

DE 00-210
DE 00-211

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Petitions for Valuation of Certain Hydro-Electric Facilities

Order Addressing Threshold Issues

O R D E R N O. 23,620

January 18, 2001

I. INTRODUCTION

This docket requires the New Hampshire Public Utilities Commission (Commission) to determine the value of two hydro-electric facilities owned by Public Service Company of New Hampshire (PSNH): the J. Brodie Smith Station in Berlin (Smith Station) and the Amoskeag Station in Manchester (Amoskeag Station). Pursuant to 2000 N.H. Laws 249:5 and RSA 38, the cities of Berlin and Manchester (collectively, Petitioners) have petitioned the Commission for such a valuation as to the facilities in their respective municipalities. In this Order, we address two key threshold issues relating to the valuation process.

On December 12, 2000, the Commission issued Order No. 23,596 in this docket, following a Pre-Hearing Conference conducted on November 29, 2000. Rather than establish a full procedural schedule for the remainder of the proceeding as we typically do in such an order, we agreed with the Parties and

the Commission Staff that it would be useful for us to make a ruling first as to two issues: (1) the appropriate role of the "independent, qualified asset valuation specialist" that 2000 N.H. Laws 249:5 contemplates the Commission engaging "to conduct the asset valuation process," and (2) the binding effect on this proceeding, if any, of the PSNH Restructuring Settlement Agreement that we approved in Docket No. DE 99-099 and, in particular, the employee protections of that Agreement as they concern employees of Smith and Amoskeag stations. Accordingly, we authorized the parties to submit briefs and reply briefs on these two issues. We received written filings from the Petitioners and from PSNH. Although several Parties, as well as Staff, offered preliminary views on these subjects at the Pre-Hearing Conference, these were fully summarized in Order No. 23,596. We therefore summarize below only the views of the parties that submitted briefs.

II. ROLE OF THE ASSET VALUATION SPECIALIST

A. Positions of the Parties

1. City of Berlin and City of Manchester

The Petitioners begin their discussion of the role of the asset valuation specialist by pointing out that this proceeding is a "contested case" within the meaning of the relevant provision of the Administrative Procedures Act, RSA

541-A:1, IV. Accordingly, in the view of the Petitioners, the Commission is obliged under RSA 541-A:31, III, RSA 541-A:31, IV and RSA 541-A:33, IV to conduct an adjudicative proceeding, including the opportunity to present evidence and to cross-examine witnesses.

The Petitioners further point out that 2000 N.H. Laws 249:5 provides municipalities with a special opportunity to seek valuation of certain PSNH hydro-electric facilities within their borders under the procedures for such valuations set forth generally in RSA Chapter 38. They further note that, pursuant to RSA 38:9, when a utility and a municipality fail to agree upon a price, the task of valuation falls to the Commission, which "after proper notice and hearing, shall decide the matters in dispute."

In light of these legislative determinations, the Petitioners contend that in authorizing the Commission to hire an independent consultant to conduct the valuation process, the Legislature could not have intended to delegate any authority to the specialist. According to the Petitioners, due process, common sense, fundamental fairness and the Commission's past practice therefore dictate that the asset valuation specialist be treated simply as an expert witness providing testimony on behalf of Staff. Under such a rubric,

according to the Petitioners, the expert should be required to submit pre-filed direct testimony and submit to cross-examination.

2. Public Service Company of New Hampshire

PSNH's position on the appropriate role of the asset valuation specialist does not differ substantially from that of the Petitioners. According to PSNH, the relevant language in 2000 N.H. Laws 249:5 simply reflects an acknowledgment by the Legislature that the Commission and its Staff lack valuation expertise and therefore need the services of a qualified expert to provide the appropriate insight. In the view of PSNH, the use of the word "conduct" in 2000 N.H. Laws 249:5 suggests that the Commission's expert should submit her or his own valuation, rather than simply rely on the expert opinions of the parties' experts. PSNH asks the Commission to apply its usual practice in this proceeding by requiring its expert to submit its advice in the form of a report or pre-filed direct testimony that would then be subject to discovery, cross-examination and rebuttal.

B. Commission Discussion

We agree with the recommendations of PSNH as to the role of the asset valuation specialist. It is our intention to proceed to the hiring of a qualified asset valuation

specialist as soon as is practicable. Although the applicable statute does not require the Commission to consult with any of the parties in choosing such an expert, cf. RSA 369-B:3, IV(b)(13) ("PSNH shall be allowed to comment prior to the selection" of the asset sale specialist in connection with auction of generation assets), we deem it appropriate to give the parties an opportunity to advise the Commission of any qualified asset valuation specialists they would like us to consider as part of the selection process. Accordingly, we will ask the parties to advise us of any such recommendations within ten days of this order. Thereafter, we will issue a request for proposals and make a choice expeditiously. Once the independent asset valuation expert is chosen, we will expect that expert to submit a report and recommendation regarding the value of the plants in the form of prefiled direct testimony, to respond to discovery requests following the submission of the pre-filed testimony and to submit to cross-examination at hearing. We will expect experts preparing recommendations on behalf of other parties to participate on the same basis and schedule.

III. EFFECT OF THE PSNH RESTRUCTURING SETTLEMENT AGREEMENT

A. Positions of the Parties

1. City of Berlin and City of Manchester

The petitioners note that, in late 1999, the Commission rejected a previous effort by the City of Manchester to seek a valuation of the Amoskeag Station under RSA Chapter 38. *See City of Manchester*, 84 NH PUC 624 (1999). We concluded that we lacked jurisdiction to conduct such a valuation because the City had not met the requirement in RSA 38:4 to gain approval from the municipality's voters first. *Id.* at 628. According to the Petitioners, this decision prompted the City of Manchester to seek legislative redress in the form of a bill "to allow a municipality to initiate acquisition proceedings prior to the required votes under RSA §38:3 [sic]." Prehearing Memorandum of Law of the Cities of Manchester and Berlin at 5. The Petitioners aver that these lobbying efforts led directly to the enactment of 2000 N.H. Laws 249:5.

The Petitioners refer to 2000 N.H. Laws 249:5 as a "private act." Relying on an orientation manual prepared by the New Hampshire Office of Legislative Services, the Petitioners contrast such a private act - applying to one or

more persons or entities - with "public acts" that are applicable to the general public.

In the opinion of the Petitioners, because private acts should be strictly construed to effectuate their purpose, *Arnold v. City of Manchester*, 119 N.H. 859, 863 (1979), and because 2000 N.H. Laws 249:5 does not indicate on its face that the employee protection provisions of the Restructuring Settlement Agreement are applicable to municipalities seeking valuations under 2000 N.H. Laws 249:5, the Commission should assume no connection between the statute and the agreement. According to the Petitioners, there is nothing in the "legislative record" - by which we assume the Petitioners mean the relevant legislative history - to suggest that the Legislature "intended to do anything more than simply allow a municipality to obtain a fair market value determination from the Commission prior to the votes" under RSA 38:3. Prehearing Memorandum of Law of the Cities of Manchester and Berlin at 6.

The Petitioners further contend that, as parties to a contract, the signatories to the Restructuring Settlement Agreement cannot dispense with the rights of municipalities or impose legal obligations upon municipalities given that no municipalities are parties to the Agreement. According to the

Petitioners, the Commission's approval of the Restructuring Settlement Agreement does not alter these legal realities.

According to the Petitioners, PSNH "consistently acknowledged" during the proceedings in Docket No. DE 99-099 that the terms and conditions of the Restructuring Settlement Agreement were not binding upon Chapter 38 proceedings. *Id.* at 7. In support of this contention, the Petitioners cite both materials provided to them in discovery during Docket NO. DE 99-099 as well as written testimony provided by PSNH witnesses that "[f]ollowing the divestiture, it is expected that the provisions of Chapter 38 will still afford a municipality the option of taking a hydro plant." *Id.* at 8 (citing rebuttal testimony of PSNH witnesses McDonald and Large). The Petitioners also draw the Commission's attention to hearing testimony by PSNH witness McDonald. Asked whether a municipality acquiring a hydro-electric plant under RSA 38 would be obligated to offer the same employee protections contained in the Restructuring Settlement Agreement, Mr. McDonald responded that "[y]ou would probably be just acquiring the physical assets at that point when you did a Chapter 38." *Id.* at 9. He responded "[t]hat's correct" when asked whether the employee protection provisions comprised simply "a new condition that was created for the purpose of

the Settlement Agreement by the folks that negotiated the Settlement Agreement." *Id.*

2. Public Service Company of New Hampshire

In support of its position, PSNH points out that the PSNH Restructuring Settlement Agreement as originally drafted sought to provide an opportunity for municipalities to participate in the process of auctioning PSNH's generation assets, but that it became clear during the hearings in Docket No. DE 99-099 that these provisions were not adequate given the logistical and financial realities confronting interested municipalities. PSNH further notes that, following these hearings and the resulting Order approving the Restructuring Settlement Agreement, Governor Shaheen signed Chapter 249 into law on June 12, 2000. On the same date, PSNH further notes, the Commission's general counsel issued a letter requiring PSNH to file a revised version of the Restructuring Settlement Agreement, conforming to Chapter 249, and requiring parties seeking rehearing or clarification of the Commission's previous approval to advise the Commission by July 5, 2000 as to any changes in their rehearing or clarification requests arising out of the enactment of Chapter 249.

PSNH further avers that, in the June 23, 2000 edition of the Restructuring Settlement Agreement, for the

first time there was express language noting that "[a] municipality may also petition the PUC for valuation of a hydroelectric generating asset pursuant to Section 5 [of Chapter 249]." Additionally, PSNH points out, the revised Restructuring Settlement Agreement continued to include language from the previous version of the proposal requiring that any offer by a municipality to purchase a hydro-electric facility must involve "the same hydroelectric generating asset, adjacent lands, grant the same employee protections and benefits and other requirements as PSNH is proposing to establish in the fossil and hydro auctions," i.e., the subsequent public sale of PSNH's remaining non-nuclear generation assets (with certain exceptions not relevant here).

According to PSNH, the significance of this history is that the 2000 N.H. Laws 249:5 valuation process is clearly linked to the conditions for the public sale of its generation assets, which is unassailably covered by the employee protection provisions of the Restructuring Settlement Agreement. PSNH points out that the City of Manchester was aware of this "linkage" as of June 23, 2000 but failed to make any objection to it despite being given an opportunity in the general counsel's June 12, 2000 letter. Public Service Company's Memorandum on the Role of the Asset Valuation

Specialist and the Applicability of the Settlement Agreement at 4. According to PSNH, in these circumstances the Petitioners are improperly seeking to relitigate an issue that was fully resolved in Docket No. DE 99-099. In PSNH's view, the determinations made in Docket No. DE 99-099 regarding employee protections are *res judicata* here.

PSNH further contends that it would be inappropriate to view 2000 N.H. Laws 249:5 as a private act, unrelated to the legislative consideration and approval given the Restructuring Settlement Agreement elsewhere in Chapter 249. PSNH points out that all remaining portions of the measure explicitly deal with the Restructuring Settlement Agreement. According to PSNH, the appropriate interpretive perspective is to view Chapter 249 as a whole, comprising the Legislature's determinations as to all restructuring issues - one of which is that municipalities should be accorded a special opportunity to participate in the divestiture process. Viewed in this light, according to PSNH, Section 5 is "merely procedural in nature," functioning as a "timing provision" that leaves the municipalities subject to the substantive requirements of both Chapter 38 and the Restructuring Settlement Agreement. *Id.* at 5.

Finally, according to PSNH, even if the Petitioners

were not bound by the provisions of the Restructuring Settlement Agreement their efforts to acquire Smith Station and/or Amoskeag Station are still subject to RSA 38:11, which provides that

[w]hen making a determination as to whether the purchase or taking of utility plant or property is in the public interest under this chapter, the commission may set conditions and issue orders to satisfy the public interest. The commission need not make any public interest determination when the municipality and utility agree upon the sale of utility plant and property.

RSA 38:11. According to PSNH, "[t]he Commission must make a public interest determination under RSA 38:11 unless there are separate agreements on the sale between each City and PSNH" and "PSNH will not voluntarily agree to the sale of these plants without the conditions set forth in the Settlement Agreement." Public Service Company's Memorandum on the Role of the Asset Valuation Specialist and the Applicability of the Settlement Agreement at 5.¹

¹ Elsewhere in its memorandum, PSNH points out that in approving the Restructuring Settlement Agreement on April 19, 2000, the Commission determined that "PSNH must retain the authority to reject a pre-auction offer from a municipality for a facility." Order No. 23,443 (April 19, 2000), slip op. at 231. In its reply memorandum, the Petitioners have reacted vehemently to PSNH's quotation of this passage as well as PSNH's statement that it will not voluntarily agree to any sale of generation assets that are not consistent with the terms of the Restructuring Settlement Agreement. According to

IV. COMMISSION ANALYSIS

We have no difficulty in concluding that any proceedings we conduct under Section 5 of Chapter 249 of the Laws of 2000 are subject to the terms of the PSNH Restructuring Settlement Agreement. It is well-established that, when interpreting a statute, it is necessary "to construe all parts of [the] statute together to effectuate its overall purpose and to avoid an absurd or unjust result." *Estate of Van Lunen*, ___ N.H. ___, ___, 750 A.2d 737, 740 (2000). In our view, it is beyond debate that the overall purpose of Chapter 249 was to modify and, as modified, to approve the PSNH Restructuring Settlement Agreement - a process made necessary by the requirement of specific legislative authorization for the provisions in the Agreement securitizing (i.e., making a binding obligation of the State) certain of PSNH stranded costs. Under the Petitioners' view of the statute, the employees of Smith Station or Amoskeag

the Petitioners, "PSNH cannot possibly suggest that it may unilaterally reject the price determined by the Commission in a Chapter 38 proceeding." Response of the Cities of Manchester and Berlin to PSNH's Memorandum on the Role of the Asset Valuation Specialist and the Applicability of the Settlement Agreement at 3. We do not understand PSNH to be making such an argument. In any event, the quoted language from Order No. 23,443 concerns the Restructuring Settlement Agreement as it was then pending, not as it was redrafted to comport with Chapter 249.

Station would reap the benefits of the employee protection provisions of the Restructuring Settlement Agreement if the facility is sold in the public auction but not if it is sold to a municipality under the process contemplated by 2000 N.H. Laws 249:5. This would be precisely the sort of absurd or unjust result that we are required to avoid.

We are not persuaded by the Petitioners' suggestion that a different result should obtain because 2000 N.H. Laws 249:5 is a private act. Beyond the principle that private acts "must be strictly construed," *Arnold*, 119 N.H. at 863, a prescription that does not resolve the problem here, we are aware of no special principles of statutory construction that require us to interpret a private act in a manner different from any other legislative enactment. *See id.* (noting that words in private act "must be given their ordinary meaning"). Even if there were, we do not agree with the Petitioners that Section 5 could be viewed in isolation as a private act. It is more correctly viewed as a particular provision, applicable in a certain set of special circumstances, in an omnibus measure addressing a public policy issue (the restructuring of PSNH) generally.

Since we conclude that 2000 N.H. Laws 249:5

proceedings are subject to the provisions of the PSNH Restructuring Settlement Agreement, it is not necessary for us to consider the parties' remaining arguments about res judicata and the effect of the public interest provisions of RSA 38:11.

V. CONCLUSION

In light of the foregoing determinations, we believe the next appropriate step is to proceed to the selection of the independent, qualified asset valuation specialist contemplated by 2000 N.H. Laws 249:5. We intend to issue a Request for Proposals (RFP) shortly, and will require the parties to this docket to submit within ten days the names of any qualified individuals or entities to which they would like the RFP directed in particular. We will mail a copy of the RFP to any such individual or entity.

Once we have selected the valuation expert to assist the Commission, we will ask the parties to convene for an informal technical session in order to develop a procedural schedule that will govern the remainder of this docket.

Based upon the foregoing, it is hereby

ORDERED, that the Parties submit, within ten days of this order, the names of any persons or entities they wish to suggest to the Commission for possible selection as the

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independent, qualified asset valuation specialist described in
Section 5 of Chapter 249 of the Laws of 2000.

By order of the Public Utilities Commission of New
Hampshire this eighteenth day of January, 2001.

Douglas L. Patch
Chairman

Susan S. Geiger
Commissioner

Nancy Brockway
Commissioner

Attested by:

Thomas B. Getz
Executive Director and Secretary