

THE STATE OF NEW HAMPSHIRE
BEFORE THE PUBLIC UTILITIES COMMISSION
Public Service Company of New Hampshire
Investigation of Merrimack Station Scrubber Project

Docket No. DE 08-103

OFFICE OF CONSUMER ADVOCATE'S MEMORANDUM OF LAW
ON THE PUC'S AUTHORITY TO INVESTIGATE AND DETERMINE WHETHER
PSNH'S MODIFICATIONS TO MERRIMACK STATION ARE IN THE PUBLIC INTEREST

I. Introduction

On August 22, 2008, the New Hampshire Public Utilities Commission (PUC) issued a secretarial letter directing Public Service Company of New Hampshire (PSNH) to file certain information. Specifically, the PUC stated:

“PSNH is directed 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 by PSNH.”¹

In its secretarial letter, the Commission refers to PSNH's parent company's (Northeast Utilities, or “NU”) quarterly earnings report (10-Q) filed with the Securities and Exchange Commission (SEC) on August 7, 2008. In its 10-Q, “NU identified an estimated project cost of \$457 million, which represents approximately an 80 percent increase over the original estimate of \$250 million.”²

The Commission went on in the letter to identify a “potential conflict” between RSA 125-O:11 and RSA 369-B-3:a, and directed PSNH to file “a memorandum of law addressing the nature and extent of the Commission's authority relative to the Merrimack Station scrubber

¹ DE 08-103, PSNH Merrimack Station Scrubber Project, Request for Information, Secretarial Letter, August 22, 2008.

² *Id.*

project.”³ PSNH filed its response (PSNH Response) and memorandum of law (PSNH Memorandum) on September 2, 2008.⁴

The secretarial letter also invited the OCA to file a memorandum of law. This memorandum responds to that invitation.

II. The PUC has the authority to investigate PSNH’s modifications to Merrimack Station.

The PUC is a specialized state agency with technical expertise in the field of public utilities⁵ and is vested by the NH Legislature with “plenary authority” over PSNH.⁶ RSA 347:3 endows the PUC with ““general supervision of all public utilities ... so far as necessary’ to effectuate the Commission’s various enabling statutes.”⁷ In carrying out its general supervisory duties, the Commission acts as “the arbiter between the interests of the customer and the interests of regulated utilities.”⁸

³ *Id.* at p. 2.

⁴ PSNH’s cover letter and memorandum of law filed in this docket on September 2, 2008 includes many comments and arguments on the issue of whether the scrubber project is in the “public interest.” This suggests that the company seeks to litigate the public interest issue as though it is now before the PUC. However, because the public interest issue is not before the PUC until the threshold legal question of the PUC’s authority is addressed, the OCA reserves the right to respond at a later time to PSNH’s public interest claims and argument.

⁵ See Appeal of Manchester Gas Co., 129 N.H. 800, 806 (1987) (Supreme Court recognizes and refuses to “second-guess” the PUC’s exercise of its informed expertise.” See also Pennichuck Corp. v. City of Nashua, 2004 WL 1950458 (unpublished N.H. Super. Court Order in 04-E-0062, Aug 31, 2004) (citation omitted) (Superior Court recognizes doctrine of primary jurisdiction, which “encourage[s] the exercise of agency expertise” by “mandate[ing] that a court refrain from exercising its jurisdiction to decide a question until it has first been decided by a specialized agency that also has jurisdiction to do so”); and In re Pinetree Power, Inc., 152 N.H. 92, 871 A.2d 78, N.H., 2005 (“When we are reviewing agency orders that seek to balance competing economic interests, our responsibility is not to supplant the PUC’s balancing with one more nearly to our liking”).

⁶ PSNH Power Quality Improvement Team Pilot Project, Order No. 24,632 (June 8, 2006), at p. 6; and Granite State Electric Company d/b/a National Grid, Public Service Company of New Hampshire, Unitil Energy Systems, Inc., Business & Industry Association of New Hampshire and Select Energy, Inc., Request to Change Name of Default Service to Basic Energy Service in Customer Communications, Order No. 24,614 (April 13, 2006), at p. 7.

⁷ Granite State Electric Company d/b/a National Grid et als., Order No. 24,614 at 7.

⁸ RSA 363:17-a.

The PUC's authority includes, *inter alia*, the power and duty to investigate PSNH's modifications to any of its generating plants, including the Merrimack Station coal plant in Bow. PSNH is well acquainted with this process.⁹

Specifically, RSA 365:5 allows the Commission, on its own motion or upon petition of a public utility, "to investigate or make inquiry in a manner to be determined by it as to any rate charged or proposed or as to any act or thing having been done, or having been omitted or proposed by any public utility." Also, RSA 365:19 explicitly authorizes the PUC to conduct an "independent investigation as in its judgment the public good may require." Additionally, RSA 374:4 delegates to the PUC both the "power" and the "duty, to keep informed as to all public utilities in the state," and RSA 374:5 requires every utility to report to the PUC cost information prior to making any additions or improvements to its plant.

Both alone, as well as taken together, these PUC enabling statutes are clear and lead to one conclusion. When it commenced this investigation of PSNH's modifications to Merrimack Station, as well as directed PSNH to file certain cost-related information, the PUC properly exercised its lawful authority to investigate these modifications.

III. The PUC has the authority to determine whether the modifications to PSNH's Merrimack Station are in the public interest.

A. RSA 369-B:3-a requires the PUC to review the Merrimack Station modifications.

During the restructuring of the electric industry in New Hampshire, the Legislature restricted PSNH's ability to divest itself of its generation assets.¹⁰ In addition to restricting the sale of PSNH's fossil fuel and hydro-electric generating assets until at least April 30, 2006, the Legislature also specified that the PUC must approve any modifications or retirements of such assets that PSNH seeks to undertake. "Prior to any divestiture of its generation assets, PSNH

⁹ See In re Pinetree Power, Inc., 152 N.H. 92, 96 (2005) (PUC reviewed PSNH's modifications to Schiller plant).

¹⁰ See RSA 369-B:3-a.

may modify ... such generation assets if, among other findings, the commission finds that it is in the public interest of retail customers of PSNH to do so.”¹¹

The New Hampshire Supreme Court has held, in a case concerning PSNH’s modification of one of its other coal plants, that “RSA 369-B:3-a is a clear directive by the legislature to the PUC specifically regarding PSNH.”¹² Under this “clear directive,” only modifications that are consistent with the public interest of PSNH’s retail customers are permitted. Therefore, RSA 369-B:3-a requires that the PUC review the proposed \$457 million modification of the Merrimack plant in order to make a finding that the project is in the public interest.

B. PSNH can not complete Merrimack Station modifications without PUC financing approval pursuant to RSA 369.

PSNH will also require long-term financing to complete the proposed modifications to Merrimack Station. PSNH’s filings in this docket project that the updated cost of these modifications will be \$457 million.¹³ However, PSNH currently only has authority to issue up to \$200 million in long-term debt securities, and its ability to incur short-term debt in 2008 is limited to a maximum of 10 percent of net fixed plant plus \$35 million (or approximately \$144 million).¹⁴ The OCA is not aware of the extent of PSNH’s outstanding debt at this time, but it seems clear that with these current debt limits, PSNH will require additional financing to complete the scrubber project.

¹¹ RSA 369-B:3-a.

¹² In re Pinetree Power, Inc., 152 N.H. 92, 96 (2005).

¹³ See PSNH Response at p. 13. PSNH also provides their estimates of the impact of the project on rates with the revised cost estimate. See PSNH Response at p. 14. Assuming for the sake of argument that PSNH’s cost estimates are accurate, the OCA has estimated, based on PSNH’s data and the company’s proposal to depreciate the project over 15 years, that in the first year of the project the average customer (using 650 kWh per month) would see an increase in their bill of approximately \$3.00 per month. In years 2 through 15, the increase would be approximately \$2.00 per month.

¹⁴ See Public Service Company of NH, Petition for Approval of Issuance of Long-term Debt Securities and Permanent Increase in Short-term Debt Limit, Order No. 24,781 (August 3, 2007) (approving relief requested), as amended by Orders 24,821 (January 30, 2008) and 24,845 (April 14, 2008) (increasing the authorized credit spread applicable to long-term financing approved in Order No. 24,781).

PSNH may not undertake additional long-term debt financing, however, without the approval of the PUC. RSA 369:1 requires PSNH to obtain approval from the PUC to borrow funds “payable more than 12 months after the date thereof.” In considering whether to allow a utility to incur long-term debt, the PUC must determine whether, under all the circumstances, a proposed financing is “consistent with the public good.”¹⁵

The New Hampshire Supreme Court has held that the “public good” determination required under RSA 369 includes considerations beyond the terms of the proposed borrowing.¹⁶ “In such an inquiry, the Commission looks beyond actual terms of the proposed financing and must also consider the planned use of the proceeds and the effect on rates.”¹⁷ During the so-called “Easton” review, in determining whether the proposed use would be in the public good, the PUC is required to consider whether the uses to which the loan would be put could be economically justified compared to other options available to the utility.¹⁸

PSNH should therefore seek approval from the PUC, through an Easton review, for the additional debt needed to complete the modifications to Merrimack Station before it proceeds with those modifications. Other New Hampshire utilities seeking to invest significant sums in capital improvements have sought the PUC’s permission before undertaking such costly projects.¹⁹ This is the prudent approach that PSNH should follow. Arguably, PSNH should have

¹⁵ RSA 369:4.

¹⁶ See Appeal of Easton, 125 N.H. 205 (1984).

¹⁷ Hampstead Area Water Company, Petition for Approval of Financing, Order No. 24,864 (June 20, 2008) citing Appeal of Easton, 125 N.H. at 211 (1984).

¹⁸ Id.

¹⁹ See, e.g., Pittsfield Aqueduct Company, Petition for Authority to Borrow up to \$750,000, Order No. 24,610 (March 31, 2006), at p. 2 (“Pursuant to RSA 369:1, utilities in New Hampshire 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.’ The New Hampshire Supreme Court has observed that our review should look beyond actual terms of the proposed financing to the use of the proceeds of those funds and the effect on rates,” citing Appeal of Easton, 125 N.H. 205, 211 (1984)); see also Petition of Concord Steam for Approval of Transfer of Utility Assets, Distribution System Upgrades and Steam Purchase Agreement, Docket No. DG 08-107, filed August 29, 2008, at p. 6 (“the Company requests that the Commission open a docket to conduct something akin to a so-called Easton review, which is typically conducted as part of a proceeding in which a public utility seeks authority to engage in a financing transaction, particularly where the proceeds

sought this review immediately upon learning that the costs of the scrubber project had grown by 80%. PSNH's failure to do so should not now result in the company arguing against required PUC reviews because a delay in the project will cost ratepayers more.

To allow PSNH to proceed further with the proposed modifications, without conducting an "Easton" review, fails to protect PSNH ratepayers, whose interests the PUC must weigh heavily in such a review. The longer PSNH waits for PUC approval of the financing it requires to finish the modifications to Merrimack Station, the more money they will have invested.²⁰ The more money PSNH invests, the more likely the PUC will be hard pressed not to find that the investment is in the public good. Waiting to consider and determine whether the financing of the modifications is in the public good, as required by RSA 369:1 and RSA 369:4, and which the PUC is duly authorized to do, is unfair to ratepayers, and is imprudent.

C. Review of the modifications to the Merrimack Station, pursuant to RSA 369-B:3-a, and review of the long-term debt required to finance these modifications, are conditions precedent to PSNH's compliance with RSA 125-O:11.

RSA 125-O requires PSNH to reduce mercury emissions by 80% by installing a "scrubber technology" at Merrimack Station no later than July 1, 2013.²¹ In addition to this directive, the Legislature also made clear that PSNH still must seek all necessary approvals before proceeding with the scrubber project. "The achievement of this requirement is *contingent* upon obtaining all necessary permits and approvals from federal, state, and local regulatory

of the financing will be used for a significant capital project. In such proceedings, the Commission has traditionally examined the prudence of the proposed use of the proceeds of the financing and the effect of such an expenditure on rates.")

²⁰ PSNH reports that the company has already spent approximately \$10 million dollars on the scrubber project. See PSNH Response at p. 6.

²¹ See RSA 125-O:11, I and II; and RSA 125-O:13, I.

agencies and bodies.”²² The interpretation of this language is at the heart of the PUC’s legal inquiry concerning its jurisdiction.²³

The language of RSA 125-O:13, I, is clear; the PUC need look no further than “the plain and ordinary meaning of the words used.”²⁴ PSNH may not proceed with the modifications to Merrimack Station required by RSA 125-O:11 and RSA 125-O:13 until it obtains the PUC approvals required by statutes including RSA 369-B:3-a and RSA 369.

In addition, there is no conflict between these statutes.²⁵ At least with regard to RSA 125-O:11 and RSA 369-B:3-a, PSNH agrees.²⁶ The legislature is not presumed to waste words or enact redundant provisions and whenever possible, every word of a statute should be given effect.²⁷ And as PSNH also acknowledges in its memorandum, “[i]f any reasonable construction of the two statutes taken together can be found,” the Supreme Court will apply both statutes.”²⁸

The Legislature promulgated RSA 125-O in June 2006. Both RSA 369-B:3-a and RSA 369:4 were in effect at that time. It is presumed that the Legislature is “familiar with all existing

²² RSA 125-O:13, I (emphasis added).

²³ In light of the pivotal nature of the interpretation of this phrase to the PUC’s threshold legal question, it is remarkable that PSNH spends so little time on this issue in its lengthy legal memorandum. PSNH only makes three passing references to this phrase. See PSNH Memorandum at pp. 6, 18 and 21. Even more remarkable for a company well versed with legal requirements associated with operating as a public utility in New Hampshire is PSNH’s conclusion that the “permits and approvals” required by RSA 125-O:13 just “do not include” statutes enforced by the PUC. *Id.* at p. 21.

²⁴ See, e.g., *Green Crow Corp. v. Town of New Ipswich*, 950 A.2d 163, 164-165, N.H. (2008) (“We look to the plain and ordinary meaning of the words used in the statute and will not examine legislative history unless the statutory language is ambiguous, consider what the legislature might have said, or add words not included in the statute.”)

²⁵ There is also no conflict created by the requirement that the reductions in mercury emissions required by accomplished “as soon as possible.” RSA 125-O:11, I. “Possible” means capable of existing, happening, being done, etc.” *The Oxford American Desk Dictionary*, Oxford University Press, 1998. When it used the word “possible,” the Legislature acknowledged that PSNH may need some time to obtain “all necessary permits and approvals from federal, state, and local regulatory agencies and bodies,” RSA 125-O:13, I, including the PUC’s reviews.

²⁶ See PSNH Memorandum at p. 12 (“The Secretarial Letter states that there is ‘a potential conflict between’ the Scrubber Law and RSA 369-B:3-a. PSNH finds no such conflict.”)

²⁷ *Town of Amherst v. Gilroy*, 950 A.2d 193, 197 __ NH __ (2008) (citation omitted).

²⁸ PSNH Memorandum at p. 15, citing *Board of Selectmen of Merrimack v. Planning Board of Merrimack*, 118 N.H. 150 (1978) citing *State v. Miller supra: Public Serv. Co. v. Lovejoy Granite Co.*, 114 N.H. 630, 325 A.2d 785 (1974) (Supreme Court will not find implied repeal where any reasonable construction of two statutes exists).

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.”²⁹ Moreover, “[w]hen ascertaining legislative intent, a court assumes not only that a legislature knew the laws in effect at the time, but also that it knew the judicial interpretation of those [preexisting] laws.”³⁰ Accordingly, the Legislature knew, or is presumed to have known about the requirements of RSA 369-B:3-a, RSA 369:1 and RSA 369:4 when it enacted RSA 125-O.³¹

With this awareness, had the Legislature wanted to repeal or limit the effectiveness of RSA 369-B:3-a, RSA 369:1, or RSA 369:4, it could have done so expressly.³² The Legislature did not do this or add any language to RSA 125-O:11 or RSA 125-O:13 exempting PSNH from the previously-existing requirements of RSA 369:1, RSA 369:4, RSA 369-B:3-a (or any other statute applicable to PSNH and enforced by the PUC). In fact, to the contrary, by requiring PSNH to obtain “all necessary ... approvals” from “state ... regulatory agencies” before proceeding with the modifications to Merrimack Station, the Legislature clearly contemplated and required review by the PUC.

²⁹ Presumptions in Aid of Construction, 82 C.J.S. Statutes § 310 (updated June 2009) citing South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 118 S. Ct. 789, 139 L. Ed. 2d 773, 28 Env'tl. L. Rep. 20293 (1998) (The Supreme Court of the United States assumes that Congress is aware of existing law when it passes legislation); Kelley v. Georgia Dept. of Human Resources, 269 Ga. 384, 498 S.E.2d 741 (1998); Application of American Restaurant Operations, 264 Kan. 518, 957 P.2d 473 (1998); MacMillan v. State Compensation Ins. Fund, 285 Mont. 202, 947 P.2d 75, 13 I.E.R. Cas. (BNA) 1655 (1997); State v. Levandowski, 955 S.W.2d 603 (Tenn. 1997); State v. Tiraboschi, 269 Ga. 812, 504 S.E.2d 689 (1998); Keller v. Merrick, 955 P.2d 876 (Wyo. 1998); Robert D. Holloway, Inc. v. Pine Ridge Addition Residential Property Owners, 332 Ark. 450, 966 S.W.2d 241 (1998); Theriot v. Midland Risk Ins. Co., 694 So. 2d 184 (La. 1997); and Sizemore v. State Farm General Ins. Co., 202 W. Va. 591, 505 S.E.2d 654 (1998).

³⁰ Presumptions in Aid of Construction, 82 C.J.S. Statutes § 310 (updated June 2009) (citations omitted).

³¹ In fact, that the Legislature knew of RSA 369-B:3-a at the time that it promulgated RSA 125-O can not be disputed. A later section of RSA 125-O specifically refers to that statute. See RSA 125-O:18 (providing for recovery of prudent costs associated with compliance and referring to RSA 369-B:3-a).

³² See, e.g., Green Crow Corp. v. Town of New Ipswich, 950 A.2d 163, 166, and 167, N.H. (2008) (Concluding that the legislature could have used “Notwithstanding any other provisions of this chapter to the contrary” or similar language to except the applicability of other statutory requirements if it had intended to do so). For instance, the Legislature could have used words to the effect of, “Notwithstanding any other provisions of this chapter to the contrary, ... [to] make[] plain that [RSA 125-O:11 and RSA 125-O:13] stand [] alone, exclusive of other contrary provisions of RSA [369 or RSA 369-B].” Green Crow Corp. v. Town of New Ipswich, 950 A.2d at 166.

Perhaps even more importantly, the Legislature also stated that in their consideration of approvals for the project, agencies such as the PUC “*are encouraged to give due consideration to the general court’s finding that the installation and operation of scrubber technology at Merrimack Station is in the public interest.*”³³ With this language, the Legislature clearly recognizes that agencies with jurisdiction over the project must undertake their own reviews of the project, and merely “encourages” agencies to “consider” the Legislature’s finding that the project is in the public interest in making their own separate determinations. PSNH’s contention that the PUC’s “public interest finding” mandated by RSA 369-B:3-a would be “duplicative of” the Legislature’s “public interest” finding in RSA 125-O:11, I, overlooks the simple but important fact that there have been significant developments in the scrubber project since the time that the Legislature reviewed it and made this finding, namely that PSNH estimates that the costs have increased by 80%.³⁴

Lastly, RSA 125-O must be read in the context of other statutes applicable to PSNH, including RSA 369-B:3-a and RSA 369.³⁵ It is a long-standing canon of statutory construction that individual sections of a statute are not to be read independently, and must instead must be read together to lead to a reasonable result.³⁶ This is especially the case in this instance, as RSA 125-O:11 *et seq.* is an environmental statute that applies to a generating plant owned by a regulated public utility. PSNH may not simply apply RSA 125-O in a vacuum, without regard to the overarching set of laws regulating public utilities. Before PSNH modifies Merrimack Station, the PUC must consider the implications of the application of RSA 125-O on PSNH and

³³ RSA 125-O:13, I (emphasis added).

³⁴ See PSNH Memorandum at p. 13.

³⁵ See, e.g., In re Pinetree Power, Inc., 152 N.H. 92, 96 (2005) (Court defined “statutory scheme” for purposes of interpreting “public interest” requirement in RSA 369-B:3-a as including the restructuring statute, RSA 374-F).

³⁶ See *id.*, and see Green Crow Corp. v. Town of New Ipswich, 950 A.2d 163, 164-165, N.H. (2008) (“We interpret a statute to lead to a reasonable result and review a particular provision, not in isolation, but together with all associated sections’ . . . ‘Our goal is to apply statutes in light of the legislature’s intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme.’”)(citations omitted).

its consumers, as well as on the entire complex statutory scheme related to the operation of electric utilities and electricity generation and sale.³⁷

In sum, the Legislature has spoken clearly. PSNH must obtain the necessary PUC approvals, including those explicitly required by RSA 369-B:3-a and RSA 369, before it may proceed with modifications to Merrimack Station pursuant to RSA 125-O.

IV. Conclusion

For the foregoing reasons, the PUC has the authority to investigate and determine whether PSNH's modifications to Merrimack Station are in the public interest. The OCA urges the PUC to proceed expeditiously with its review in order to ensure that the fundamental goal of RSA 125-O, to reduce toxic mercury emission from coal-burning power plants, is implemented prudently and uses ratepayer funds in a just and reasonable manner.

Respectfully submitted,



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³⁷ As stated earlier, the statutory scheme developed by the Legislature for the regulation of public utilities clearly charges the PUC with “general supervision of all public utilities and the plants owned, operated or controlled” by them, RSA 374:3, so that utilities deliver “reasonable safe and adequate” service, RSA 374:1, at “just and reasonable” rates. RSA 374:4. The PUC also has authority to enforce compliance with the restructuring laws. See, e.g., RSA 374-F:1, III (defining interdependent policy principles to guide the PUC in implementing electric utility industry restructuring).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion was forwarded this day by electronic mail to the parties on the service list and the interested parties email list in this docket.

September 11, 2008



Meredith A. Hatfield