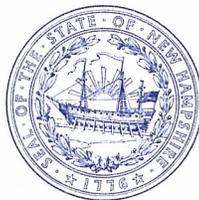


THE STATE OF NEW HAMPSHIRE

CONSUMER ADVOCATE
Meredith A. Hatfield

ASSISTANT CONSUMER ADVOCATE
Kenneth E. Traum



TDD Access: Relay NH
1-800-735-2964

Tel. (603) 271-1172

FAX No. 271-1177

Website:
www.oca.nh.gov

OFFICE OF THE CONSUMER ADVOCATE

21 S. FRUIT ST., SUITE 18
CONCORD, NEW HAMPSHIRE 03301-2429

December 11, 2009

Debra A. Howland
Executive Director and Secretary
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, NH 03301



RE: DE 09-236 Unutil Energy Systems, Inc. Petition for Authority to Issue Securities

Dear Ms. Howland:

On November 23, 2009, Unutil Energy Systems, Inc. (UES) filed a petition for authority to incur up to \$15 million in secured long-term debt. UES requested that the Commission approve the petition by order *nisi* by December 18.

The Office of Consumer Advocate (OCA) has several concerns about UES's financing petition. Generally, the OCA's concerns relate to the proposed interest rate, the proposed costs of the financing, the proposed use of the financing, the impact of the proposed financing on customers, and the type of approval process requested by UES. These concerns are discussed more specifically in the following paragraphs.

UES proposes notes with a targeted term of 10 years, which will bear fixed annual interest rates not to exceed 7.8%.¹ The OCA questions the reasonableness of the proposed interest rate, as it seems higher than rates proposed in other long-term financing petitions² filed in 2009.³ UES explains that the proposed rate is based upon the "maximum yield for the 10-year treasury in the last five years (from 11/16/2004 to 11/16/2009)."⁴ The OCA questions whether this is an appropriate time period to use as a basis given the market instability that began in mid-2007. Also the OCA questions whether the proposed rate is consistent with UES's observations

¹ Petition for Authority to Issue Securities, p. 1, paragraph 3; and David L. Chong, Exhibit UES-1, p. 2, lines 13-14.

² Excluding financing administered by New Hampshire Department of Environmental Services, and financing petitions solely involving borrowing from an affiliate.

³ See, e.g., Order 25,021 (approving petition of Public Service Company of NH for approval of up to \$150 million secured long-debt, most likely for a period of 10 years, and at a rate, when calculated using applicable treasury rate as of December 3, 2009, of no higher than 7.39%); and Order 25,041 (approving petition of Pennichuck East Utilities, Inc. for approval of \$6 million of secured long-debt, for a period of 20 years, at a rate in the range of 6 to 6.5%).

⁴ Testimony of David L. Chong, Exhibit UES-1, p. 4, lines 16-18.

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about the liquidity of the private placement market and the attractiveness of investments in utilities in general and UES specifically.⁵ In addition, the OCA questions the appropriateness of the “comparable utility transactions” which informed UES’s proposed rate given that all of these other transactions involved more principal than the amount proposed in UES’s petition, and the maturities ranged from 5 to 30 years.⁶ Lastly, because higher interest rates typically accompany higher risk investments, the OCA questions whether UES is aware of any circumstances unique to itself that would qualify the proposed long term debt as higher risk than would be attributed by investors to another utility.

UES proposes to include in its financing issuance approximately \$550,000 in costs associated with the proposed financing, including an estimated \$405,000 in attorneys’ fees.⁷ This amount, nearly double the financing costs approved in UES’s last financing docket in 2006,⁸ seems unreasonably high and unsupportable. UES contends that using outside legal counsel is more economical and is necessary because of the specialized nature of corporate financings.⁹ Even assuming for the sake of argument that both of these assertions are true, the costs of outside counsel must be objectively reasonable and consistent with the public good.¹⁰ However, UES provided no information in its filing that could form the basis of such a determination by the Commission. UES’s filing is silent about the manner in which it secured the services of its outside counsel, Dewey & LeBoeuf (*e.g.*, competitive bidding process), about how Dewey & LeBoeuf’s rates compare to the rates of other firms who could provide the same services, or about the basis for UES’s decision to pay Dewey & LeBoeuf an estimated \$250,000 for assistance with the proposed financing. The OCA does not believe that the Commission can approve these costs or the recovery of these costs from ratepayers without answers to these and other questions. The OCA also believes that, to the extent that the Company did not use a competitive bidding process to secure the assistance of Dewey & LeBoeuf, the Commission should formally direct UES to do so for future filings.

After payment of financing costs, UES proposes to use the remaining proceeds of the proposed financing “to repay outstanding short-term indebtedness incurred for additions, extensions and betterments to the Company’s property, plant and equipment,” and “for other

⁵ *See, e.g.*, Testimony of David L. Chong, Exhibit UES-1, p. 9, lines 20-22 (citing Exh. UES-1, Sched. DLC-4, “current investor demand exceeds available supply and investors are submitting increasingly aggressive bids”); p. 10, lines 2-6 (“The private placement market has not been constrained by the same liquidity issues as in other sectors of the global financial markets. In the bond market and especially in the private placement market, the Placement Agent expects that investor liquidity will increase due to ongoing receipt of interest payments, bond redemptions and scheduled maturities”); p. 10, lines 11-16 (“According to the Placement Agent, investors have been attracted by Unitol’s stable growth and performance in its sector, regulatory climate and strong management team, and will welcome the opportunity to invest further in Unitol and its subsidiaries. From a broader perspective, the fact that the utility sector has been viewed favorably by investors is evidenced by the high levels of new issuance in the past few years and year-to-date”); and p. 12, line 8 (“long-term interest rates are currently favorable for issuers”).

⁶ *See* Exh. UES-1, Sched. DLC-3.

⁷ Exhibit UES-3; and Testimony of David L. Chong, Exhibit UES-1, p. 8, lines 2-17 (describing breakdown of proposed issuance costs).

⁸ *See* Order 24,658 (August 25, 2006) (approving issuance of up to \$15 million in long-term debt and authorizing recovery of \$250,000 in financing costs).

⁹ Testimony of David L. Chong, Exhibit UES-1, p. 8, lines 7-12.

¹⁰ *See* RSA 369:1 *et seq.*

lawful corporate purposes.”¹¹ UES provided its short-term debt balance as \$16,696,000¹² and an amount of \$2,754,000 for “General Corporate Purposes,” but UES provided no details about how the short-term debt was used or how the other funds will be used for “General Corporate Purposes.”¹³

RSA 369:1, as well as the New Hampshire Supreme Court’s and the Commission’s interpretations of this statute, require the Commission to review the uses of proposed long-term debt before it determines that it is consistent with the public good and necessary for the provision of safe and reliable service.¹⁴ Consequently, in this case, the Commission needs more information about the uses of the short-term debt that UES seeks to refinance as well as the uses for “General Corporate Purposes” before it makes any determination about whether the proposed long-term financing is consistent with the public good under the law.

In reviewing the use of the proposed long-term debt to refinance short-term debt, the nature of the proposed long-term debt (e.g., “project specific” vs. “general” financing) should not limit the Commission’s statutory obligation to make a public good determination about how this debt will be used by UES.¹⁵ Nor is the Commission required to conduct, as one utility has interpreted the OCA’s position, “an item-by-item review of each and every capital *expenditure* [of every *project*] for which the proceeds of a utility financing may be used.”¹⁶ However, to the extent that UES can not identify which capital improvement projects were financed with the short-term debt at issue in this case, it has not sustained its burden of proof for approval of its petition.¹⁷

Also not relevant to the Commission’s public good determination is the fact that utilities in New Hampshire can invest in capital improvements without prior Commission approval, as is the case if the utility does not use financing to pay for the improvement.¹⁸ This is a financing docket, and some of the financing will be used to pay for capital improvements. The law governing long-term financing requests requires that the Commission make a determination that

¹¹ Testimony of David L. Chong, Exhibit UES-1, p. 6, lines 9-12. *See also* Exhibit UES-2.

¹² Testimony of David L. Chong, Exhibit UES-1, p. 6, line 13. *See also* Exhibit UES-2

¹³ UES’s filing includes a listing of “bondable additions.” *See* Exh. UES-1, Sched. DLC-6, p. 1. However, this list was provided in support of UES’s contention that it “meets the second test, Net Bondable Expenditures, [in its twelfth and thirteenth indentures,] by a significant margin.” Testimony of David L. Chong, Exhibit UES-1, p. 12, lines 1-6. UES did not refer to this list to demonstrate how it used the short-term debt that it proposes to refinance.

¹⁴ *See, e.g.*, Order 25,041, pp. 3-4 (in order approving long-term debt issuance by Pennichuck East Utilities, Inc., the Commission cited *Appeal of Easton*, 125 N.H. 205 (1984), stating, “Analysis of the public good consideration [required by RSA 369:1 *et seq.*] involves looking beyond actual terms of the proposed financing to the use of the proceeds of those funds ... to insure the public good is protected”).

¹⁵ *Cf. Public Service Company of New Hampshire, Petition for Issuance of Long-term Debt*, DE 09-033, Order No. 25,021 (October 5, 2009).

¹⁶ *Public Service Company of New Hampshire, Petition for Issuance of Long-term Debt*, DE 09-033, Order No. 25,050 (reference to PSNH’s objection to motion for rehearing), at p. 8 (emphasis added).

¹⁷ *See* Puc 203.25 (the party seeking relief through a petition, application, motion or complaint shall bear the burden of proving the truth of any factual proposition by a preponderance of the evidence).

¹⁸ *Cf. Aquarion Water Company of New Hampshire, Inc., Petition for Approval to Issue Promissory Note*, DW 09-193, Letter to Debra A. Howland from Mark A. Naylor dated November 25, 2009, fn. 1.

the uses of the financing, including any financed capital improvements, are consistent with the public good and necessary for the purpose of providing safe and reliable service.

UES's filing contains *no information* about the impact that the proposed financing will have on its customers. This rate impact information is required in order for the Commission to make an informed decision about whether the proposed financing is consistent with the public good.¹⁹

UES requested approval by the Commission of its petition through an order *nisi*, without a hearing, no later than December 18, 2009.²⁰ UES proposes a final closing on the bonds of late January 2010.²¹ Also consistent with other recent financing dockets, the OCA takes the position that customers are entitled to specific notice about UES's proposed financing, the specific nature of the uses of the financing, as well as the impact that the financing will have on rates. The process proposed by UES, although it permits a request for a hearing after the order is issued, affords no notice to customers. Without such notice, the hearing opportunity provided by a *nisi* order is deficient because the *nisi* order effectively shifts the burden to individuals who are affected by the order without any notice to those individuals.

The OCA respectfully recommends that the Commission consider the concerns discussed in this letter before proceeding further with UES's financing petition. Thank you for your assistance with bringing these concerns and recommendations to the attention of the Commission.

Sincerely,



Rorie E.P. Hollenberg
Staff Attorney

cc: Service List (by electronic mail only)

¹⁹ See Order 25,041, pp. 3-4 (in order approving long-term debt issuance by Pennichuck East Utilities, Inc., the Commission cited *Appeal of Easton*, 125 N.H. 205 (1984), stating, "Analysis of the public good consideration [required by RSA 369:1 *et seq.*] involves looking beyond actual terms of the proposed financing to ... the effect on rates to insure the public good is protected").

²⁰ Testimony of David L. Chong, Exhibit UES-1, p. 13, line 21, through p. 14, lines 12-13. Of note, it appears from the filing that the Directors of UES met in March and approved the proposed financing. UES included no explanation in its filing about why it waited until late November to file its petition with the Commission.

²¹ Testimony of David L. Chong, Exhibit UES-1, p. 13, line 21, through p. 14, lines 14-15.