

DE 00-211

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Petition for Valuation of J. Brodie Smith Hydro-Electric Station

Order Following Hearing

O R D E R N O. 24,086

November 15, 2002

APPEARANCES: O'Neill, Grills & O'Neill, P.L.L.P. by Peter H. Grills, Esq. for City of Berlin; Robert A. Bersak, Esq. for Public Service Company of New Hampshire; Office of Consumer Advocate by Michael W. Holmes, Esq. on behalf of residential ratepayers; and Donald M. Kreis, Esq. for the Staff of the New Hampshire Public Utilities Commission.

I. PROCEDURAL HISTORY

In this proceeding, the City of Berlin (City) invokes the jurisdiction of the New Hampshire Public Utilities Commission (Commission) under RSA 38 with respect to the valuation and possible condemnation of the J. Brodie Smith Hydro-Electric Station (Smith Station) of Public Service Company of New Hampshire (PSNH). In this order, the Commission determines that consideration of the City's proposed acquisition of Smith Station may proceed and that it is appropriate to conduct a formal valuation of the facility.

The City initiated this case by petition filed on September 29, 2000 under Section 5 of Chapter 249 of the New Hampshire Laws of 2000 (Chapter 249). Chapter 249 reflects the Legislature's approval, with certain modifications not relevant here, of the Agreement to Settle PSNH Restructuring

(Restructuring Agreement) that the Commission approved in Docket No. DE 99-099. The Restructuring Agreement settled ongoing federal litigation between the Commission and PSNH over restructuring-related stranded costs and other issues; it also opened the PSNH service territory to competitive energy suppliers as of May 1, 2001.

In Section 5 of Chapter 249, the Legislature specifically contemplated the possibility that one or more municipalities would want to acquire PSNH generation facilities within their borders as PSNH prepared to divest itself of these facilities and focus on becoming an electric distribution company. Section 5 authorized municipalities to seek valuation of such facilities, a condition precedent to municipal condemnation under RSA 38, but without completing the voter approval process normally required as a part of that statutory scheme.

Most of the ensuing proceedings are fully described in Order No. 23,733 (June 28, 2001). The docket was originally consolidated with a companion proceeding, Docket No. DE 00-210, which concerned a similar petition filed by the City of Manchester with respect to the Amoskeag Hydro-Electric Station located in that municipality. The Commission granted the intervention petitions of Local 1837 of the International Brotherhood of Electrical Workers (collective bargaining agent

of the employees of Smith Station) (IBEW) and a group of municipalities (the towns of Bow, Hillsborough and Gorham, the City of Franklin and the New Hampton Village Precinct, collectively referred to as the Municipal Intervenors). The Office of Consumer Advocate (OCA) entered an appearance on behalf of residential ratepayers.

In Order No. 23,733, the Commission stayed the proceedings in the Amoskeag docket indefinitely. The Commission took this action in light of 2001 N.H. Laws 29:17, which authorized the Commission to stay or suspend Chapter 249 valuation proceedings given the Legislature's explicit authorization in 2001 for the Commission to delay the overall divestiture of the PSNH generation portfolio.¹

More significantly for present purposes, Order No. 23,733 granted a motion by the City of Berlin to amend its petition to reflect the City's desire to proceed directly under RSA 38, in light of the City's completion, subsequent to the

¹ Chapter 29 of the 2001 Laws contained an explicit finding by the Legislature that commodity prices for oil and natural gas had substantially increased over the preceding year, resulting in higher wholesale electricity prices in New Hampshire, preventing competitive energy suppliers from entering the marketplace. See 2001 N.H. Laws 29:4, I. Thus, the Legislature concluded that "[a] critically important measure that should be undertaken to protect customers from price volatility and a noncompetitive market is for the [Commission] to delay the divestiture [of the PSNH non-nuclear generation portfolio] until the commission determines such sale is in the public interest. *Id.* at subsection III. Thus the Legislature specified that the sale of PSNH's non-nuclear generation assets should take place no sooner than 33 months after competition day as defined in RSA 369:B:2, III - i.e., no sooner than February 1, 2004. 2001 N.H. Laws 29:13, II. Other aspects of Chapter 29 that are significant to this case are discussed *infra*.

filing of the City's initial petition, of the voter approval process specified in RSA 38. The Commission concluded that Chapter 29 had not repealed RSA 38 by implication insofar as RSA 38 would authorize a municipality to purchase any PSNH generation facilities, rejecting PSNH's arguments to the contrary.

Order No. 23,733 also took up an important aspect of RSA 38 - the requirement of a public interest determination by the Commission, after notice and hearing, as a prerequisite to municipal condemnation of utility facilities. See RSA 38:10 and 11. The Commission determined that, in the unique circumstances of this case, it would be appropriate to consider the public interest implications of the proposed acquisition first, rather than take up the question at the same time as or subsequent to the valuation process. The Commission noted that, in considering whether the City's acquisition of Smith Station would be in the public interest, a key issue would be the effect of a near-term transfer of Smith Station from PSNH ownership in light of the legislatively mandated delay in the overall divestiture of PSNH's non-nuclear portfolio.

The City drew the Commission's attention to RSA 38:3, which provides that when a city's voters have approved the municipality's acquisition of a generation facility within one year of approval of the proposal by the municipality's governing

body by a two-thirds majority, such public vote "shall create a rebuttable presumption that such action is in the public interest." The Commission cautioned the City that it should not simply rely on this rebuttable presumption and await the evidence produced by other parties to rebut that presumption.

In light of these determinations, the Commission summoned the parties to a status conference to discuss how to proceed toward a hearing on the public interest issues. The status conference took place as scheduled on July 12, 2001. By secretarial letter issued on July 17, 2002, the Commission approved a procedural schedule providing for the submission of pre-filed testimony and the exchange of discovery precedent to a hearing in November 2001.

On July 25, 2001, PSNH filed a motion with respect to RSA 38:9, IV, which provides that the expenses of any Commission valuation proceeding under RSA 38 "shall be paid by the parties involved, in a manner fixed by the commission." PSNH took the position that in the circumstances of this case, all such expenses would be borne by the City; PSNH requested an order to that effect. By Order No. 23,775 (September 7, 2001), the Commission denied the motion without prejudice, noting its agreement with the City that the parties' conduct over the course of the proceeding would be relevant to the allocation of the Commission's costs.

PSNH submitted the pre-filed testimony of Terrance J. Large and Stephen R. Hall on September 7, 2001. On October 4, 2001, the City filed a motion to compel PSNH's responses to certain discovery requests. The City also requested a postponement of the deadline for the submission of its witnesses' pre-filed testimony. By Order No. 23,831 (November 1, 2001), the Commission granted the City's discovery motion and revised the procedural schedule accordingly, with a hearing to be conducted on January 8-9, 2002. The City thereafter requested a revision to the schedule and, on November 15, 2001 the Commission advised the parties by secretarial letter that the schedule had been revised and the hearing postponed to February 11-12, 2002.

The City filed a second motion to compel PSNH discovery responses on November 26, 2001. On December 18, 2001, the City submitted the pre-filed testimony of Sheree Brown, Paul Williams, Robert Theberge, David Morin and Richard LeFleur. Staff advised the Commission on January 2, 2002 that it was authorized to request that the Commission treat the pending discovery motion as withdrawn, provided that the Commission amend the procedural schedule to allow for the submission of certain additional discovery responses and the filing of supplemental testimony. The Commission granted this request by secretarial letter on January 28, 2002 and rescheduled the

hearing in the case to March 20-21, 2002. On January 29, 2002, the City filed the direct testimony of Sheree Brown to replace the testimony previously submitted on her behalf.

On March 13, 2002, the City and PSNH jointly moved for an additional postponement of the hearing. The Commission granted the motion by secretarial letter on March 18, 2002, postponing the hearings to May 8-9, 2002. The City submitted a prehearing memorandum and a motion in limine on May 6, 2002.

On May 7, 2002, Staff filed a letter indicating that (1) it had been contacted by counsel to the City, who was in transit from his offices in Minnesota, (2) that counsel for the City had advised Staff that the City had decided not to authorize its attorneys or its witnesses to appear at the hearing scheduled for the following day, and (3) that the City's counsel further advised that the City may be withdrawing its valuation petition. Accordingly, the Commission issued a secretarial letter on May 7, 2002 postponing the hearing in this docket until further notice.

On July 31, 2002, the Commission issued a secretarial letter rescheduling the merits hearing in this docket for September 24, 2002. In addition, given the substantial time that had elapsed since the submission of pre-filed testimony, the Commission gave the parties an opportunity to submit supplemental testimony on or before September 6, 2002.

The parties responded to this opportunity as follows: PSNH submitted a letter on September 6, 2002 including a brief factual update to one of the points made in its pre-filed testimony. On the same date, the City submitted supplemental testimony of Ms. Brown, Mr. Morin, Mr. LeFleur and Mr. Williams as well as the testimony of Patrick McQueen.

As scheduled, the merits hearing took place on September 24, 2002. At the request of PSNH, the City, OCA and Staff, the Commission thereafter extended the deadline for filing post-hearing briefs to October 25, 2002. PSNH and the City filed briefs on that date; the Commission also received written statements from OCA and the IBEW.

II. POSITIONS OF THE PARTIES AND STAFF

A. City of Berlin

According to the City, by virtue of RSA 38:3 and the voter approval obtained from the municipal electorate in November 2000, PSNH has the burden of proving that the City's acquisition of Smith Station would not be in the public interest. According to the City, it has not simply relied on the RSA 38:3 presumption with regard to the public interest determination.

In its testimony and again in its brief, the City recites the recent and troubled history of the local economy - particularly the bankruptcy that led to the closure of the pulp

mill in Berlin with the resulting loss of some 850 jobs. According to the City, against the backdrop of the mill's precarious financial condition, the City was concerned about losing economic development opportunities by not exercising its valuation and condemnation options under RSA 38. Thus, the City avers, it retained engineering and financial consultants who advised that municipal acquisition of Smith Station would be in the public interest.

According to the City and its witnesses, the mill is not simply the largest employer in northern New Hampshire but also makes up 25 percent of Berlin's tax base. The City avers that the mill's bankruptcy and closure in September of 2000 increased the local unemployment rate from 2 to 16 percent, with the direct and indirect loss of 1,334 jobs. The City further notes that in May of 2002 the mill was purchased out of bankruptcy by Fraser Paper Company, with paper mill operations resuming in July of 2002 (employing 300) and a hoped-for resumption of pulp mill operations in 2003.

The City draws the Commission's attention to record evidence to the effect that the nation's pulp and paper industry is in a crisis, with 28 mills closing in 2001. Thus, according to the City, there is a significant risk that the mill's new owner will not be successful. This, the City avers,

is precisely why the City intends to move forward with the acquisition of Smith Hydro Station in hopes of hedging the risk of failure, to the extent of either providing a stable and affordable energy supply for the Mill's operations or to use the electric output from the Smith Hydro Station in some other way so as to replace City revenues lost from the reduction [of] the Mill's property tax or in the event of the Mill's closure.

City of Berlin Brief at 8-9.

The City goes on to stress the historical importance of hydro-electric power to the pulp and paper industry, which is energy-intensive. In the past, according to the City's witnesses, 70 percent of the mill's requirements had been produced by on-site hydro-electric facilities. According to the City, assuming an industrial rate of \$60 per megawatt-hour, this amounts to a daily cost of \$60,000 or an annual cost of \$21 million. Thus, the City reasons, if it acquires Smith Station it can provide a stable and affordable supply of energy to the Mill, and an important hedge against price volatility associated with market purchases of energy or fuel.

The City additionally holds out the possibility that it could find other uses for Smith Station's output. According to the City, if it can attract new businesses by offering reliable electric services at stable and affordable prices it would be a boon to the region.

The City disagrees with PSNH's view that selling Smith Station to the municipality would expose PSNH's customers (or at

least those customers not migrating from PSNH's transition service to competitive energy suppliers) to additional and unacceptable price volatility by removing Smith Station from PSNH's generation portfolio. According to the City, the Commission has already decided that the legislatively mandated delay in the divestiture of PSNH's non-nuclear generation assets does not preclude the City's acquisition of Smith Station under RSA 38.

According to the City, removing Smith Station from PSNH's generation portfolio would cause, at most, only a slight change in the Company's average cost of providing transition service. The City contends this change cannot be determined without modeling the Company's system dispatch practices, projecting market prices and knowing how the City would use Smith Station's output. The City also points out that the impact on PSNH's customers cannot be fully determined until Smith Station is valued and, thus, a calculation can be made of how much sale proceeds will be offset against recoverable stranded costs pursuant to the Restructuring Agreement.²

The City points out, using figures from 2000, that almost 56 percent of PSNH's energy sales were made to parties other than regular customers within the Company's service

² Such sale proceeds would be used to offset the so-called Part 3 stranded costs under the Restructuring Agreement.

territory or wholesale customers receiving requirements service. Again using 2000 figures, the City notes that Smith Station generated 100,390 megawatt-hours of electricity, amounting to just 0.57 percent of the Company's total sources of energy or only 1.01 percent of the energy derived from Company-owned resources or long-term purchase power commitments. Thus, according to the City, any impact on transition service from the loss of Smith Station will be minimal.

The City takes exception to PSNH's contention that there is a \$2.5 million annual benefit associated with Smith Station. Noting that this figure was calculated using energy clearing prices from 2000, the City contends that the same calculations applied to 2001 energy clearing prices would reduce the benefit to \$1.37 million. According to the City, this benefit would be further reduced if reductions in recoverable stranded costs, as a result of sale proceeds, were taken into account.

It is the City's position that removing Smith Station from PSNH's generation portfolio would cause no greater price volatility than would normally be experienced by the Company's transition service customers as a result of unit outages, market price variations and fuel adjustment proceedings.

With regard to the Legislature's decision to delay the divestiture of PSNH's generation assets, the City notes that in

the year preceding the enactment of the statute in question, the ISO-New England clearing price reached an average of more than \$49 per megawatt-hour, 55 percent greater than the preceding year. According to the City, this was the impetus to the enactment of Chapter 29 of the New Hampshire Laws of 2001 whereas, by April of 2002, the average clearing price had declined to \$33.39 per megawatt-hour. The City also notes that 3,663 megawatts of capacity was added in New England between 1999 and 2002, with an additional 6,121 megawatts under construction, thus reducing upward pressure on prices. These lower energy prices, the City points out, have allowed PSNH to recover its stranded costs more quickly than had been anticipated.

Finally, the City takes PSNH to task for failing to mention the impending sale of its entitlement to output from the Seabrook nuclear power plant and the resulting effect of this transaction on the cost of transition service. The City's argument is that PSNH customers will experience an enormous impact via the loss of nearly 420 megawatts of relatively inexpensive Seabrook energy and, compared to these impacts, the proposed sale of Smith Station is insignificant from a public policy standpoint.

B. Public Service Company of New Hampshire

PSNH contends that Chapter 29 of the 2001 New Hampshire Laws precludes the Commission from determining that the acquisition of Smith Station by the City of Berlin would be in the public interest. Specifically, PSNH invokes the explicit legislative findings that it is "critically important" to delay the divestiture of the PSNH non-nuclear generation assets, using them to serve PSNH's transition service load, until the Commission determines that the overall divestiture is in the public interest. 2001 N.H. Laws 29:4, III. PSNH notes that the Legislature referred to "the potential lack of a significant number of viable competitive suppliers" and the importance that "measures be taken to protect customers from the potential of a non-competitive and volatile electricity market." *Id.* at subsection II. According to PSNH, the record adduced at hearing demonstrates that the electricity market is still volatile and there are still no competitive suppliers available to PSNH customers as an alternative to transition service.³

³ PSNH acknowledges in its brief that the Commission has already ruled on this issue. According to PSNH, it has not sought appellate judicial review of this determination because the matter is not yet ripe for adjudication in an appellate forum.

Next PSNH contends that the City has failed to comply with RSA 38:2 and is thus not entitled to its claimed presumption under RSA 38 that the proposed sale would be in the public interest. PSNH refers the Commission to RSA 38:2, I, which authorizes a municipality to “[e]stablish, expand, take, purchase, lease or otherwise acquire . . . one or more suitable plants for the manufacture and distribution of electricity” (Emphasis added.) According to PSNH, the City Council and voters in Berlin have authorized only the acquisition of a plant for the manufacture of electricity, as opposed to the manufacture and distribution of it. This, in PSNH’s view, is fatal to the City’s claimed compliance with the statutory regime.

In support of this position, PSNH recites certain portions of the legislative history associated with earlier versions of the statute. It notes that the original version of the provision, enacted in 1913, refers to municipal acquisitions “for the purpose of supplying through the whole or any portions of such municipality electricity.” PSNH Brief at 6. PSNH next points out that, in 1935, the language of the statute, presently codified at RSA 38:2, I, became “the manufacture and/or distribution” of electricity. *Id.* Finally, according to PSNH, Section 3 of Chapter 56 of the Revised Laws of 1942 reflects legislative modification of this provision to include its

present reference to "manufacture and distribution." According to PSNH, the Legislature must be presumed to have made this change deliberately, and the change must be given effect.

On the merits of the case, PSNH contends that the transaction cannot be in the public interest "absent a gross mistake in valuation by this Commission." PSNH Brief at 8. According to PSNH, this is because the City's sole reason for acquiring the facility is to obtain a low-cost source of electricity - and an accurate valuation of the facility would thwart this objective because it would fully compensate PSNH's customers for the market price of the replacement power purchases made necessary by the loss of Smith Station.

According to PSNH, the record does not suggest that the City would be able to operate the plant more economically than PSNH can, thus lowering the cost of its output. PSNH notes that Ms. Brown, testifying on behalf of the City, alluded to the City's possible access to low-cost financing but also conceded that the City could lose some economies of scale enjoyed by PSNH in the operation of numerous hydro facilities. PSNH further points out that the City would be required under RSA 38:35, III to make payments in lieu of property taxes on the plant, and that the City's carrying costs would be based on a fully compensatory valuation while PSNH's carrying costs are based on

the plant's book value, a low figure because Smith Station is highly depreciated.

PSNH accuses the City of having "waffled" on its willingness to comply with the employee protection provisions that would apply under the Restructuring Agreement to PSNH generation facilities divested through an auction process. The Company points to the hearing testimony of Mr. Morin, a city councilor, that he could not emphatically state that the City would comply with these provisions notwithstanding a representation by counsel to the opposite effect referenced in Order No. 23,596.

PSNH takes emphatic exception to the City's suggestion that the transaction is in the public interest because the harm to PSNH customers is relatively small and spread among more than 430,000 ratepayers whereas the benefits to the City are substantial. According to PSNH, "[w]hat the City desires is for the masses (i.e., PSNH customers) to subsidize the minority (the City of Berlin)." PSNH Brief at 11. In PSNH's view, such a result would be contrary to RSA 369-B:4, VIII, which PSNH contends is a requirement that a municipality pay consequential damages resulting from the purchase of plant or property from a utility as the result of a municipalization effort. PSNH also contends that such a subsidy of the minority would run afoul of two of the electric industry restructuring policy principles

articulated in RSA 374-F:3. Specifically, PSNH refers to RSA 374-F:3, VI, counseling that restructuring "should be implemented in a manner that benefits all consumers equitably and does not benefit one customer class to the detriment of another." PSNH also invokes RSA 374-F:3, XI, which states that the goal of restructuring is to "create competitive markets that are expected to produce lower prices for *all* customers."

(Emphasis added.)

Invoking RSA 374:58 (precluding utilities and municipalities from constructing "redundant parallel electric utility lines"), RSA 374-F:3, VI, RSA 374-F:3, XII and RSA 369-B:4, IV (requiring System Benefits Charges and stranded cost charges to be non-bypassable) PSNH contends that the City is contemplating a violation of law to the extent it plans to construct a new line to supply energy directly from Smith Station to the mill. PSNH characterizes this as an effort to bypass the Company's retail delivery tariff and the payment of stranded cost charges.

Similarly, PSNH directs the Commission's attention to RSA 38:35, I, which provides that

[a]ny retail electric customer located within a municipality that has established a municipal electric utility after July 1, 1997, but who is not within the service area of such utility, shall not be responsible for, and no entity may require the customer to pay, through taxes or otherwise, any costs associated with such utility except for electric power and services

consumed directly by the municipality, and any electric power and services sold by the utility to the customer.

According to PSNH, the City will be in violation of this statute to the extent it subsidizes electric service to the mill via tax receipts.

The final argument PSNH makes in support of concluding the proceeding at this point arises out of its view that further proceedings in this docket would be an improvident use of the Commission's resources as well as that of the parties.

According to PSNH, a valuation process would be time-consuming and costly, and condemnation would not be helpful to the City unless the Commission makes a mistake in the valuation process.

In the alternative, should the Commission determine that acquisition of Smith Station by the City is in the public interest, PSNH requests that the Commission impose certain conditions: (1) that the City agree to pay all reasonable costs of both the Commission and PSNH with regard to the ensuing hearings, (2) that the City be required to honor the employee protection provisions contained in the Restructuring Agreement with regard to Smith Station, (3) that the City be precluded from constructing redundant electric lines, (4) that the City not be permitted to consider any plans that would result in the bypass of system benefits charges and/or stranded cost charges, (5) that the City be required to refrain from any plan that

would result in a taking of PSNH transmission or distribution facilities, and (6) that for as long as PSNH is required to provide Transition Service, the Commission should establish and impose a "reconciling mechanism" to ensure that such customers are "held neutral" with regard to any errors in energy price forecasting in the valuation process.

C. Local 1837, International Brotherhood of Electrical Workers

Although the IBEW did not appear at the hearing, it submitted a letter on October 25, 2002 taking the position that its members would be adversely affected over the long term by the City's proposal, even if the City is required to abide by the Employee Protection provisions of the Restructuring Agreement. The IBEW also adopted the positions of PSNH by reference. Accordingly, the IBEW asked the Commission to determine that the proposed transaction is not in the public interest.

D. Office of Consumer Advocate

The OCA submitted a letter on October 25, 2002 indicating its support for PSNH's positions in the docket.

E. Staff of the New Hampshire Public Utilities Commission

Staff did not file a brief or otherwise take a position on the pending issues.

II. COMMISSION ANALYSIS

Our analysis begins with a conclusion that is unnecessary for us to revisit prior determinations that have been made after extensive briefing in earlier phases of this proceeding. We decided in Order No. 23,733 that the City could proceed under RSA 38 notwithstanding the determinations made by the Legislature in Chapter 29 of the Laws of 2001 with regard to the necessity of delaying the overall divestiture of the PSNH non-nuclear generation portfolio. We decline PSNH's invitation to reach a different conclusion now.

Nor can we agree with PSNH that all of the proceedings in this case subsequent to Order No. 23,733 were unnecessary because the City has not in fact complied with RSA 38:2 and RSA 38:3 in gaining voter approval for its Smith Station acquisition plans. To the extent that PSNH has not waived this argument, we conclude that it lacks merit. PSNH's contention, that the City has failed to comply with the RSA 38 regime because what it has proposed to its voters is not the acquisition of facilities for both the manufacture and distribution of electricity, runs contrary to established canons of statutory construction.

The search for statutory meaning begins with the language of the statute itself; when this language is plain and unambiguous, there is no need to look beyond the statute for further indications of legislative intent. *Franklin Lodge of*

Elks v. Marcoux, ___ N.H. ___, ___, 782 A.2d 907, 908 (2001). The task involves viewing the statute as a whole, seeking to understand the language in light of the policy sought to be advanced by the entire statutory scheme. *Rodgers v. Colby's Ol' Place, Inc.*, ___ N.H. ___, ___, 802 A.2d 1159, 1160 (2002). In the context of that search for legislative meaning, depending on the context it is sometimes necessary to construe the word "and" as meaning "or," or vice versa. See, e.g., *United States v. Gomez-Hernandez*, 300 F.2d 974, 978-79 (8th Cir. 2002) (citing *United States v. Fisk*, 70 U.S. 445, 447 (1865)); *United States v. One 1973 Rolls Royce*, 43 F.2d 794, 814-15 (3d Cir. 1994); *Bruce v. First Fed. Sav. & Loan*, 837 F.2d 712, 715 (5th Cir. 1988) (citing numerous other cases).

As PSNH notes, RSA 38:2, I authorizes the City to acquire, maintain and operate "one or more suitable plants for the manufacture *and* distribution of electricity." (Emphasis added.) What PSNH overlooks is that the quoted sentence also authorizes such municipal acquisitions "for such other purposes as may be permitted, authorized, or directed by the commission." Thus, the Legislature intended such an expansive definition of the kind of "plant" a municipality could acquire that it authorized the Commission to enlarge that definition on a case-by-case basis in its discretion. In the circumstances, it would frustrate clearly expressed legislative intent to conclude that

the use of the word "and" in the phrase "manufacture and distribution of electricity" limits municipalities to the acquisition of facilities that accomplish both these things as opposed to either of them. See generally *Appeal of Ashland Elect. Dept.*, 141 N.H. 336 (1996) (authorizing municipal development of distribution facilities without acquiring or developing generation facilities).

Moreover, even if one were to determine that the statute and its purpose are ambiguous, the legislative history cited by PSNH is inconclusive at best. Although, as PSNH points out, it is appropriate to assume that when the Legislature changes statutory language it does so deliberately, there is no meaningful inference to be drawn from the amorphous assertion that at some unspecified time between 1935 and 1942 the Legislature changed the phrase "and/or" to the word "and," particularly when PSNH fails to disclose in its brief whether this unspecified enactment included the additional clause from the current statute relating to "such other purposes as may be permitted, authorized, or directed by the commission." For these reasons, we are unable to conclude that by failing to gain voter authorization to acquire distribution as well as generation facilities, the City has failed to comply with Chapter 38 in a manner that leaves it unable to claim the benefits of the statute, including the rebuttable presumption

that the transaction is in the public interest as set forth in RSA 38:3.

We turn next to the meaning and significance of that presumption. The question is central to the case in its present posture.

In our judgment, the very least the City can claim as a result of the rebuttable presumption is that the transaction would be in the public interest from the standpoint of the municipality and its citizens. We make this observation because PSNH has repeatedly invited us to question the City's judgment in deciding to move forward with the case.

Such an invitation is helpful in only one, very limited, sense. Although the issue is not squarely raised by PSNH or the City, we believe it is appropriate in the context of the public interest phase of the proceeding to make clear our conclusion that the applicable law requires us to set the cost of municipalizing Smith Station at its fair market value. A hydro-electric facility that has been on line for as long as Smith Station will typically be fully depreciated and, thus, carrying a very low net book value for purposes of ratemaking.⁴ While we reject PSNH's stated premise - that the

⁴ "Net book value" in ratemaking parlance refers to a facility's original cost less accumulated depreciation. See, e.g., *Appeal of Public Serv. Co. of N.H.*, 124 N.H. 479, 483 (1984) (noting that, under traditional cost-of-service ratemaking, a utility earns an investment return only on net book value of such a facility).

City is proceeding here in the hope that we will err in our valuation in the municipality's favor - implicit in this argument might be the concern that we might value the plant for municipalization purposes using the same methodology that would apply in traditional ratemaking.

However appropriate that might be if PSNH remained a traditional, vertically integrated electric utility subject to cost-of-service ratemaking as to both generation and distribution -- a subject on which we express no opinion -- book value is not the appropriate benchmark when, as here, the sale price will be applied against stranded costs otherwise recoverable by PSNH from its customers. The fact that Smith Station is all but completely depreciated means that PSNH's ratepayers have fully compensated PSNH's owners for their investment in the plant. Furthermore, the Legislature could not have meant to create a situation where municipalities could bypass the auction process in a way that would deprive ratepayers of benefits. Thus, it would be inconsistent with the public interest under RSA 38:10 and 38:11 if the municipalization were to proceed in a manner that failed to credit PSNH's customers with the difference between the facility's low book value and its relatively high value (as a reliable, low-cost generation station) in the regional electricity marketplace.

This determination as to the public interest is fully consistent with applicable legislative determinations about municipalization in the context of electric industry restructuring. The Legislature has declared that "[s]tranded costs should be determined on a net basis." RSA 374-F:3, XII(d). In other words, if customers are to be burdened with the cost of divesting generation assets at less than book value, they are entitled to the benefits attendant upon divesting an asset whose worth in the marketplace is greater than its book value.

This policy judgment, we believe, was assumed when the Legislature enacted 2000 N.H. Laws 249 and thereby approved the PSNH Restructuring Agreement. As already suggested, Section 5 of Chapter 249 addressed an issue of some controversy in the proceedings here with respect to the Restructuring Agreement: whether, and to what extent, municipalities should have a special opportunity to acquire PSNH generation assets prior to their divestiture at auction. Section 5 provides for such an opportunity by allowing municipalities to defer voter approval and immediately "petition the commission pursuant to RSA 38:9 . . . for a determination of the *fair market value* of the facility." (Emphasis added.) Although 2000 N.H. Laws 249:5 is not procedurally applicable to the instant case, we conclude that this reference to "fair market value" reflects a

legislative determination concerning the appropriate valuation methodology.

Nothing in the City's pleadings to date suggests that it is counting on valuation at net book value in order to proceed with the transaction. Moreover, the ratification process set forth in RSA 38:13 provides the municipality with an opportunity to abandon the transaction, should it determine that the valuation is too high. In these circumstances, the reasonable inference is that the City is seeking a fair valuation and will, if necessary, reconsider the financial realities after the valuation is concluded. Finally, nothing in the present record supports the suggested inference that the City is pursuing an outcome it knows to be contrary to the public interest from the standpoint of its citizens. For these reasons, it is fair to regard the municipal acquisition of Smith Station as in the interest of the City of Berlin and its residents, including the mill operations there.

No party has suggested that there is any greater public good here, beyond the potential benefits of supplying relatively inexpensive energy to the mill operations or, possibly, other electric users in the City. Thus, the question becomes whether there is some larger public harm sufficient to rebut the RSA 38:3 presumption. On the present record, we are unable to determine that a harm of sufficient magnitude exists,

or at least we find that there is no apparent harm that cannot be compensated or reflected in the valuation or corrected by conditions on the acquisition. No record evidence supports a finding that there is some particular harm to PSNH or its customers, beyond the net loss of some inexpensive generation capacity, arising out of the removal of Smith Station from PSNH's overall generation portfolio or its hydro-electric facilities in northern New Hampshire in particular.⁵ The loss of the generation itself does not rise to a level sufficient to rebut the public interest presumption.

In arguing to the contrary, PSNH repeatedly and persistently points to the Legislature's finding in Chapter 29 of the Laws of 2001 that price volatility in the regional wholesale market for electricity is a harm from which its customers deserve protection. We have already determined, in Order No. 23,733, that the 2001 enactment did not repeal by implication the provisions of RSA 38 under which the City is proceeding. But we also held out the possibility that the acquisition of Smith Station by the City could be inconsistent with the policy objectives that the Legislature has adopted, and

⁵ IBEW takes the position that the municipalization of Smith Station would not be in the public interest because it would deprive the plant's employees of the advantageous benefits they presently enjoy as unionized PSNH workers. IBEW suggests this would be so even if we require the City to abide by the employee protection provisions of the Restructuring Agreement, because those protections are only short-term. As discussed, *infra*, we will require the City to abide by the employee protection provisions.

by which we consider the Commission to be bound, in Chapter 29. See Order No. 23,733, slip op. at 19-20 (also noting that appropriate conditions on the transaction could address any such concerns).

In our judgment, PSNH reads too much into the 2001 enactment. By imposing a delay of at least 33 months in the divestiture of PSNH's non-nuclear generation portfolio, the Legislature was seeking to mitigate price impacts. But there is a significant difference between employing a physical hedge against higher or more volatile energy prices and possibly increasing that exposure by the approximately 1 percent Smith Station represents of PSNH's generation entitlements. It must be borne in mind that from the initial enactment of the municipalization statute in 1913 forward, any condemnation of electric generation capacity would have had the effect PSNH complains of here -- requiring the affected utility to pay the prevailing prices for power that replaces that associated with the condemned property. Thus, if one accepted PSNH's premise that its incremental exposure to additional price volatility were unacceptable, then RSA 38 would have to be deemed a nullity as to electric facilities. This we have already declined to conclude. See *id.* at 17-18.

The additional statutory arguments made by PSNH are also unavailing. RSA 369-B:4, VIII vests the Commission with

the authority to award consequential damages on a just and reasonable basis to a utility in the event of municipalization, including but not limited to damages arising out of any stranded investments. RSA 38:15 and RSA 38:16 contain an analogous provision. We read these allowances for damages as not precluding the City's acquisition of Smith Station but as putting the City on notice that PSNH and/or its customers must be fairly compensated for the property condemned, in a manner that does not add to either recoverable or non-recoverable stranded costs. We have never understood the City to contend otherwise.

Likewise, and notwithstanding certain testimony to the contrary, we are prepared to assume the City has no intention of violating or evading the requirements of RSA 374:58. As PSNH points out, this provision precludes the construction of "redundant parallel electricity lines." Since the construction of such lines is not an inevitable aspect of municipalizing Smith Station, RSA 374:58 does not provide a basis for rejecting the City's petition at this time. For the same reason, we reject PSNH's suggestions that the City is attempting to facilitate the evasion of the charges in PSNH's delivery service tariff that are non-bypassable under RSA 374-F:3 and RSA 369-B:4, IV, or to avoid the requirement in RSA 38:35 that taxpayers

be insulated from subsidizing rates charged by municipal electric operations.

Since we have determined that the record evidence is insufficient to rebut the RSA 38:3 presumption that the municipalization of Smith Station would be in the public interest, and given that we decline to presume that the City otherwise intends to evade any applicable legal requirements, the only remaining issue is the conditions that PSNH asks us to impose in order to permit the case to move into its valuation phase. In this regard, we note that in her testimony on behalf of the City, Ms. Brown declined to rule out the City's willingness to abide by such conditions. Instead, she suggested that they would affect the value of the plant from the City's standpoint and are thus best addressed in the context of the valuation.

We agree to some extent. Conditions have the potential to affect the valuation and, ultimately, to cause the City to exercise its option at a later stage in the RSA 38 process to abandon the condemnation. However, RSA 38:11, which requires the public interest determination, also authorizes the Commission to impose conditions on the transaction.

One such condition concerns the City abiding by the employee protection provisions of the Restructuring Agreement as they would apply to the employees of Smith Station. In Order

No. 23,620 (January 18, 2001), entered at a juncture when the City was still proceeding under 2000 N.H. Laws Chapter 249 as opposed to RSA 38, we concluded that all provisions of the Restructuring Agreement, including the employee protection provisions, were applicable to the municipalization efforts at issue here.⁶ We discern no reason to reach a different result now that the City is proceeding under RSA 38, because the conditions remain consistent with the public interest, are of limited duration and generally impose a relatively small burden on the City. We note that the collective bargaining agreement recited in Section 10 of the Agreement has lapsed, and this record does not contain evidence as to what, if any, collective bargaining agreement has replaced it. We also note that, other than transfers pursuant to Chapter 38, no sale of PSNH hydro plants may occur before February 2004. For these reasons, to give effect to the general policy of comparable treatment of PSNH employees regardless of the identity of a plant's buyer, we

⁶ The employee protection provisions are recited at pages 53-58 of the revised and conformed edition of the Settlement Agreement in DE 99-099. In summary, they require any auction purchaser of PSNH generation assets to assume PSNH's obligations under the applicable collective bargaining agreement with Local 1837, and to offer any employees on the payroll at the time of the closing but not represented by Local 1837 either 12 months of employment or certain severance benefits. Further, the purchaser is required to provide a defined benefit pension plan to the facility's employees on the payroll at the time of the closing. In approving the Restructuring Agreement, we described these provisions as a "fair compromise with the unions" and determined that municipal purchasers should be subject to them, at least insofar as they become participants in the divestiture process contemplated by the agreement. See *PSNH Proposed Restructuring Settlement*, 85 NH PUC 154, 261 (2000).

will need to take further evidence in the valuation phase of this docket.

As to other proposed conditions, we are unable to agree with PSNH that we should require the City to bear not only its own costs in this case but also those of the Commission as well as those of PSNH itself. We have already addressed the issue of the Commission's expenses at length in Order No. 23,775 (September 7, 2001), concluding that the allocation of those expenses is best left to the end of the proceeding because it turns, in part, on the parties' conduct over the course of the case. We see no reason to reconsider that determination now. As to PSNH's costs, nothing in RSA 38 authorizes their imposition upon the City. In support of their allocation to the City, PSNH argues in essence that it would be inappropriate to require its ratepayers to bear the Company's expenses associated with this case.

We agree with this premise about insulating ratepayers, but not with PSNH's conclusion. First, to the extent that PSNH customers should be shielded from transaction costs of municipalizing Smith Station, we can take that into account in fixing the condemnation price. Secondly, we do not assume at this point in the proceedings that all of PSNH's costs are prudent and therefore will be allocated to ratepayers as opposed to the Company's shareholders.

We are also unable to adopt PSNH's suggestion that we impose a reconciling mechanism on the transaction so as to insulate PSNH ratepayers from the risks attendant with the valuation process. As was noted at hearing, there is a 100 percent likelihood that the valuation process will fail to predict future electricity prices accurately. This is inherent in all such valuations and, yet, the Legislature has never seen fit to engraft such a reconciling mechanism onto the RSA 38 process. We will not disturb the implicit legislative determination that this risk - to which the City is also exposed - is borne by both sides of the transaction.

The remainder of the conditions proposed by PSNH amount to a suggestion that we require the City to abide by applicable provisions of state law in acquiring and operating Smith Station. We need take no further action on them beyond assuring all parties that we will assume their compliance with all legal obligations.

In conclusion, we stress the provisional nature of our determination. In finding that the present record does not yield sufficient evidence to rebut the statutory presumption that municipalization of Smith Station would be in the public interest, we reserve the right to reach a different determination at a later stage should the evidence so warrant.

Consistent with the RSA 38 statutory scheme, the next appropriate step is to move forward with the valuation itself. In that regard, on or before December 6, 2002, the parties may submit their written recommendations as to how we should proceed. Thereafter, we will advise the parties by letter as to what further proceedings will ensue.

Based upon the foregoing, it is hereby

ORDERED, that the valuation of the J.Brodie Smith Hydro-Electric Station pursuant to RSA 38:9 shall commence forthwith, subject to the conditions set forth herein and subject to further procedural order of the Commission.

By order of the Public Utilities Commission of New Hampshire this fifteenth day of November, 2002.

Thomas B. Getz
Chairman

Susan S. Geiger
Commissioner

Nancy Brockway
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary