1, petitioned the Public Utilities Commission (PUC) for authority to borrow $111,000,000 from the Rural Electrification Administration (REA) "to enable it to continue to finance its [2.17391%] interest in Seabrook Units I and II." A hearing on the petition before the PUC was scheduled for January 12, 1984, pursuant to RSA 369:4, and intervenor status was granted to appellants Roger Easton, Gary McCool and Consumer Advocate Michael W. Holmes.

At the January 12, 1984 hearing, the PUC granted Holmes' motion to postpone. At a subsequent hearing on February 8, 1984, the commission granted the Conservation Law Foundation's motion to intervene and heard arguments on the scope of the financing proceedings. When it became apparent that the proceedings could not go forward until the PUC ruled on their proper scope, the commission suspended the hearing and directed the parties to file written memoranda on the scope of the proceedings under RSA chapter 369. A further hearing was scheduled for February 16, 1984.

[480 A.2d 89] In accordance with the commission's order, the intervenors argued that the proceedings must include, as part of the required [125 N.H. 209] determination that the financing "be consistent with the public good," RSA 369:4, evidence of whether the object of the desired funding, that is, the Co-op's continued participation in Seabrook is "prudent." The intervenors stressed the significance of this inquiry given Seabrook's ballooning costs, construction delays, reduced capacity estimates, reduction in demand growth, and the demonstrated opportunities for alternative generation and conservation--all factors which had changed dramatically since the PUC's initial approval, in 1981, of the Co-op's $75,750,000 participation in Seabrook. The Co-op, by contrast, argued that the proceeding should be limited to examining the amount of the proposed financing and to considering the fairness and reasonableness of the terms of the financing.

At its February 16, 1984 hearing, the PUC ruled that its understanding of RSA chapter 369 and, more specifically, RSA 369:4 was such that the scope of the proceedings thereunder is limited to the narrow question of whether the proposed borrowing at the terms set forth in the petition is in the public good. The commission then stated that it would proceed only on the points that were material and relevant to the proceeding, namely, (1) the amount of the financing and (2) the reasonableness of its costs and terms.

Having ruled on the scope of the proceedings, the PUC took evidence on February 16 and 17, 1984. In a decision dated February 24, 1984, a majority of the commission reiterated its February 16 conclusion and cited Appeal of Public Service Company of New Hampshire, 122 N.H. 1062, 454 A.2d 435 (1982) as authority. The commission granted the Co-op's motion to strike evidence submitted by the intervenors as being "irrelevant and outside the scope of the proceedings."

The commission then turned to the question whether the proposed borrowing at the terms set forth therein was in the public good. The majority issued its ruling by looking merely at the terms of the proposed borrowing. It concluded that the financing rate, being nearly as low as the government borrowing rate, and the amount of the proposed financing were reasonable and in the public good. The commission thus approved the Co-op's authority to borrow $111,000,000. The majority noted, however, that it was "very concerned about what the upcoming cost estimates will mean with respect to the economics of both Seabrook Units and their impact on the financing plans of the participants" and that, accordingly, "approval of the instant financing is not to be taken as the commission's last word on the continued prudency of the Co-op's Seabrook participation."

[125 N.H. 210] Commissioner Aeschliman, in her dissent, argued that the majority was in error in narrowly defining the scope of the proceedings in view of the changing completion estimates and the uncertainty of Unit II's

completion. She concluded, however, that even given the narrowness of the scope of the proceedings, as defined by the majority of the commission, the Co-op did not satisfy the requirements of the law.

The intervenors' motions for rehearing were denied and this appeal followed. The parties ask us to define the scope of financing proceedings held pursuant to RSA chapter 369, and, consequently, to determine the role of the PUC in these proceedings.

We begin our analysis by noting that this appeal now involves the authority of the Co-op to borrow $54,000,000 to finance its interest in Seabrook. By order dated June 15, 1984, this court granted the PUC's and Co-op's motions to remand, with respect to $57,000,000 portion of the financing at issue, which amount the Co-op now wishes to devote to the acquisition of an ownership interest in the Yankee projects. The motions to remand were denied with respect to the remaining $54,000,000 portion of the financing in issue.

[480 A.2d 90] RSA chapter 369 provides, in pertinent part:

"The proposed issue and sale of securities 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....

The commission, after such hearing or investigation as it may deem proper, shall determine the actual or probable cost incurred or to be incurred; and, if in its judgment the issue of such securities upon the terms proposed is consistent with the public good, it shall authorize the same to an amount sufficient, at the price fixed in accordance with the laws applicable thereto, to provide funds for defraying the cost as so determined."

RSA 369:1, :4.

This court has stated that the PUC is vested with broad statutory powers. Appeal of Granite State Elec. Co., 120 N.H. 536, 539, 421 A.2d 121, 123 (1980). We have held that "the primary concern of the commission in ascertaining the public interest for purposes of capitalization is the protection of the consuming public." [125 N.H. 211] Petition of the New Hampshire Gas & Electric Co., 88 N.H. 50, 57, 184 A. 602, 607 (1936). On the other hand, it has never been the position of this court that a utility completely surrenders its right to manage its own affairs merely by devoting its private business to a public use. Appeal of Public Service Co. of N.H., 122 N.H. 1062, 1066-67, 454 A.2d 435, 437 (1982).

In support of its position, each party cites the same three New Hampshire cases. These cases, rather than providing definitive support for either position, attempt to strike a balance between the commission's authority and management's prerogatives. 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 considerations beyond merely the terms of the proposed financing.

In *State v. New Hampshire Gas & Electric Company,* 86 N.H. 16, 163 A. 724 (1932), we held that the commission had no authority under its financing authorization powers to punish a utility for disobeying another law. Id. at 31, 163 A. at 732. We underscored, however, that "the commission is given no other power than to approve or disapprove the request of the utility, either in whole or in part, depending solely upon its judicial determination of the factual issue of whether or not the public good will be promoted thereby." Id. at 30, 163 A. at 731 (emphasis added).

Similarly, in Petition of New Hampshire Gas & Electric Company, 88 N.H. 50, 184 A. 602 (1936), while we held that the commission "may not directly determine and impose upon the utility a financial structure of its own devising," id. at 58, 184 A. at 607, we endorsed a searching role for the commission in scrutinizing company submissions. We held that the commission "may approve all, none or a part of the securities sought, in accordance with its findings of what the public good requires." Id. We also stated that "[a] prime test is not to permit the capital issue to exceed, at least so much as to affect the public interest materially, the fair cost of the property reasonably requisite for present and future use...." Id. at 55, 184 A. at 605 (emphasis added).

More recently, we construed the role of the PUC under the financing provisions of RSA chapter 369. Appeal of Public Serv. Co. of N.H., 122 N.H. 1062, 454 A.2d 435 (1982). In that case, we quoted language from our decision in *Grafton County Electric Light & Power Company v. State,* 77 N.H. 539, 94 A. 193 [125 N.H. 212] (1915), a case in which we construed the phrase "public good" within the meaning of a public utilities **[480 A.2d 91]** statute substantially similar to RSA chapter 369. There we stated:

"This is equivalent to a declaration that the proposed action must be one not forbidden by law, and that it must be a thing reasonably to be permitted under all the circumstances of the case. If it is reasonable that a person or a corporation have liberty to take a certain course with his or its property, it is also for the public good. It is the essence of free government that liberty be not 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 the public service."

Id. at 540, 94 A. at 194 (emphasis added).

In Appeal of Public Service Company of New Hampshire supra, we held that the PUC, as a matter of law, misinterpreted the scope of its authority to define the public good when it prohibited the expenditure of capital received in a routine stock issuance on the construction of Seabrook Unit II. Our conclusion was based on the fact that the PUC's determination contravened Public Service Company of New Hampshire's "vested right" to construct Unit II. Although we held that the restrictions the PUC imposed in that case were unreasonable, we stated that "[t]he PUC is 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 Serv. Co. of N.H., 122 N.H. at 1072, 454 A.2d at 441.

In Appeal of Public Service Company of New Hampshire, the plant was under construction and the financing request was routine. The docket was devoted to the question of whether PSNH had bona fide responses to its offer to sell some of its share in Seabrook.

In the instant case, the intervenors have indicated that they seek to have the PUC consider whether the uses to which the loan will be put can be economically justified compared to other options available to the Co-op. The $54,000,000 is in addition to the prior amount of $75,750,000 which was supposed to cover the Co-op's 2.17 percent interest in the Seabrook project. They seek to have the PUC 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 [125 N.H. 213] present estimated costs in the public interest? These are all legitimate matters for consideration under RSA chapter 369.

Appeal of Public Service Company of New Hampshire does not stand for the proposition that the PUC's authority under RSA chapter 369 is limited to the determination of whether the terms of the proposed financing are in the public good. On the contrary, this court long has held that the PUC 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. We have held that the PUC may "attach reasonable conditions as it finds to be necessary in the public interest."

Finally, we note that RSA 541:14 provides that, in an appeal such as this, "if the court shall be of the opinion that justice requires the reception of evidence of facts which have occurred since the hearing ... it shall remand the case to the commission to receive and consider such additional evidence." See also RSA 541:15, :16.

In its petition, the Co-op alleged:

"The amount of financing for which authorization is requested, $111,000,000. represents estimated additional needs for the COOPERATIVE'S share of Seabrook, assuming commercial operation dates of June 30, 1986 for Unit I and March 31, 1990 for Unit II. These commercial operation dates are as required by the REA staff to reflect contingencies of possible schedule delays and construction costs in excess of present estimates

[480 A.2d 92] of the lead participant.... The schedule used by [the cooperative's consulting engineers] as a starting point for the REA requested schedule extensions was the lead participant's schedule in effect as of June 20, 1983, with commercial operation dates of December 31, 1984, and July 31, 1987, for Units I and II respectively....

The COOPERATIVE believes and therefore alleges that the payment of the predicted costs associated with its ownership interest of 2.17391% ... in Seabrook Units # I and II, is for the implementation of sources of energy to meet the reasonably foreseeable needs of the COOPERATIVE."

Since the June 1983 estimates and, more particularly, since February 1984, much has occurred to qualify this case for remand under RSA 541:14. The March 1984 cost estimates have been released; Public Service Company of New Hampshire, the lead participant,[125 N.H. 214] has repeatedly stated that it is on the brink of bankruptcy; work at Seabrook has been terminated for approximately ten weeks; the completion of Unit II has been seriously questioned; and new cost and completion date estimates have exceeded greatly the past figures and dates. In such circumstances, it seems futile to decide an appeal based upon premises not borne out by current reality.

In point of fact, in the instant, truncated appeal, the majority commissioners themselves expressed concerns about unknown, but foreseeable, events that have occurred since the February hearings. Chairman McQuade observed on February 24, 1984, in Supplemental Order No. 16,915:

"The Commission, as the responsible watchdog for all New Hampshire citizens regarding utility matters, is committed to a thorough review of the updated Seabrook costs when they are available in early March. Upon review of the updated cost projections, when available, it is reasonable to assume that the Public Utilities Commission will be opening dockets to address those areas of mutual concern expressed by the intervenors. At that time, the commission will be working with factual information so that I may fully evaluate the impact of the new information on all New Hampshire ratepayers as well as the 2% ownership by the Cooperative."

Likewise, Commissioner Iacopino said:

"Others make much to do about the possibility that PSNH's new cost studies now scheduled for March 1, 1984 may be substantially different from the figures projected by Southern Engineering and REA. However, the accuracy of PSNH

figures are consistently attacked by intervenors and regulatory bodies.

The Commission cannot foresee the future any better than anyone else and it must rely on the record in the proceeding before it to determine whether the approval of the financing is within the public interest.

The Commission, however, can impose reasonable conditions on a financing (See RSA 369:1)."

The Co-op argues strenuously that it has a right to finance its interest in Seabrook, and that this right precludes any inquiry beyond the actual terms of the proposed financing. This position ignores the limiting language of the order in which the PUC approved the Co-op's purchase of a 2.17 percent interest in Seabrook:

[125 N.H. 215] "both raised the question of whether or not the $75,750,000 would be enough to cover the cooperative's responsibilities of a 2.17 percent ownership interest. Testimony was offered that there were contingencies built into the loan for inflation or unexpected costs. However, both intervenors raised the possibility that escalating costs of Seabrook might necessitate more financings. While this possibility does exist, it is not enough to negate a finding of the public good. This amount of money at this cost rate is reasonable for the knowledge to date."

Re New Hampshire Electric Cooperative, Inc., 66 N.H.P.U.C. 139, 140, (1981) (emphasis added).

[480 A.2d 93] The intervenors timely appealed that decision but it was summarily affirmed by this court pursuant to Rule 25. Appeal of Cooperative Members for Responsible Investment, No. 81-231 (1981). While that affirmance is not precedent, it may arguably serve to insulate review of the initial amount of purchase. However, the Co-op does not have the right to borrow unlimited sums, and whatever sums it seeks to borrow are subject to the provisions of RSA chapter 369. "[T]he PUC may reject management decisions '[w]hen inefficiency, improvidence, economic waste, abuse of discretion, or action inimical to the public interest are shown.' " Appeal of Public Serv. Co. of N.H., 122 N.H. at 1076, 454 A.2d at 443 (quoting Re Public Service Company of New Hampshire, 62 N.H.P.U.C. 83, 92, aff'd, *Legislative Util. Consumers' Council v. Public Util. Com.,* 117 N.H. 972, 380 A.2d 1083 (1977)). Simply put, we have never held that "management has a blank check." Id. The extent of management's authority to invest or borrow further remains subject to the supervision of the PUC in the public interest.

Moreover, unlike Re New Hampshire Electric Cooperative, Inc. supra, in this case, and at this point in time, it is not a mere possibility that the costs of Seabrook may necessitate more financing. The June 1983 cost and completion estimates upon which the Co-op's financing petition was based, are no longer valid. Hence, it is not clear that the terms and conditions of the Co-op's November 1983 petition are reasonable and in the public good.

The commission, as Chairman McQuade stated on February 24, is a "watchdog" and should now do what it then said it would do: "be opening dockets to address those areas of mutual concern expressed by the intervenors." Nothing prevents hearings under RSA 374:3, :4.

[125 N.H. 216] Accordingly, we remand this case to the PUC with the instruction that it proceed in a manner consistent with the foregoing opinion.

Remanded.

BATCHELDER, J., did not sit; DICKSON, J., sat pursuant to RSA 490:3; the others concurred.

N . 010

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Appeal of Conservation Law Foundation of New England, Inc., 127 N.H. 606, 507 A.2d 652 (N.H. 1986)

[507 A.2d 653] [Copyrighted Material Omitted]

[507 A.2d 654] [Copyrighted Material Omitted]

[507 A.2d 655]

Backus, Meyer & Solomon, Manchester (Robert A. Backus on brief and orally), for Seacoast Anti-Pollution League.

Armond M. Cohen, Boston, Mass., by brief for Conservation Law Foundation of New England, Inc.

Eckhaus and Ruback, Derry (Lawrence Eckhaus on brief), for Campaign for Ratepayers' Rights.

Michael W. Holmes, Concord, by brief and orally, as Consumer Advocate.

Sulloway, Hollis & Soden, Concord, and Catherine E. Shively, of Manchester (Martin L. Gross & a. on brief and orally), for Public Service Co. of N.H.

Stephen E. Merrill, Atty. Gen., and Larry M. Smukler, Concord on brief (Ronald F. Rodgers, Sr. Asst. Atty. Gen., on brief), by brief for State as amicus curiae.

PER CURIAM.

These are consolidated appeals from an order of the public utilities commission issued in its docket DF 84-200 and reported in Re Public Service Co. of New Hampshire, 66 PUR4th 349 (N.H.P.U.C

I. Facts and Procedural History

The object of this proposed financing is the provision of funds to allow the company to participate in the completion of construction of Unit I and "common facilities" at the Seabrook Nuclear Power P

This is the third financing proposed in accordance with a three-step financing plan, devised in the spring of 1984, in response to the company's financial problems. In Appeal of Seacoast Anti-Polluti

$425 million, both in Appeal of Seacoast Anti-Pollution League, 125 N.H. 708, 490 A.2d 1329 (1984), and in Appeal of Seacoast Anti-Pollution League, 125 N.H. 708, 484 A.2d 1196 (1984). Those opini

The commission has reviewed the proposed financing under its docket DF 84-200, opened on August 2, 1984, to determine whether the company's participation in the completion of the constructior

In prehearing procedural rulings in docket DF 84-200, the commission delineated the scope of this Easton inquiry. Among the issues that the commission found to be subsumed within the determine

Hearings in this docket began on December 3, 1984, and stretched over 38 hearing days, concluding on February 22, 1985. Transcripts of the testimony cover over 7,500 pages, and the record incl

On April 18, 1985, a majority of the commission issued a 211-page report, along with an order approving the requested financing subject to two conditions. First, before the securities could be issue

imposed upon authorization of the second stage of the financing plan, that the company could not contribute more to the cost of new construction at Seabrook than its proportional share of $5 million pe

Commissioner Aeschliman filed an 82-page separate report. She also would have approved the financing request but only upon further conditions which in her view would protect ratepayers from fu

When the appellants' timely motions for rehearing were denied, these appeals followed. While the appeals have been pending,

[507 A.2d 657] we have issued three separate orders. First, on August 8, 1985, we heard oral argument on the appellants' petition for a writ of prohibition to forbid the commission from granting the com

On September 13, 1985, the commission majority filed with the court a 51-page report resulting from the remand, proposing an order to remove both conditions. The company immediately moved th

We issued our third and last prior order during the pendency of these appeals after oral argument on the merits on October 29, 1985. On the following day, we unanimously remanded the case to th

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the commission if such findings would have any effect on the validity of its conclusions in its Report and Order of April 18, 1985. We based this remand on our view that the commission did not present tl

II. Scope of Subject Matter and Standards of Review

The scope of the issues before us in this appeal is determined by the law governing the commission's responsibility when considering a utility's financing request and by the law governing the scope

The scope of the commission's responsibility rests upon the mandate of RSA 369:1 and :4, which require the commission's approval for the issuance of a utility's securities and which condition the g

[507 A.2d 658] (quoting Grafton, supra, 77 N.H. at 540, 94 A. at 194). Accordingly, we emphasized that the express statutory concern for the public good comprises more than the terms and conditions

The commission responded to the mandate of the Easton opinion

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by opening the present docket, and in two cases arising thereafter we further defined the scope of the required inquiry. In Appeal of SAPL, 125 N.H. at 465, 482 A.2d at 509, we referred to the issue of a affected injuriously" "if it appears, upon all the evidence, that the capitalization sought is so high that the utility, because of [its] inability to earn operating costs, depreciation and other charges, will not be able

Those cases thus held that the commission could not approve the present financing request except on the basis of findings that the company would have a need for its share of power to be generat

The scope of this court's authority to review the commission's methodology and its conclusions drawn from the evidence is limited by RSA 541:13, see RSA 365:21, and by the body of decisional la

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"We have frequently enunciated our recognition of the narrowness of our scope of review of commission orders. The ultimate issue before this court on appeal is whether the party seeking to set aside tl

[507 A.2d 659] or unreasonable." *LUCC v. Public Serv. Co. of N.H.*, 119 N.H. 332, 340, 402 A.2d 626, 632 (1979) (citations omitted).

When, therefore, we are reviewing agency orders which seek to balance competing economic interests, or which anticipate such an administrative resolution, our "responsibility is not to supplant the stated, as an appellate court we do not sit as a public utilities commission.

Although these principles limit our authority to disturb the commission's resolution of factual and judgmental issues, we nonetheless have a broad responsibility to review the evidentiary record. Whil commission.

Subject to these limitations and responsibilities, we may turn now to the merits of the appellants' issues. The appellants do not challenge the terms and conditions of the financing, but devote this ap

It would be appropriate in the abstract to deal first with the issues concerning the need for power, then with those dealing with the cost of Unit I as a means to supply that power, comparing it to othe

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possible alternatives, and finally to review the commission's findings about the rate effect incident to the completion of Unit I. The posture of the case, however, leads us to begin our review with the issu function of cost as translated into rates. Hence if the commission's conclusions about costs are found to be legally sufficient, they will furnish a comparatively firm point from which to review all the other econc

III. Completion Cost and Resulting Total Cost Attributable to Unit I

Taking August 1, 1984, as its point from which to measure, the commission found a $1 billion completion or "to go" cost for Unit I "reasonable for financing purposes." Re PSNH, 66 PUR4th at 402

[507 A.2d 660] [T]he $1 billion 'to go' cost ... translates into a cost of approximately $870 per installed kilowatt of Seabrook capacity.... PSNH's base case total cost figure [of] $4.7 billion ... translates int to go and the $882 [million] company estimate provides sufficient financial flexibility so that the company will be able to meet its construction costs even if it fails to meet the December 1986 [COD] by several

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1985). Given a $600 million cash cost to go, the company's own completion cost is estimated to be $213,416,520. Commission Report and Fifteenth Supplemental Order No. 17,939 at 8 (November 8, 1

Although the appellant Consumer Advocate challenges the commission's finding as to COD, we do not find its determination clearly unreasonable. The commission bifurcated its analysis into two di

employment at Seabrook. His success in meeting projected deadlines since coming to Seabrook indicated to the commission that its increased confidence in the company's schedule was justified. In ad

The commission, however, refused to accept the company's fuel loading to COD estimate of 4 months. Nor did it accept appellant witness Paul Chernick's 13.5-month estimate for planning purpose analysis may be optimistic, we do not find that they are unreasonable.

[507 A.2d 661]

Turning now to the estimate of total cost, certain of the appellants in their joint reply brief maintain that the actual total cost of Unit I will be approximately $5.4 billion, using the company's 1984 Annual R

We thus find that the commission had sustainable bases for its findings of completion and total costs. We turn now to review its conclusions about the relative desirability of possible sources of powe

IV. Relative Economic Desirability and Technical Feasibility of Proposed Alternatives to Unit I

A. Methodology of Comparing Economic Desirability of Completing Unit I to Proposed Alternatives

The appellants' first challenge to the commission's determination of the economic desirability of completing Unit I, as compared to proposed alternatives, concerns the use of "incremental cost analy

An incremental cost analysis is the common standard used to assess the desirability of alternatives to partially completed utility plants. See Pierce, The Regulatory Treatment of Mistakes in Retrosp net positive value upon removal from the plant." Pierce, supra at 510.

The appellants argue, however, that an incremental cost analysis is inappropriate in New Hampshire in light of RSA 378:30-a, the "anti-CWIP" statute, which prohibits utilities from charging customers fo plant is cancelled.

This argument, however, ignores the basic fact that sunk costs are economic costs, whether allocated to ratepayers or to investors. Whether Unit I is completed or cancelled, therefore, sunk costs c

[507 A.2d 662] of cancellation or completion is selected[,]" Re PSNH, 66 PUR4th at 396, and all three commissioners agreed that an incremental cost analysis is appropriate for the purpose of assessin

The Consumer Advocate raised a complementary analytical issue by contending that the value of incremental AFUDC (allowance for funds used during construction, see Appeal of Public Serv. Co. completion, and as a future cost the commission properly included it in both the completion and the cancellation scenarios.

B. Commission's Findings Concerning Unit I Relevant for Purposes of Comparison

The appellants next challenge the commission's cost and other findings used to compare Unit I completion to the competing possibilities. In section III supra we have already examined challenges t

The appellant Conservation Law Foundation (CLF) has challenged the finding of capacity factor. Capacity factor may be defined as "the percentage of kilowatt-hours [kwh] that are actually generate

The commission found a 60% capacity factor to be a reasonable assumption for use in comparative analyses. CLF maintains that this was error because the evidence in the record supports a capa

We note in passing that a 60% capacity factor was accepted by all three commissioners, and was also accepted as reasonable by the commission in a prior docket. More importantly, however, the (witness Dr. Richard Rosen's projection) to 72% (the company estimate),

[507 A.2d 663] and that a general 60% capacity factor was reasonable. After a review of the commission's reasoning from the evidence,

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we conclude that the commission's finding is not unreasonable.

C. Comparison of Unit I Completion with Alternatives

Once the commission defined the assumptions associated with completion of Unit I, it compared the cost of completion to the costs of various cancellation alternatives. The commission defined the

In its evaluation of conventional thermal generation as an alternative, the commission considered a study submitted by the company and developed by its system planning engineer, Joseph Staszo particular characteristics of Unit I. Dr. Rosen recommended cancellation.

The commission chose to use Mr. Staszowski's plan for the purposes of its analysis, on the basis of the uncertainty surrounding the costs of Dr. Rosen's alternatives and the lead time necessary to presents sufficient evidence to sustain this finding, and we cannot say that it was clearly unreasonable.

The commission dealt with the possibility of relying on Canadian energy in finding that Hydro-Quebec Phase I, from which "PSNH [could] receive 7.6 per cent of 690 megawatts or 52 megawatts

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of hydroelectric power ...[,]" had not been shown to be a reliable source of power in terms of planning and peak demand. Re PSNH, 66 PUR4th at 390. In Phase II, which would expand hydro capacity fr

The commission analyzed the cogeneration alternative by reviewing the testimony and exhibits of John Hilberg, President of Calcogen, a developer of cogeneration facilities. Mr. Hilberg proposed th

We should note here that CLF claims that the commission failed to apply the same standards evenhandedly to the alternatives and to Unit I. CLF cites commission language to the effect that "[f]orec

1. Expenses may escalate beyond rate support for the project.

2. Operating characteristics may not be as favorable as the design of the small power project may predict.

3. Operating and maintenance costs may exceed estimates.

4. Design lives may not endure as planned."

Re PSNH, 66 PUR4th at 389-90.

This, asserts CLF, sounds like a description of Unit I itself, and thus indicates a lack of regulatory evenhandedness on the part of the commission in that "[i]f the [c]ommission finds Seabrook a 'relial

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the commission went on to note that small power producers can stop producing power when it is no longer economically advantageous for them to do so, in support of its conclusion, that "the amount ar

The commission next discussed the aggressive conservation alternative. The Consumer Advocate argued that this alternative was economically preferable to completion of Unit I. Amory Lovins, Dir
Aeschliman, in her separate opinion, agreed that the conservation alternative does not provide a sufficient basis to reduce demand below the company's estimate. Id. at 467. In support of these conclusions, t

D. Comparison of Unit I Completion to Bankruptcy of the Company

From the time that the commission opened docket DF 84-200 to conduct the Easton inquiry it planned to assess the effects of the possible bankruptcy of the company in the event that it did not app

[507 A.2d 665] if the commission had found that an alternative source would be more cost effective than completion of Unit I and that the consequent cancellation of Unit I would force the company into

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required to determine whether the desirability of the cost saving outweighed the negative effects of bankruptcy. Second, if the commission had found that upon completion of Unit I the capitalization of th
alternative to completion of Unit I. The so-called bankruptcy alternative upon which our dissenting brothers place such emphasis is therefore not even a relevant issue in this case. Because of the dissenters' «

All three commissioners found that a denial of the proposed financing, and cancellation of Unit I without recovery of sunk costs, would compel the company to seek reorganization under Chapter 11

Donald Trawicki, a partner of Touche Ross & Co., testified that in the event this financing request was denied, the company probably would be unable to secure the financing necessary for its contir

The commission accordingly undertook an investigation of the probable effects of bankruptcy, requesting the assistance of the attorney general. The attorney general retained the law firm of Devine

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commission heard testimony from various other witnesses on the bankruptcy issue.

The commission concluded that the company's bankruptcy would not serve the public interest. The commission emphasized the independence of this conclusion from its findings that the proposed I

Although the commission found that consequences of bankruptcy would in many respects be uncertain, see Re PSNH, 66 PUR4th at 426, it concluded that reorganization would probably frustrate tl
cannot carry in the face of testimony from a number of witnesses that the availability and cost of capital would be uncertain following bankruptcy. The commission thus had an evidentiary basis to find that the

The appellants further assert that the commission unreasonably found that "bankruptcy reorganization will be more costly to ratepayers regarding reliable electric services at reasonable rates over tl
427 n. 66. Moreover, the commission recognized that the legal prohibition against recovery of investment in a cancelled plant, and the difficulty of regaining credibility in the investment community after reorga

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CLF raises the further argument that the commission did not specifically contrast the economic risks of Unit I completion with the risks inherent in a corporate reorganization. We find no merit in this argu

Not only does substantial evidence support the commission's conclusion that a bankruptcy reorganization would not be in the public interest, but it is noteworthy that no witness explicitly recommen

It is likewise noteworthy that Commissioner Aeschliman, in her separate opinion, agreed that "bankruptcy entails great uncertainty and risk for ratepayers as well as enormous administrative expens

[507 A.2d 667] V. Need for Power

Just as the completion cost figure governs the relative desirability of proposed alternatives, the total projected cost of Unit I governs the disposition of the two remaining issues in this appeal: the cal

l as a source of power. The commission affirmed this determination in its Report and Fifteenth Supplemental Order No. 17,939 (November 8, 1985), when it certified that its earlier conclusions remained

On several grounds, the appellants CLF, CRR, and Seacoast Anti-Pollution League (SAPL) challenge the commission's determination of the need for the power to be generated by Unit I. We shoulc

As a threshold matter, we observe that the commission was unanimous in its conclusion that there will be a need for additional electrical power in the foreseeable future. Commissioner Aeschliman,

On the record before us, we believe that the commission could reasonably rely on the company's 1984 load forecast as a starting point for its analysis of and findings on the future demand and neec 1984. Id. at 380.

Looking to the future, in which price or rate changes will affect demand, the commission observed that the company took price elasticities properly into account in its load forecasts. See Re PSNH, €

PUR4th at 381-87; Exhibits 31 and 42, and see infra. According to the company's Exhibit 42, the 1984 load forecast takes price-demand effect into account in two ways: "[f]irst, the end use portion [of th prices are specified for each end use of electricity to reflect the time lag response by customers to price changes through the use of an elasticity aging function." Exhibit 42.

Price elasticity of demand may be defined as " 'the per cent change in the quantity [of electricity] consumed divided by the per cent change in the real price of the electricity.' " Re PSNH, 66 PUR4th

We may consider further details of the need calculation in light of the appellants' objections, beginning with the assertion of CLF that the commission failed to make clear whether Unit I is needed to

CLF further claims that the finding of need is specious, because the evidence indicates that even without Unit I, there will be no physical shortages of electricity. Depending on which disputed exces

argument is sound to some degree for some period of time because sufficient alternative sources of power may be available so that blackouts will not occur. It is, however, not to the point. The commiss

We should note here that one contested element of the commission's methodology for calculating need was the reserve factor. Need is defined as "capability responsibility," which is equal to load o description of NEPOOL, see infra.) Mr. Eichorn's statement bolsters the commission's conclusion that a 25% reserve was reasonable. We conclude that, even if the commission's original justification for a 25

Next, we consider the argument of CLF that the commission applied a "build to demand" standard in an alleged misinterpretation

[507 A.2d 669] of RSA chapter 162-F and RSA 374:1. In its reply brief, CLF modified that position by claiming that, while the commission did not explicitly adopt such a standard, it implicitly did so by co

One of the more arcane subjects of contention in this case is the issue of the effect of the loss of the UNITIL load on the demand and calculation of need for power. UNITIL is a holding company par

with the company, effective September 30, 1986. CLF claims that the commission failed to consider the loss of the UNITIL load, arguing: "[t]he majority does not deal with the loss of UNITIL load on the

We observe, however, that the commission did consider the potential loss of the UNITIL load in several ways. First, it noted that the entire load may not ultimately be lost. Even though the contracts

Moreover, the commission accepted several of the company's computer scenarios that took the loss of the UNITIL load into account. See Exhibits 124D and 124F. It stated that "[t]he PSNH load mc

As to the related issue of whether the load forecast assumes unrealistically low projected rates for electricity, we conclude that the commission could properly find as it did on this issue. The commis lower than sales which are produced when the prices of the Hadley rate shock scenarios are assumed in the load forecast model." Re PSNH, 66 PUR4th at 384; see Exhibit 143.

Further, Mr. Staszowski's scenarios 4, 7, and 8 assume low peak demand growth, energy use, and sales growth. See Exhibit 136, Attachment A. As we have noted before, the commission observec

"[i]n virtually all [of Mr. Staszowski's] alternative cases, there was a benefit to completing Seabrook Unit No. I." Re PSNH, 66 PUR4th at 410-11 (footnote omitted). Accordingly,

[507 A.2d 670] we cannot say that the commission's conclusions as to the relationship between price levels and demand were unreasonable.

CLF raises a different objection when it asserts that the commission erred in considering NEPOOL's need for Unit I, because the commission "is under a duty to determine the needs of New Hamps

NEPOOL has been described as "a regional power-pooling system" with a membership of approximately sixty New England utilities which collectively contain roughly ninety-eight percent of New Er Agreement § 4.1, App. 31A).

We observe that this issue was not properly raised below in any motion for rehearing. RSA 541:4 provides that "[n]o appeal from any order or decision of the commission shall be taken unless the a agencies should have a chance to correct their own alleged mistakes before time is spent appealing from them." (Citation omitted.)

In any event, we note that the commission's discussion of NEPOOL's need for Unit I was not a basis for its decision, but rather a minor point raised in its discussion of New Hampshire's need for Unit I p

Since we conclude that the commission's findings of a need for power are sufficient to withstand these challenges, we now take up the final issue, whether the capitalization that would result from th

VI. Reasonableness of Resulting Rates

Statutory law limits customer rates to a level that is "reasonable," RSA 378:27 and :28, or "just and reasonable," RSA 378:7. As previously explained, Easton and its progeny mandate that the comn findings.

A. The Meaning of "Reasonable Rate"

The term "reasonable rate" must be understood as referring to the result of the ratemaking process. That process appropriately balances the competing interests of ratepayers who desire the lowes

depreciation of the utility's property that is used and useful in the public service, see RSA 378:27; and r is the rate of return allowed on the rate base. See, e.g., Appeal of Public Serv. Co. of N.H., 125 N

"This revenue requirement permits the utility to recover from its customers operating expenses (like labor, fuel, and maintenance costs) that it has prudently incurred in providing service that directly ben assets. The utility is also given the right to make a profit on its investments by including in the revenue requirement the product of the value of the utility's capital assets remaining after each year's depreciatio

Glicksman, Allocating the Cost of Constructing Excess Capacity: "Who Will Have To Pay For It All?", 33 Kan.L.Rev. 429, 432 (1985) (footnote omitted). Leaving aside the rules governing permissibl

A full understanding of the reasonable rate concept necessitates consideration of the commission's discretion in setting each of these variables. This discussion, however, will not dwell on the proce

regarding the meaning of "reasonable rates" do not turn on anticipated difficulties in deciding the **[507 A.2d 672]** legitimacy of the operating expenses incurred. We will concentrate instead on the proces

As we have seen, the rate of return is a percentage applied to the rate base expressed as a dollar amount in order to produce "interest on long-term debt, dividends on preferred stock, and earnings 95 N.H. 353, 361, 64 A.2d 9, 16 (1949).

Subject to the qualifications that follow, the commission should set a rate sufficient to yield a return comparable "to that generally being made at the same time and in the same general part of the cc

Although these standards look outward to capital costs and comparable risks, it is important to recognize their relationships to the actual circumstances of a utility whose rates are under consideratic

allowable revenue. The commission may set the "sufficient" rate of return by reference to a capital structure that it finds appropriate, rather than the actual capital structure of the company, as well as by

The commission has this authority to set the rate of return by reference to appropriate, as distinguished from actual, capital structure because the object of the process is to strike a fair balance betw

[507 A.2d 673] New *Eng. Tel. & Tel. Co. v. State*, 113 N.H. at 95, 302 A.2d at 817; *New Eng. Tel. & Tel. Co. v. State*, 104 N.H. at 234, 236-37, 183 A.2d at 241, 243.

The same point is true about the process of setting the remaining variable, the rate base, which can be a task of the greatest complexity. For present purposes we may say that two issues are centr

Much case law in this jurisdiction and elsewhere has addressed one basic aspect of the latter valuation problem, the relative significance to be accorded to original cost as distinguished from replac value of investment in rate base property may be reduced to reflect any lack of corporate foresight.

It is a constant in the law of ratemaking that there is no single formulation sufficient to express constitutional, statutory, or judicially derived standards for determining rate base inclusion. See *Power Con*

Attempts to place appropriate limits on the exercise of such pragmatic flexibility have led to the development of two broad principles governing inclusion or exclusion. The first is that of prudence, wh entire investment in a given asset was foreseeably wasteful, the entire investment must be excluded; if only some of the constituent costs attributable to a given asset were foreseeably wasteful, the value for

The second principle of rate base inclusion or exclusion derives directly from the statutory description of allowable rate base property as "used and useful." RSA 378:27, :28. Here again, there is no

[507 A.2d 674] thus necessarily providing scope for policy judgments.

Although the relationship between the principles of prudence and usefulness is certainly obscure in existing case law, see Pierce, supra at 513, and although in this jurisdiction the principles

seem to have been treated as forming a continuum rather than as wholly distinct criteria, see, e.g., LUCC, 119 N.H. at 341, 344, 402 A.2d at 632, 634, the principles are significantly different in at least c

or not of investment in property held for future use. See LUCC, 119 N.H. at 343-44, 402 A.2d at 633-34; N.H. Gas & Elec., 88 N.H. at 55, 184 A. at 605; C. Phillips, Jr., supra at 316. We will return to this

To summarize the results of the ratemaking process that we have considered significant for this case, we may say that in a proceeding to set rates the commission must set a reasonable rate of ret

It should now be apparent that a rate or structure of rates charged to customers is reasonable within the meaning of the statute when it will produce an amount of revenue that has been determined,

Conversely, given the existing statutes that we have cited, the reasonableness of a rate should not be determined either independently

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of the process by which expenses, rate base, and rate of return are set, or after that process has been completed. Although our cases have often referred to the standard of just and reasonable rates as

Indeed, any attempt to judge reasonableness apart from that process would entail redundancy and risk both illegality and unconstitutionality. Redundancy would be entailed because it is difficult to t

Legality would at least be open to question simply because the relevant statutes mandate the provision of a reasonable return on net cost of used and useful property. The application of any ratema

A risk of unconstitutionality would likewise arise from any attempt to determine the reasonableness of a rate apart from the process that we have described. This is so, not because the State or Fede reasonableness that might be applied independently from the balancing process that does reflect such interests would run the risk of unconstitutionality by inviting the fixing of rates without regard to the balar

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Since concerns about these risks of illegality and unconstitutionality have not been briefed or argued in this appeal, we go no further than to note that the risks are there.

We may conclude the discussion by reaffirming an earlier statement quoted above: "the commission controls three variables in regulating rates to provide revenue to [a utility]: operating expenses, r

B. The Commission's Responsibility to Anticipate the Rate Effect of this Financing

An understanding of the commission's responsibility must begin with RSA 378:27 and :28, which provide authority to hold a ratemaking proceeding at which the variables limiting rates to reasonable Easton proceedings, and nothing that we have said or held about Easton hearings implies otherwise. See Appeal of SAPL, 125 N.H. at 708, 490 A.2d at 1329;

[507 A.2d 676] Appeal of SAPL, 125 N.H. at 465, 482 A.2d at 509; Appeal of Easton, 125 N.H. at 205, 480 A.2d at 88.

It follows that in an Easton hearing the commission's responsibility to address the rate implications of a decision approving a utility's financing request is not a responsibility to determine what these i

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later ratemaking proceeding a reasonable rate can be set that will allow the company to support the capitalization that will result from use of the proceeds of the proposed financing. Since a reasonable r determine whether the probable range of rates would provide genuine scope to resolve the competition between the interests and to determine whether a rate set within the range would allow the company to

The one exceptional instance in which the commission would be effectively obligated to determine a rate, rather than a range, in an Easton proceeding like this, would occur if the commission were

C. The Commission's Findings as to Rate Effect

We conclude that in its supplemental order the commission made sustainable findings that satisfy its obligation to consider rate effects and the ability of the company to support the resulting capital

The commission established the upper range of probable rates by making three distinct projections utilizing the so-called base case scenario presented in Exhibit 99A. The base case relies on the u

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base case are: (1) full dollar inclusion in rate base of the company's share of total project cost of $4.6 billion; (2) COD of October 31, 1986; (3) no write-off or recovery of Unit II; (4) no loss of UNITIL loac

In Exhibit 99B, certain sensitive assumptions were then altered to determine their effect on the rates forecast in Exhibit 99A. Exhibit 99B generated a different rate forecast by eliminating the phase-i

[507 A.2d 677] shock," increases. Another exhibit, 124D, also eliminated the rate phase-in, but went further to assume the total loss of the UNITIL load, constant availability factor of 60%, and a write-of

Rates were then projected using these assumptions. In order to summarize the results here, we have chosen to emphasize the rates for four distinct years or sets of circumstances. The first rate co 4.85cents/kwh to 14.44cents/kwh); and for Exhibit 124D this occurs in 1987 and results in a 67.48% increase (a rise of 6.39cents/kwh/to 15.86cents/kwh). The rates forecast for 1991 are 17.65cents/kwh for E

This comparison indicates that when rates are phased in, they continue to rise above the rates in the rate-shock scenarios because the company accumulates deferred revenues during the phase-ir

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in later years. The rates in the two rate-shock scenarios are roughly parallel, but the rates resulting from the assumptions in Exhibit 124D are slightly higher because that scenario assumes a loss of the

It is instructive to note the significant differences when the rates are projected in so-called real terms, that is, without adjustments for inflation, reflecting only the effects of the rate base additions. In

In each of these instances, there is a clear evidentiary basis for the calculation. It consists of the value of the present rate base, which is not in dispute, plus plant additions and projections of usage

The commission did not determine a lower end of the probable rate range, for it took the position that it would be entirely speculative to project exclusions from rate base for any portion of the Unit I

Although the commission did not do this, we do not consider that the failure warranted reversal, because we believe that the commission effectively satisfied the Easton requirement by finding the m

The major assumptions are: (1) no phase-in of Unit I costs; (2) total project cost of $4.5 billion; (3) in-service date of August 1, 1986; (4)

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no write-off or recovery of Unit II costs; (5) no loss of UNITIL load; (6) $480 million Newbrook financing; and (7) availability factor of 72%. Schedule 9 then forecasts the rates resulting from an exclusion 14.15cents/kwh and for 1994 is 15.14cents/kwh. The highest rate forecast occurs in 2000 (the last year of the forecast) and is 17.77cents/kwh or 108.1% above the 1985 rate. In real, non-inflated terms, the h

Although the commission was careful not to suggest that a reasonable rate would probably be found to be as low as the survival level, and while the survival level itself would require adjustment in tl New Hampshire economy or which is unfair to stockholders in the event of disallowance of any portion of the capital investment on the basis of imprudence[,]" Re PSNH, 66 PUR4th at 423, or, we should add

This adequately addresses the question whether the company's continued participation will result in a capital structure that probably can be supported by reasonable rates. We therefore hold that th

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of the proposed financing satisfy the Easton requirements and withstand the appellants' challenges.

As will be seen, we are at odds here with our brothers who dissent today. We respectfully but emphatically disagree with their position that the commission has failed to deal adequately with the rate reasonable rates and nonetheless properly deny the financing with the result of corporate bankruptcy. In our judgment the commission could properly find such an option inconsistent with the public interest.

Although we therefore sustain the commission's treatment of rate effects, Commissioner Aeschliman's thoughtful separate opinion on this issue nonetheless deserves comment. It is an occasion no

Commissioner Aeschliman accepts the position taken by the appellants' witness Gregory Palast that a company rate more than 4-5cents/kwh above the average NEPOOL rate would result in signifi investment in Unit I, which must be deferred until the plant is commercially operating, as required by RSA 378:30-a, the "anti-CWIP" law. See Appeal of Public Serv. Co. of N.H., 125 N.H. at 46, 50, 480 A.2d .

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the application of a criterion of reasonableness dependent on the level of regional rates and the application of the usefulness principle to authorize the allocation to the investors of a part of the burden o

Although we believe that the first step in Commissioner Aeschliman's approach suffers from an analytical flaw, if regarded as a ratemaking device, we nonetheless recognize its value as a tool of cri

Dealing first with what we see as the flaw, Commissioner Aeschliman seems to take the position that a given differential between projected company rates and the projected NEPOOL average shou need for power. If it were so incorporated, its reappearance as a separate criterion of reasonableness would be redundant. Moreover, as a separate criterion for judging the level of reasonable rates, this stan

These considerations support the view expressed by this court over thirty years ago, that "[o]f itself, the evidence relating to rates elsewhere has no conclusive probative force. Its affirmative effect d

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case, it is well to consider the commission's legitimate flexibility in dealing with rate base inclusion and in valuing rate base property on a standard of prudence.

We may start with the commission's authority to exclude investment or to reduce the value of otherwise recognizable investment on the ground of imprudence. It has to be admitted, on the one hanc imprudently. We of course express no opinion on the merits that such an assertion might have.

In any event, it is important to bear in mind, as Commissioner Aeschliman's separate opinion indicates, that the principle of used and useful property will also be applicable in determining rate base.

In noting this, we do not imply that we would necessarily agree with Commissioner Aeschliman's calculation that without UNITIL the entire 409 megawatts representing the company's share of the c

Nor do we imply that Commissioner Aeschliman's particular choice of an equity AFUDC exclusion attributable to the new plant is

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necessarily the best method, or even an acceptable mechanism, for recognizing excess capacity under the principle of usefulness. Such a choice is one to be made by expert policymakers, not by this c

The variety of these treatments reflect not only pragmatic responses to different facts, but different policy choices as well. For example, a rate base exclusion tied to usefulness, without more, is an i State Commerce Comm'n 1982).

Whether or not Commissioner Aeschliman's approach is ultimately adopted in the coming rate proceeding, her separate opinion is a reminder both that regulatory concepts are subject to developme

Affirmed.

KING, C.J., and BATCHELDER, J., dissented.

KING, Chief Justice, and BATCHELDER, Justice, dissenting:

This $525 million proposal is the largest utility financing in New Hampshire history.

Moreover, it represents but a fraction of the $1.7 billion investment of the Public Service Company of New Hampshire (PSNH or company) in the first unit of the ill-starred Seabrook nuclear plant, current

We are convinced that the order of the public utilities commission (PUC or commission) is "unreasonable" within the meaning of RSA 541:13. The PUC committed errors of law in (1) failing to asses

In evaluating the evidence presented in this case, we have been forced to maintain a critical--even skeptical--frame of mind. Experience dictates this approach. If Seabrook's history has taught us ar

The following table illustrates the evolution of PSNH's Seabrook project estimates:

Estimated Estimated Commercial Date ($ million) Operation Date --------- ---------- ---------- Unit 1 Unit 2 Total Unit 1 Unit 2 Feb-7

[507 A.2d 682]

Exhibit 63, table 1.1. PSNH has not been held accountable for this abysmal record. Indeed, the company has used its wildly inaccurate predictions to intimidate the commission. For example, in a rate c

In the instant docket, as in the past, the company's evidence did not go unchallenged. Expert witnesses testified that PSNH had once again underestimated costs. Several of these experts have pro

The PUC nonetheless repeatedly chose to discount the testimony of intervenor witnesses, and to endorse PSNH projections. According to the commission, company estimates are inherently "more

This case is fraught with uncertainty. The total project cost, completion date, and amount of future rate increase are unknowns. We are certain of two things, however. First, the proposed financing r

this is not the last trip to the well. The company projects that between 1987 and 1989 it will need to borrow an additional $343 million through the issuance of debt instruments in the securities markets ir

Second, if Unit I is completed PSNH rates will escalate, and ultimately every person and organization in the State will be affected. It will become decidedly more expensive to rent an apartment, owr

We differ with the majority of the court on four issues. The first is the standard of review. This court has an affirmative duty under RSA 541:13 to scrutinize commission orders to assure that they cor

The third issue concerns the rate projections presented in this case. The commission failed to evaluate the implications of these projections, stating that it could do so only in the context of a pruden

The final issue pertains to bankruptcy. A thorough inquiry into the feasibility of a PSNH reorganization under chapter 11 of the Bankruptcy Code was essential in this case. The commission assume

I. Standard of Review

The legislature has delegated to the commission the task of determining, based upon subsidiary findings of evidentiary facts, whether the proposed financing serves the public good. RSA ch. 369. Ir

RSA 541:13 defines both the appellants' burden of proof and the court's power to review commission findings and orders. Orders may be vacated for errors of law or when it appears "by a clear prepond

The reasonableness of the order depends upon the validity of the underlying evidentiary findings. Because of the commission's specialized role, its findings are accorded a legislative presumption o

[507 A.2d 684] "rests with the appellants to satisfy the court that upon the evidence the findings are erroneous. The fact that they are merely prima facie disposes of the contention that they were intend

Grafton *Etc. Co. v. State*, 77 N.H. 490, 504, 93 A. 1028, 1033 (1915) (citation omitted).

Among the court's functions in this case is ensuring that the commission has exercised its regulatory discretion within the scope of statutory authority and consonant with legislative policy. Applicatic

Upon review, we "may inquire whether the agency's decision was fairly based on a consideration of all relevant factors." Appeal of Concord Natural Gas Corp., 121 N.H. 685, 693, 433 A.2d 1291, 1:

must encompass specific findings of need and economic comparisons. See Appeal of Seacoast Anti-Pollution League, 125 N.H. 708, 490 A.2d 1329 (1984); Appeal of Easton, 125 N.H. 205, 480 A.2d 8

In this case, the commission's misconception of its role and misinterpretation of the public good standard have led to decision-making tainted by errors of law with respect to rates and bankruptcy.

II. Role of the Commission

The PUC's primary responsibility is to protect the ratepaying public's interest in adequate utility service at reasonable rates. Its secondary responsibility is to ensure that utility investors obtain a reas

RSA 369:1 provides that a public utility may not issue long-term securities without the approval of the PUC. RSA 369:1 and :4 provide that the PUC is responsible for determining whether the propo:

The object of RSA chapter 369 is to avoid over-capitalization, i.e., to limit that part of

[507 A.2d 685] a utility's cpitl investment represented by its cpitl stock nd debts of permnent chrcter. The legislture's min object in providing for PUC control of utility's cpitl structure is "to estblish nd pres

Preserving a proper base for regulation serves two purposes. The primary purpose is protection of the ratepayers' interest in proper

service at fair cost. Petition of N.H. Gas & Electric Co., 88 N.H. 50, 57, 184 A. 602, 607 (1936). This interest is jeopardized when capitalization threatens to become so high that consumers will suffer a d

The secondary purpose of preserving a proper base for regulation is protection of investors' interests in obtaining a fair return. See generally Petition of Derry Electric Co., 180 A. 697 (N.H.1935), wi

In this case, the commission ignored the distinction between its primary duty to the public and its secondary duty to investors. In its April report the PUC stated that its role was to "balance the intere

The commission asserts that RSA 363:17-a requires a "balancing in the decisional process of investor, consumer, and utility aspects of the public interest." Re PSNH, 66 PUR4th at 434. RSA 363:1

The PUC is not "an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the *Commission.*"

PUC must choose the course least harmful to ratepayers. This choice, moreover, would withstand constitutional scrutiny. The public interest can justify a good deal of financial harm to utility investors wi

The commission assumes that approval of this financing and the subsequent completion of Seabrook will produce a rate structure that will not be oppressive to ratepayers and at the same time will

In Appeal of Easton, 125 N.H. 205, 480 A.2d 88 (1984), this court directed the PUC to engage in a thorough investigation when determining whether to approve a proposed utility securities issue. W

The PUC has statutory authority to deny a financing request or to put restrictions on a proposed financing. RSA 369:1 states:

"[PUC] 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 reasonabl

In Easton, we reiterated that in approving a utility financing the PUC may attach reasonable conditions to a securities issue where necessary in the public interest. 125 N.H. at 213, 480 A.2d at 91. A

497, 93 A. 1028, 1030 (1915). Thus, the commission could have rejected PSNH's request for authorization to issue $525 million in securities if it had found that the security issuance or the underlying pu

The PUC's power to impose "reasonable terms and conditions" on approved financing proposals can be applied creatively. The commission was at liberty to accept the recommendations of Commi

"(1) Cost recovery from ratepayers will not be approved for the equity portion of the cost of financing the Seabrook investment that is determined to be excess capacity.

(2) Cost recovery from ratepayers will be limited to those expenditures which were prudently incurred prior to the date of this order in the event that Seabrook I does not become operational and tha

Id. The commissioner further recommended that the PUC disallow the third mortgage on existing utility generating assets. Id.

In Appeal of PSNH, 122 N.H. 1062, 454 A.2d 435 (1982), a majority of this court called into doubt the PUC's power to reject or place restrictions on a proposed utility financing where the purpose of

"In this state, the common-law rule is that 'an owner, who, relying in good faith on the absence of any regulation which would prohibit his proposed project, has made substantial construction on the prop

acquires a vested right to complete his project in spite of the subsequent adoption of an ordinance prohibiting the same.' "

Id. at 1069, 454 A.2d at 439 (citing *Henry and Murphy, Inc. v. Town of Allenstown,* 120 N.H. 910, 912, 424 A.2d 1132, 1133-34 (1980)).

We dissented in that case, stating that "RSA chapter 162-F, which established a procedure for the issuance of certificates of site and facility, does not limit the PUC's authority to impose conditions

We also maintained that the PUC must have continuing control over the issuance of securities by utilities because of the relationship between the cost of a project and the fair rate of return to which

The court's holding in Appeal of PSNH had a short life. In Appeal of Easton, 125 N.H. 205, 480 A.2d 88 (1984), this court unanimously recognized that the PUC has the power to regulate utility finar

The process of adding a bulk power facility to the rate base occurs in three phases: siting, financing, and rate-setting. The commission regulates utility activity during each of these phases. During th

for electricity." RSA 162-F:8, II(a). The statute requires the commission to consider "economic factors" in evaluating electricity needs. Id. As discussed previously, RSA chapter 369 governs the financing

During the rate-setting phase, RSA chapter 378 applies. In a rate case the PUC must determine and fix "just and reasonable or lawful rates." RSA 378:7. The rates must be "sufficient to yield not les

[507 A.2d 688] Contrary to the view of both the majority of the court and the commission, the PUC has broad authority to assess the reasonableness of projected rate levels in each of the three pha

Thus, issuance of a site and facility certificate does not constrain the commission if a utility's continued participation in a project later proves detrimental to the public interest:

"[A] commission that has been trusted with the power to approve new plants based on its assessment of future conditions at the time of the initial decision to build should have the power to change its or

Pierce, The Regulatory Treatment of Mistakes in Retrospect: Canceled Plants and Excess Capacity, 132 U.Pa.L.Rev. 497, 535 (1984). New Hampshire's statutory scheme encourages utilities to pr

Thus, the PUC must act to protect ratepayers and investors in a public utility whenever the interests of either group are endangered. The PUC can act when a utility applies for a site and facility cert

project in its rate base, and when a utility proposes long-term financing to continue construction of a power plant.

Our conception of the PUC's appropriate role in this case is hardly novel. Utility commissions in other New England States have not been passive in regard to Seabrook. As the appellants point out,

In 1984, the Maine Public Utilities Commission found that "completing Seabrook I is uneconomic for all three utilities under credible assumptions." Re Investigation of Seabrook Involvements by Mai

In April 1985, the Massachusetts Department of Public Utilities (DPU) stated that " 'the degree of risk associated with increased costs and potential future abandonment [of the project] ... precludes

"1. In the event Seabrook I does not become commercially operable, cost recovery from ratepayers will be limited solely to those expenditures which were **[507 A.2d 689]** prudently incurred before the c

2. In the event that Seabrook I becomes commercially operable, cost recovery from ratepayers will be limited to the marginal costs of capacity and energy that would otherwise be faced by the utility, but

3. In the alternative, a company may choose to receive an as-available marginal cost rate for electricity produced

throughout the life of Seabrook I, without a constraint on the minimum and maximum levels of cost recovery."

Id., 483 N.E.2d at 80 n. 3. Since the utilities refused to comply with these conditions the financing requests were denied. The court also affirmed the DPU's decision regarding the Massachusetts Mu

Furthermore, the Vermont Public Service Board (PSB), in May 1985, ordered utilities in that State to attempt to sell their ownership interests in Seabrook, stating "that it will be cheaper for Vermont f Seabrook interests, at least until suitable offers are received. See In re Central Vermont Public Service Corp., 71 P.U.R. 4th 708 (Vt.P.S.B. Dec. 4, 1985).

Finally, we note that the Connecticut Department of Public Utility Control (DPUC), pursuant to legislative mandate, imposed a cost cap of $4.7 billion on Unit I for purposes of the upcoming rate proc

In making this comparison we recognize that the Vermont utilities' ownership shares are considerably smaller than PSNH's, and that PSNH, as the principal owner, has the largest investment at risk

who oversee utilities that own substantial portions of Seabrook, have taken protective action on behalf of the public interest. The steps taken by other New England States to protect consumers from Se

III. Rates

The PUC found that projected rate increases of 200% by the turn of the century are consistent with the public good. This "finding," however, was not based on an analysis of the evidence. It was, fr

The commission clings to this notion with remarkable tenacity. Before the hearings in this proceeding, we directed the commission to consider "the effect on the company's future rates of this and ar 22 (N.H.P.U.C. May 10, 1985).

By order dated October 30, 1985, the court remanded this case to the commission for a supplemental report containing

1) findings as to the reasonably probable range within which rates will be set if the proposed financing is approved and the plant completed; and

2) determinations as to the effect of such findings on the validity of the conclusions reached in the PUC's April decision.

This effort at last bore fruit; in its Report and Fifteenth Supplemental Order No. 17,939 (N.H.P.U.C. Nov. 8, 1985), the commission specified the range of "reasonably probable rates" that will obtain

assumes rate phase-in; inclusion of demand for power by UNITIL (the holding company of Concord Electric Company and Exeter and Hampton Electric Company); commercial operation date (COD) 10

The projections in the second group, Tables 4 and 5, rely on testimony of Donald Trawicki, a financial consultant and accountant for Touche Ross & Co. Trawicki testified that up to $1.1 billion of PS

Although the PUC adopted this range of projections, it reiterated its conviction that the reasonableness of projected rate levels could not be assessed in this proceeding and made no significant atte

In analyzing whether the projected rates were reasonable, the PUC apparently applied the chapter 378 rate-setting standards.

[507 A.2d 691] According to the commission, reasonable rates are rates 'sufficient to yield not less than a reasonable return on the cost of the property of the utility used and useful in the public service

1) whether there is a need for the power to be supplied by the project;

2) if so, whether the proposed plant is the cheapest means of meeting that need;

3) whether the cost of the plant was prudently incurred; and

4) whether the return on the cost of the plant will be reasonable.

Report and Fifteenth Supplemental Order No. 17,939 at 38 (N.H.P.U.C. Nov. 8, 1985). The commission stated that three of these issues, 1, 2 and 4, had been resolved in PSNH's favor in the April c

The commission apparently believes that its chapter 369 power to impose conditions to minimize consumer exposure to rate shock is negligible. According to the commission, the concept of rate rea

"Electricity rate levels flow from revenues necessary to provide a reasonable rate [sic] on prudent investment–not the reverse process of first determining a rate level to derive the level of prudent investr

Id. at 31-32.

In sum, the commission believes that reasonable rates necessarily result from application of the rate-setting formula set forth in chapter 378, and that apart from the chapter 378 framework no objec

No. 17,939 at 2 (N.H.P.U.C. Nov. 8, 1985) (Aeschliman, Comm'r, sep. op.), the commission majority expressly refused to employ a market standard. Report and Fifteenth Supplemental Order No. 17,93

This position is faulty. Rate increases of this magnitude cannot be evaluated in a vacuum. The protection of the public interest in just and reasonable rates cannot be left entirely to the rate-setting p

[507 A.2d 692] In a 1949 rate case, the public service commission relied on evidence pertaining to rates in effect or sought by the utility in other jurisdictions. *Company v. State*, 95 N.H. 353, 64 A.2

On appeal the utility contended that this evidence was improperly considered. We found to the contrary:

"While the jurisdiction of the Commission is confined to intrastate rates, it is not required to fix them in a vacuum, or to close its eyes to the company's conduct of its affairs in neighboring states where cc

higher rates. No exposition of factors which might account for the apparent differential was undertaken by the company.... In this situation, the evidence was pertinent in considering whether the compan

Id. at 362-63, 64 A.2d at 17 (emphasis added).

In this case there is evidence that projected PSNH rates will be considerably higher than those prevailing outside the ambit of its monopoly. Gregory Palast, a utility rate economist for Union Associa differential would be 4-6cents/kwh. Report and Fifteenth Supplemental Order No. 17,939 at 10, table 2 (N.H.P.U.C. Nov. 8, 1985) (Aeschliman, Comm'r, sep.op.). Assuming a "cost to go" of one billion dollars

The commission acted unreasonably in ignoring this evidence. The evidence provided the commission with an opportunity to test the results of its economic analysis against an objective standard. T period are compatible. In refusing to assess the implications of its rate projections, the PUC missed an important opportunity to verify the soundness of some of its other assumptions.

"It is ... not sufficient to say that since you have found that the load forecast is reasonable, and that the plant is needed, that the level of rates that results is reasonable per se. It is necessary to test the r

Id. at 3.

We do not contend that a comparison with NEPOOL average rates was required in this case, nor do we regard the 4-5cents/kwh differential standard of reasonableness proposed by Commissioner

The majority of this court, in affirming the commission's order, adopts the view that the PUC had no obligation in this proceeding to address the implications of the projected rate increases. The com

"The term 'reasonable rate' must be understood as referring to the result of the ratemaking process....

... [T]he reasonableness of a rate should not be determined either independently of the process by which expenses, rate base, and rate of return are set, or after that process has been completed....

Indeed, any attempt to judge reasonableness apart from that process would entail redundancy and risk both illegality and unconstitutionality."

We respectfully disagree. The commission's chapter 378 power to set rates neither circumscribes its authority nor diminishes its obligation under chapter 369 to protect the public interest. We respo

The majority asserts that our position entails redundancy because

"it is difficult to think of any consideration bearing on reasonableness that may not be raised appropriately" in the rate-setting process. In other words, because the commission in the upcoming rate case

Two errors taint this argument. First, the argument ignores the distinction between the PUC's role in a rate case and its role in a financing case. In a rate case the commission deals post facto with u

In the Seabrook rate case, however, the commission will find itself in a much more difficult position. The commission will have to choose between excluding a significant [507 A.2d 694] part of the S

In a financing case the PUC has a different function. The money involved has not yet been borrowed. The PUC, with foresight, has the power to limit potential losses before they occur. Thus, the PU

An examination of rate projections was essential to provide an indication of the losses that may ensue in the later rate case. If after such an investigation the PUC had concluded that a substantial ri

included this assessment in its report. Instead, the commission ignored the probable effects of the projected rate increases, and justified its position by invoking the possibility of significant rate base exc

A second error underlies the majority's charge of redundancy. The charge is premised on the dubious assumption that up to $1.1 billion of PSNH's investment can be disallowed without precipitating mature capacity 72%), and assume, inter alia, that lenders will not call their loans when PSNH breaches financial maintenance tests and other protective covenants. Moreover, even under Trawicki's projectio

The majority next asserts that our position risks "illegality" because "the relevant statutes mandate the provision of a reasonable return on net cost of used and useful property. The application of an

[507 A.2d 695] Chapters 378 and 369 exist for different purposes and mandate different legal standards. This is a financing case, not an inchoate rate case. Chapter 378 requires the PUC to use hi

constrains the PUC in a "public good" inquiry under chapter 369. Rates that emerge from the chapter 378 process may be inconsistent with the public good. Apart from its chapter 378 function, the PUC

The majority also asserts that our analysis risks unconstitutionality because "any criterion of reasonableness that might be applied independently from the [rate-setting process] would run the risk of

We reiterate: this is not a rate case, and the money at issue has not been borrowed. Once a utility makes an investment, the constitution may require that rates be set without regard to "independen

Finally, we take issue with the majority's discussion of rate differentials. The majority concedes that a rate differential "has value as a critical tool," but asserts that its use in this proceeding would be

We disagree. There is nothing sacrosanct or exclusive about the issues--need for power, comparative incremental cost and financial feasibility--the PUC considered in this case. Each bears on the p projected rate differentials in this case. We see no point in requiring the commission to adopt rate projections if the projections can play no role in the evaluation of the proposed financing.

The commission has utterly failed to come to grips with the rate issues in this case. The PUC has abnegated its chapter 369 responsibility to protect the public interest in failing to adequately assess the

IV. Bankruptcy

Bankruptcy is an unavoidable issue in this case. Determination of whether a proposed financing serves the public good requires a comparison of the consequences of approving the proposal with th

In Appeal of SAPL, we stated that Easton "will require the commission to determine the relative economic desirability of allowing or disallowing the company's continuing participation in construction

We reject the majority's position that consideration of bankruptcy is irrelevant and the majority's concomitant endorsement of the "analytic standard" the commission employed to address bankruptcy

commits itself to preserve company solvency at all costs. We do not think the commission should ensure PSNH's corporate survival at the expense of New Hampshire ratepayers.

The commission also failed to examine alternative sources of electric generation--small power production, cogeneration, and conservation--under economic forecasts that included the effects of reor

We find further error in the commission's allocation of the burden of proof. The commission stated that "[t]he company has sustained its burden to prove that the proposed financing will serve the pu

We now consider the evidentiary record. The record includes five PSNH financial scenarios which demonstrate that denial of the financing and cancellation of the plant will result in bankruptcy, and

[507 A.2d 697] The record also includes independent bankruptcy studies of other electric utilities. Re PSNH, 66 PUR4th at 426. A review of this evidence discloses two facts. First, these studies dis

In addition to this evidence, the commission heard testimony from four witnesses who are not PSNH employees--Mark Vaughn, Esq., Gregory Palast, Donald Trawicki, and Dean Robert Viles. Vaug

the commission and the bankruptcy court, priority of debts, the delay and expense of administration, the bankruptcy "stigma," possible tax effects on municipalities, and the debt burden on a reorganizec

Although this report constituted the primary legal analysis of a possible PSNH reorganization, Vaughn testified that it did not purport to be a complete study. The report states: "While pointing out ce

Palast, a utility rate economist for Union Associates of Boston, stated that reorganization would have a positive effect on rates, that post-reorganization borrowings would cost less, and that a post-b

Trawicki, a financial consultant and accountant for Touche Ross & Co., prepared a financial scenario entitled "Newbrook plan not implemented." He stated that rates after a PSNH reorganization wo

In addition, Dean Viles of the Franklin Pierce Law Center, an academic expert, offered his views on bankruptcy. He stated that service to customers during a reorganization would not deteriorate be

The following exchange occurred during Dean Viles' testimony.

"Comm'r Nassikas: Is it your opinion that the Commission has an adequate evidentiary record to determine whether or not the Company should file for a Chapter 11 arrangement?

Dean Viles: I am afraid I have to say, no.

....

[T]he magnitude of the questions involved here and how much is at stake for the future not only of the company but for the ratepayers and the general welfare in this state, [suggest] that more [evidence

More specifically, Dean Viles stated: "I think you need to have more advice about how a bankruptcy would actually work, ... [the Devine, Millimet] report does not tell you what will happen, it doesn't

"It does not go into what might happen in the case of the reorganization after approvals were made for the Newbrook funding. It doesn't give a very clear explanation why it doesn't take into account salv

The testimony of these independent experts establishes that the evidentiary record on bankruptcy was inadequate, yet the commission failed to observe their recommendations. Moreover, the comr

Although the evidence pertaining to bankruptcy was scant, the commission was not obligated to rely on the parties to supply further information or to rest on the inadequate record. The commission

the engineering context. Re PSNH, 66 PUR4th at 403, 406. When the commission addressed bankruptcy, however, it failed to obtain and review sufficient Seabrook-specific evidence. Rather than enga

For the commission to have made adequate findings on bankruptcy, a comprehensive economic analysis was required. Such an analysis would have included (1) detailed long-term projections of p

One commentator recently stated that although bankruptcy may be a "draconian route" for a utility, it is "an option not to be lightly dismissed." Samuels, A Consumer View on Financing Nuclear Plar

V. Conclusion

Approval of this financing heralds an era of unprecedented rate increases for New Hampshire ratepayers. In light of the dismal **[507 A.2d 699]** history of this project, we believe the PUC has not pro

The company has consistently claimed that if this financing proposal is not approved, PSNH will seek protection from its creditors

under chapter 11 of the Bankruptcy Code. This ultimatum makes clear the signal importance of the bankruptcy issue. Bankruptcy is not an alternative to power supply; it is, however, an alternative to thi

An investor is under no compulsion to put his money at risk in 23% junk bonds. The ratepayer within the zone of PSNH's monopoly does not enjoy the same freedom of choice in determining from w

The consequences of high utility rates have not been investigated by the commission, nor has the commission taken measures to protect ratepayers. The legislature intended that the hard question

TITLE XXXIV
PUBLIC UTILITIES

. . 011

CHAPTER 369-B
ELECTRIC RATE REDUCTION FINANCING AND COMMISSION ACTION

Section 369-B:3-a

369-B:3-a Divestiture of PSNH Generation Assets. – The sale of PSNH fossil and hydro generation assets shall not take place before April 30, 2006. Notwithstanding RSA 374:30, subsequent to April 30, 2006, PSNH may divest its generation assets if the commission finds that it is in the economic interest of retail customers of PSNH to do so, and provides for the cost recovery of such divestiture. Prior to any divestiture of its generation assets, PSNH may modify or retire such generation assets if the commission finds that it is in the public interest of retail customers of PSNH to do so, and provides for the cost recovery of such modification or retirement.

Source. 2003, 21:4, eff. April 23, 2003.