

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 08-103

**INVESTIGATION OF PSNH'S INSTALLATION
OF SCRUBBER TECHNOLOGY AT MERRIMACK STATION**

Decision Concerning Statutory Authority

ORDER NO. 24,898

September 19, 2008

I. BACKGROUND

This investigation was opened by Secretarial Letter on August 22, 2008, following a quarterly earnings report filed by Northeast Utilities¹ with the Securities and Exchange Commission on August 7, 2008. The earnings report disclosed that the cost of installing a wet flue gas desulphurization system, commonly referred to as scrubber technology, at Public Service Company of New Hampshire's (PSNH's) Merrimack Station had increased from an original estimate of \$250 million to \$457 million. RSA 125-O:11 et seq. requires PSNH to install the scrubber technology at Merrimack Station, a coal-fired electric generation facility in the town of Bow, in order to reduce mercury emissions.

Pursuant to RSA 365:5 and 365:19, the Commission directed PSNH to file by September 12, 2008, "a comprehensive status report on its installation plans, a detailed cost estimate for the project, an analysis of the anticipated effect of the project on energy service rates, and an analysis of the effect on energy service rates if Merrimack Station were not in the mix of fossil and hydro facilities operated in New Hampshire." The Commission also noted that there was a potential statutory conflict as to the nature and extent of its authority relative to the scrubber

¹Northeast Utilities is the parent company of Public Service Company of New Hampshire.

project. In particular, it cited RSA 125-O:11, VI, which states that it is in the public interest for PSNH to install scrubber technology at the Merrimack Station, and RSA 369-B:3-a, which states that PSNH may modify its generation assets only if the Commission finds that it is in the public interest to do so. Consequently, the Commission directed PSNH to file a memorandum of law on the issues by September 12, 2008, and also invited the Office of the Consumer Advocate (OCA) to file a memorandum of law by the same date.

PSNH moved on August 25, 2008 to accelerate the dates of the required filings and on the same date the OCA objected to accelerating the deadline for filing its memorandum of law. On August 28, 2008, the Commission denied the motion as it applied to the OCA's filing. PSNH filed its status report and memorandum of law on September 3, 2008, and the OCA filed its memorandum of law on September 11, 2008. In addition, Senator Theodore L. Gatsas, the New Hampshire State Building and Construction Trades Council, and Governor John H. Lynch filed letters, on September 5, 2008, September 9, 2008, and September 12, 2008, respectively, urging an expeditious review. On September 12, 2008, the Conservation Law Foundation, the Campaign for Ratepayer Rights and TransCanada Hydro each filed letters requesting that this docket be noticed for public participation.

II. MEMORANDA OF LAW

A. Public Service Company of New Hampshire

PSNH contends that, because the Legislature found in RSA 125-O:11, VI that the installation of scrubber technology is in the public interest, it is not necessary for the Commission to make a determination pursuant to RSA 369-B:3-a as to whether the installation is in the public interest. The essence of PSNH's argument is that the Legislature unambiguously mandated that PSNH install scrubber technology as soon as possible. PSNH asserts as well that

there is no conflict between RSA 125-O:11 and RSA 369-B:3-a, but that, to the extent such a conflict did exist, the later, more specific statute controls, which in this case means that RSA 125-O:11 would control. As a result, according to PSNH, the Legislature's public interest finding would prevail and the Commission would lack the authority to make a public interest determination.

Coincident with this line of argument, PSNH also concludes that the requirement of RSA 125-O:13, I that PSNH obtain all necessary approvals does not include Commission approvals inasmuch as the Legislature has already determined that it is in the public interest to install scrubber technology. In other words, PSNH takes the position that it is not necessary for the Commission to approve anything in the first instance. PSNH contends that the Commission's authority is limited in accord with RSA 125-O:18 to an after-the-fact prudence review of PSNH's design and installation of the scrubber. Finally, PSNH argues that RSA 125-O:13, IX evidences the Legislature's intent to reserve the power and authority to oversee the installation of the scrubber to itself.

B. Office of Consumer Advocate

The OCA contends that, because the Legislature did not expressly repeal RSA 369-B:3-a, PSNH may not modify the Merrimack Station unless the Commission first determines that the modification is in the public interest. Therefore, the OCA asserts that Commission approval is a necessary approval consistent with RSA 125-O:13. In rebuttal to PSNH's argument that there is no need for a Commission determination under RSA 369-B:3-a, the OCA states that PSNH overlooks the fact that PSNH's cost estimates for the scrubber project have increased by 80 percent.

In addition, the OCA contends that PSNH cannot proceed without Commission approval, pursuant to RSA 369:1, of the long term financing that the OCA believes will be required to complete the scrubber project. It argues that with any PSNH financing the Commission must conduct an “Easton” review and consider whether the planned uses to which the loan proceeds would be applied, and the affect on rates, are consistent with the public good. *See, Appeal of Easton*, 125 N.H. 205, 211 (1984). Furthermore, the OCA opines that the Commission has the lawful authority to conduct this investigation.

III. COMMISSION ANALYSIS

The central question of law here concerns the interpretation of two statutory provisions, namely, RSA 369-B:3-a and RSA 125-0:11.

RSA 369-B:3-a, which was enacted in 2003, states:

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.** [Emphasis added.]

RSA 125-O:11, which was enacted in 2006, states:

Statement of Purpose and Findings. The general court finds that:

I. It is in the public interest to achieve significant reductions in mercury emissions at the coal-burning electric power plants in the state as soon as possible. The requirements of this subdivision will prevent, at a minimum, 80 percent of the aggregated mercury content of the coal burned at these plants from being emitted into the air by no later than the year 2013. To accomplish this objective, the best known commercially available technology shall be installed at Merrimack Station no later than July 1, 2013.

II. The department of environmental services has determined that the best known commercially available technology is a wet flue gas desulphurization system, hereafter “scrubber technology,” as it best balances the procurement, installation, operation, and

plant efficiency costs with the projected reductions in mercury and other pollutants from the flue gas streams of Merrimack Units I and II. Scrubber technology achieves significant emissions reduction benefits, including but not limited to, cost effective reductions in sulfur dioxide, sulfur trioxide, small particulate matter and improved visibility (regional haze).

III. After scrubber technology is installed at Merrimack Station, and after a period of operation has reliably established a consistent level of mercury removal at or greater than 80 percent, the department will ensure through monitoring that that level of mercury removal is sustained, consistent with the proven operational capability of the system at Merrimack Station.

IV. To ensure that an ongoing and steadfast effort is made to implement practicable technological or operational solutions to achieve significant mercury reductions prior to the construction and operation of the scrubber technology at Merrimack Station, the owner of the affected coal-burning sources shall work to bring about such early reductions and shall be provided incentives to do so.

V. The installation of scrubber technology will not only reduce mercury emissions significantly but will do so without jeopardizing electric reliability and with reasonable costs to consumers.

VI. The installation of such technology is in the public interest of the citizens of New Hampshire and the customers of the affected sources. [Emphasis added.]

VII. Notwithstanding the provisions of RSA 125-O:1, VI, the purchase of mercury credits or allowances to comply with the mercury reduction requirements of this subdivision or the sale of mercury credits or allowances earned under this subdivision is not in the public interest.

VIII. The mercury reduction requirements set forth in this subdivision represent a careful, thoughtful balancing of cost, benefits, and technological feasibility and therefore the requirements shall be viewed as an integrated strategy of non-severable components.

It is often the case in disputes as to the interpretation of a statute or a contract that both sides to the dispute contend that the statutory or contractual language is clear on its face, yet they come to diametrically opposed conclusions about the meaning of the relevant provisions. That is the situation here.

PSNH contends that RSA 125-O:11 et seq. is “clear, straightforward, and unambiguous in its mandate.” PSNH Memorandum, p.4. It states as well that interpretation of the statute is

“not difficult.” *Id.*, p.7. It further contends that there is no conflict between RSA 125-O:11 and RSA 369-B:3-a because the Legislature has already made in RSA 125-O:11 the “precise finding” as to the public interest of the scrubber technology that would have been the subject of a proceeding under RSA 369-B:3-a. *Id.*, p. 12-13. Thus, PSNH asserts that the Legislature has superseded the Commission’s authority to make a public interest finding inasmuch as the “finding has been made, and is clearly and definitively embodied in the law.” *Id.*, p.14.

At the same time, the OCA contends that there is no conflict between RSA 369-B:3-a and RSA 125-O:11 and that the two statutes must be taken together. OCA Memorandum, p.7. It argues that PSNH may not proceed with the modifications required by RSA 125-O:11 “until it obtains the PUC approvals required by statutes including RSA 369-B:3-a and RSA 369.” *Id.* The OCA further asserts that “the Legislature clearly contemplated and required review by the PUC.” *Id.*, p.8.

Obviously, the arguments made by PSNH and the OCA as to the nature and extent of the Commission’s authority with regard to the installation of scrubber technology are irreconcilable. PSNH says we do not have the authority to determine whether the scrubber project is in the public interest, while the OCA says that we do. We must decide which formulation is correct. In order to interpret the relevant statutory language we must first examine its plain and ordinary meaning. If the language of the statutes does not unambiguously yield a meaning, or if the relevant statutes conflict, then we look to the Legislature’s intent as revealed through a reading of the overall statutory scheme, legislative history and recognized rules of statutory construction. *See, Appeal of Pinetree Power, Inc.*, 152 N.H. 92, 96 (2005); and *Petition of Public Service Co. of N.H.*, 130 N.H. 265, 282-83 (1988).

RSA 369-B:3-a states that prior to divestiture PSNH may modify a generation asset “if the commission finds that it is in the public interest of retail customers of PSNH to do so.” RSA 125-O:11, VI states that the installation of scrubber technology by PSNH at the Merrimack Station “is in the public interest of the citizens of New Hampshire and the customers of the affected sources.” It appears on their face that these two provisions are mutually exclusive and cannot logically co-exist. In the former, the Commission must make a determination of the public interest before PSNH can go forward with the scrubber project, while in the latter the Legislature has determined that the scrubber project is in the public interest and has directed PSNH to go forward with the project and have it operational no later than July 1, 2013. Accordingly, these provisions conflict inasmuch as one requires Commission approval and the other does not.

Nevertheless, there are two possible arguments which could lead to the conclusion that the statutes can co-exist. The first argument concerns whether “modification” and “installation” are equivalent concepts. If the concepts concerned different subject matter or activities, it could be argued that, despite the Legislature’s finding that installation of scrubbers is in the public interest, PSNH also needs a Commission finding that a modification is in the public interest in order for PSNH to install scrubbers. The second argument concerns whether the “public interest of retail customers of PSNH” and the “public interest of the citizens of New Hampshire and the customers of the affected sources” are equivalent standards. If the standards concerned entirely distinct target populations, it could be argued that, despite the Legislature’s finding that installation of scrubbers is in the public interest of the customers of affected sources, PSNH also needs a Commission finding regarding whether installation is in the public interest of PSNH’s retail customers.

With respect to the first argument, we find that the installation of scrubber technology constitutes a modification to the Merrimack Station, and therefore the statutes concern the same subject matter or activities. This finding is consistent with our finding in *Public Service Company of New Hampshire*, 89 NH PUC 70, 90 (2004) Order No. 24,276 that the construction of a boiler at the Schiller Station to burn wood chips was a modification to the existing facility subject to the Commission's authority pursuant to RSA 369:3-a.

As for the second argument, we find that the "public interest of retail customers of PSNH" is the same as the "public interest of...the customers of the affected sources" because the customers of the affected sources are, in fact, PSNH retail customers. The standard or target population in RSA 369-B:3-a is a subset of the standard or target population in RSA 125-O:11, VI. Therefore, the Legislature's finding under RSA 125-O:11, VI subsumes any finding the Commission might make under RSA 369-B:3-a.

Having disposed of arguments that the provisions are reconcilable, the inquiry then shifts to which of the two conflicting statutes prevails. PSNH argues that RSA 125-O:11 prevails, while the OCA argues that RSA 369-B:3-a prevails. PSNH notes that when two statutes conflict, the more recent and specific statute controls over the older statute of general application. *See, Bel Air Associates. Dept. of Health and Human Services*, 154 N.H. 228, 233 (2006), *citing Petition of Public Serv. Co. of N.H.*, 130 N.H. 265, 283 (1988). PSNH states that RSA 369-B:3-a, enacted in 2003, deals with general, undefined potential modifications to its generation assets, while RSA 125-O:11, enacted in 2006, deals with a specific modification to a specific generating station, i.e., the installation of scrubbers at Merrimack Station.

The OCA observes that the Legislature "is not presumed to waste words or enact redundant provisions." OCA Memorandum, p. 7 *citing, Town of Amherst v. Gilroy*, 950 A.2d

193, 197, ___ N.H. ___ (2008). OCA further argues that the legislature is presumed to be “familiar with all existing laws applicable to the subject matter, whether constitutional, statutory, or common, and intended the statute to harmonize completely with those laws and aid in the effectuation of the general purpose and design of the same.” *Id.*, p.8, *citing, Presumptions in Aid of Construction*, 82 C.J.S. Statutes §310. Finally, the OCA states that if the “Legislature wanted to repeal or limit the effectiveness of RSA 369-B:3-a...it could have done so expressly.” *Id.*

As noted above, we cannot harmonize RSA 369-B:3-a and RSA 125-O:11. If we proceed under RSA 369-B:3-a as the OCA proposes, then we would be effectively ignoring the Legislature’s finding that the installation of the scrubber is in the public interest. On the other hand, if we do not proceed under RSA 369-B:3-a, we would arguably be allowing PSNH to ignore the Legislature’s directive to secure from the Commission a finding as to the public interest prior to modifying its generation asset. Thus, in our view, the Legislature has enacted incompatible provisions.

We conclude that the proper interpretation of the conflicting statutes in this situation is that the Legislature intended the more recent, more specific statute, RSA 125-O:11, to prevail. We do not find it reasonable to conclude that the Legislature would have made a specific finding in 2006 that the installation of scrubber technology at the Merrimack Station is in the public interest, set rigorous timelines and incentives for early completion, and provided for annual progress reports to the Legislature, while simultaneously expecting the Commission to undertake its own review, conceivably arrive at a different conclusion, and certainly add significant time to the process.² If we concluded otherwise, we would be nullifying the Legislature’s public interest finding and rendering it meaningless.

² The OCA urges that we proceed expeditiously with a review pursuant to RSA 369-B:3-a. Such an undertaking would be an adjudicative proceeding allowing for the full range of due process requirements, including testimony by

Furthermore, RSA 369-B:3-a provides that "... PSNH *may* modify or retire such generation assets if the commission finds that it is in the public interest ..." (emphasis added). This permissive clause allows PSNH to propose and then undertake a modification of a generation asset if the Commission makes a finding that it is in the public interest. In this instance the Legislature has made the public interest determination and *required* the owner of the Merrimack Station, viz., PSNH, to install and have operational scrubber technology to control mercury emissions no later than July 1, 2013. Accordingly, based upon our reading of RSA 125-O as a whole, we find that the Legislature did not intend that PSNH be required to seek Commission approval pursuant to RSA 369-B:3-a for a modification that the Legislature has required and found to be in the public interest. Thus, we conclude that an RSA 369:3-a proceeding has been obviated by the Legislature's findings in RSA 125-O:11.

Our finding that the Legislature intended its findings in RSA 125-O:11 to foreclose a Commission proceeding pursuant to RSA 369-B:3-a is supported by the overall statutory scheme of RSA 125-O:11 et seq. as well as its legislative history. A review of the Senate Journal for April 20, 2006, at p. 935 et seq., shows that the members of the Senate Finance Committee were focused largely on the timing of installation and the prospect that PSNH could install the scrubber technology in advance of the July 1, 2013 deadline. The legislative history supports a conclusion that the Legislature viewed time to be of the essence. This conclusion is consistent with the economic performance incentives that PSNH can earn, pursuant to RSA 125-O:16, if the scrubber project comes on line prior to July 1, 2013. Finally, RSA 125-O:13, IX directs PSNH to report annually to the legislative oversight committee on electric utility restructuring the

PSNH and other interested parties, discovery, cross-examination of witnesses, briefs, issuance of a decision, motions for rehearing and appeals. The only proceeding held pursuant to RSA 369-B:3-a took a year and a half. PSNH filed its petition to modify the Schiller Station on August 28, 2003. The Commission issued its decision on February 6, 2004. The Supreme Court issued its opinion upholding the Commission's decision on April 4, 2005.

progress and status of installing the scrubber technology including any updated cost information. This reporting requirement also suggests the Legislature's intent to retain for itself duties that it would otherwise expect the Commission to fulfill if RSA 369-B:3-a applied.

The OCA also makes a collateral argument based on RSA 125-O:13 that PSNH must obtain "all necessary permits and approvals from federal, state, and local regulatory agencies and bodies." It contends that the Commission is one such agency and that RSA 369-B:3-a is one such approval. In opposition, PSNH argues that an approval pursuant to RSA 369-B:3-a is not necessary because the Legislature has already made the public interest finding that would be the subject of such a proceeding. Since we find that the Legislature has presumptively determined the scrubber to be in the public interest, we conclude that Commission approval pursuant to RSA 369-B:3-a is not a necessary approval under RSA 125-O:13.

The OCA posits as well that Commission approval pursuant to RSA 369:1 of the financing needed to install the scrubber technology is a necessary approval required by RSA 125-O:13. OCA states that it "is not aware of the extent of PSNH's outstanding debt at this time, but it seems clear that with... [its] current debt limits, PSNH will require additional financing to complete the scrubber project." OCA Memorandum, p.4. The OCA also asserts that it would be prudent for PSNH to seek financing approval now and that it would be unfair to ratepayers to wait for a financing proceeding. We find that financing approval pursuant to RSA 369:1 is not necessary prior to the start of construction. We note that as a general matter public utilities are not required to seek pre-approval of financing before undertaking a construction project. The OCA does point out, however, the important issue of prudence, which we discuss further below. We observe here that the timing of obtaining financing and the resulting effects on rates, terms and conditions of such financing are issues that may fairly be raised in a prudence proceeding.

PSNH asserts that the nature and extent of the Commission's authority with respect to the installation of the scrubber project is described in RSA 125-O:18, which states:

Cost Recovery. If the owner is a regulated utility, the owner shall be allowed to recover all prudent costs of complying with the requirements of this subdivision in a manner approved by the public utilities commission. During ownership and operation by the regulated utility, such costs shall be recovered via the utility's default service charge. In the event of divestiture of affected sources by the regulated utility, such divestiture and recovery of costs shall be governed by the provisions of RSA 369-B:3-a.

Consistent with our findings above, we conclude that the Commission lacks authority to pre-approve installation, but that it retains its authority to determine prudence. We also observe that the last sentence of this provision bolsters our finding that the Legislature intended to rescind the Commission's authority to pre-approve the scrubber installation under RSA 369-B:3-a. Specifically, the Legislature expressly provided that in the event of divestiture of Merrimack Station, such divestiture and recovery of costs would be governed by RSA 369-B:3-a. The Legislature would only need to make special notice that RSA 369-B:3-a would apply in the event of divestiture, if it intended that RSA 369-B:3-a not apply absent divestiture, which is the case before us.

We are sensitive to the OCA's point that the cost estimates for the scrubber project have increased approximately 80 percent from \$250 million to \$457 million in a relatively short time. In fact, that circumstance is what prompted us to open this investigation. However, a substantial increase in the cost estimate does not constitute a grant of Commission authority to determine whether the project is in the public interest. The Legislature has already made an unconditional determination that the scrubber project is in the public interest. Nowhere in RSA 125-O does the Legislature suggest that an alternative to installing scrubber technology as a means of mercury compliance may be considered, whether in the form of some other technology or retirement of the facility. Furthermore, RSA 125-O does not: (1) set any cap on costs or rates; (2) provide for

Commission review under any particular set of circumstances; or (3) establish some other alternative review mechanism. Therefore, we must accede to its findings.

IV. CONCLUSION

The Commission has only those powers delegated to it by the Legislature. *See, Appeal of Public Service Co. of N.H.*, 122 N.H. 1062, 1066 (1982). RSA 369-B:3-a delegated to the Commission, in 2003, the authority to determine whether to pre-approve modifications to PSNH's fossil and hydro generating plants. Subsequently, in 2006, the Legislature enacted RSA 125-O:11, overriding its grant of pre-approval authority for a specific modification to the Merrimack Station. Accordingly, the Commission's authority is limited to determining at a later time the prudence of the costs of complying with the requirements of RSA 125-O:11-18 and the manner of recovery for prudent costs. In order to meet our obligations in that regard, we will continue our review of the documents already provided by PSNH, require additional documentation as necessary, and keep this docket open to monitor PSNH's actions as it proceeds with installation of the scrubber technology.

Based upon the foregoing, it is hereby

DECIDED, that, as a result of the Legislature's mandate that the owner of Merrimack Station install scrubber technology by a date certain, and its finding pursuant to RSA 125-O:11 that such installation of scrubber technology at PSNH's Merrimack Station is in the public interest of the citizens of New Hampshire and the customers of the station, the Commission lacks the authority to make a determination pursuant to RSA 369-B:3-a as to whether this particular modification is in the public interest.

By the Public Utilities Commission of New Hampshire this nineteenth day of September,
2008.

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Clifton C. Below
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary