

**THE STATE OF NEW HAMPSHIRE
BEFORE THE PUBLIC UTILITIES COMMISSION**

Docket No. DE 14-238

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Determination Regarding PSNH's Generation Assets

**BRIEF ON SCOPE OF DOCKET
BY CONSERVATION LAW FOUNDATION**

Pursuant to the Commission's Secretarial Letter dated October 30, 2014, the Conservation Law Foundation ("CLF") hereby submits the following brief on the scope of this Docket.

Introduction

The Commission opened this Docket by Order of Notice dated September 16, 2014. The Order of Notice stated that the recently amended RSA 369-B:3-a required the Commission to commence and expedite a proceeding to determine whether all or some of Public Service Company of New Hampshire ("PSNH") generation assets should be divested. Under the amended statute, the Commission "may order PSNH to divest all or some of 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." *See* 09162014 Order of Notice.

On October 2, 2014, the Commission held a prehearing conference to discuss the scope of the docket. The Commission identified the following potential issues: which generation assets should be considered; whether long-term purchased power agreement contracts should be considered; and the status and relevance of the 1999 Restructuring Settlement Agreement ("1999 Agreement"). The Commission also requested comments regarding the sequence of issues in light of the legislative mandate to expedite the proceeding. Commission Staff ("Staff") asked for

briefing on the meaning of "economic interest of PSNH's retail customers." The Commission thereafter set a December 5 deadline for filing scoping documents. The parties then would be provided an opportunity to respond to other parties' scoping documents by January 7, 2015. *See* DE 14-238, Tab 27: Transcript of Hearing.

Subsequent to the prehearing conference, Staff oversaw a technical session at which the parties discussed and refined the issues for briefing. CLF submits the following analysis regarding the scope of this docket, in response to the issues set forth by the Commission at the prehearing conference and the discussion at the subsequent technical session.

I. The Meaning of RSA 369-B:3-a, as Amended

RSA 369-B:3-a, as amended, required the Commission to commence and expedite a proceeding to determine whether all or some of PSNH's "generation assets" should be divested, and authorized the Commission to order PSNH to divest all or some of its generation assets if divestiture is in the "economic interest" of "retail customers of PSNH" and the Commission provides for the cost recovery of such divestiture. RSA 369-B:3-a. At the technical session, the parties agreed to brief the meaning of the three terms in quotes: "generation assets," "economic interest," and "retail customers."

A. Generation Assets

With respect to "generation assets," the parties discussed whether the Commission's review should be limited to PSNH's fossil-fuel generation assets, or should include its hydro assets and/or its purchased power agreements ("PPAs"). The Commission should consider all of PSNH's assets, including its non-fossil assets and purchased power entitlements. This approach would be consistent with the market analysis in the March 31, 2014 Technical Report prepared for the Commission by La Capra Associates ("La Capra Report"), which analyzed the value of

PSNH's fossil, hydro, and biomass generating assets as well as its PPAs with the Lempster Wind and Burgess BioPower facilities, and the analysis in the June 7, 2013 report jointly prepared by Staff and The Liberty Consulting Group ("Liberty Report"). This approach also comports with RSA 369-B:3-a, which does not limit the term "generating assets" to a particular class of assets, and with the scope of the divestiture contemplated under RSA ch. 374-F and the 1999 Agreement. In addition, including all PSNH generating assets – its fossil and non-fossil assets and PPAs – will ultimately provide the broadest range of options for achieving the legislative objective of minimizing stranded costs.

B. Economic Interest

With respect to "economic interest," the plain language of RSA 369-B:3-a clearly limits the "economic interest" to be considered to that of the "retail customers of PSNH." The legislative history of the bill, dating to the 2013 request by the Electric Utility Restructuring Legislative Oversight Committee ("Oversight Committee") to the Commission to open a docket related to RSA 369-B:3-a and PSNH's ownership of electric generating plants, further supports this conclusion. *See* IR 13-020, Tab 21: Oct. 21, 2013 Oversight Committee Letter (referring to "economic interest of PSNH's retail customers"). To judge customers' economic interests, the Commission may, for example, undertake and update the same inquiries reflected in the La Capra and Liberty Reports, such as (i) determining the expected market value of PSNH generation assets, (ii) evaluating the short and long-term financial risks to customers of PSNH retention of generation assets, and (iii) comparing historical and projected over-market energy rates paid by PSNH customers with the anticipated stranded cost charges on customer bills and energy service rates. Although likely to be modest, the effects of merchant, rather than cost-of-service, operation of PSNH assets on the New England wholesale energy and capacity markets

(including any reliability-related effects) may also have relevant economic costs or benefits for PSNH retail customers that could be evaluated in this docket.

In addition, the term plainly contemplates a narrower review than a determination of “public interest,” a term that has governed recent modifications to PSNH’s generation assets and was deleted from RSA 369-B:3-a by Laws 2014, ch. 310. In particular, the term does not encompass consideration of the shareholders’, employees’, or the company’s economic interests, or speculation into the ramifications of divestiture for local tax rolls or plant employment. To the extent that PSNH employee interests are of concern, Laws 2014, ch. 310 addresses such interests via incorporation of employee protection provisions in the 1999 Settlement, not through the Commission’s inquiries into “economic interest.” *See* RSA 369-B:3-b.

Finally, the Commission’s consideration of customers’ economic interest should address both the short-term and long-term implications of divestiture. To quote Staff: “While there have been developments in the fuel and energy markets since the issuance of Staff’s June 2013 report—and there continue to be developments—it is important to not view the issues only based on current events. Rather, in examining the economic interest of PSNH’s retail customers, especially as it relates to the future of the long-lived generation assets, a forward-looking view of potential and likely developments impacting the fuel and energy markets is necessary to appropriately examine the issues.” *See* IR 13-020, Tab 25: April 1, 2014 Preliminary Status Report by Staff at 2. As Staff’s comment suggests, PSNH has undertaken long-term PPAs and major investments in its assets in recent years, with long-term commitments and depreciation schedules. In this context, determinations in this docket should take into account the longest reasonable time frame for assessing PSNH customers’ economic interest, at least matching the typical commercial timeframes for depreciation and book life, financing, cash flow analysis, and

energy market forecasts of fifteen to twenty years (or potentially longer, in the case of the PSNH hydropower units).

For all of the above reasons, the Commission must limit the scope of “economic interest” to the interests of PSNH’s retail customers. To assess those interests adequately, the Commission should look forward 15-20 years rather than conduct a short-term review of current events.

C. Retail Customers

At the technical conference, all parties appeared to agree that “retail customers” means all of PSNH’s retail customers, whether default service or distribution only customers. CLF agrees that the Commission should consider the interests of the full group named in the amended statute: all PSNH retail customers. If the legislature had intended to limit the Commission’s consideration to default customers only, it could have done so. *See e.g.*, RSA 125-O:18 (prudent costs of installing scrubber to be recovered via utility’s default service charge rather than from all retail customers).

II. The 1999 Agreement Does Not Bind the Commission but Should, Along with Subsequent Events, Inform the Commission’s Approach.

The legal effect of the 1999 Agreement should not be in serious dispute in this docket. Under New Hampshire law and Commission orders in DE 09-099, the Commission must not consider the agreement’s terms to have “any greater binding or precedential effect than that which is normally accorded a final order of the Commission.” Order 23,549 (Sept. 8, 2000), at 65 (addressing meaning of Section XVIII, B). This was an express ruling of the Commission in three of its seminal orders regarding the agreement. *See id.*; Order No. 23,346 (November 16, 1999) at 8-11 (“we reiterate a conclusion we have previously stated in a similar context: ‘We do not believe we have the authority to bind the State of New Hampshire, other state agencies or future Public Utilities Commissions.’”); Order No. 23,443 (April 19, 2000) at 276-78 (“the

conditional approvals granted in this Order are subject to the further agreement that the Settlement Agreement language [purporting to make the agreement ‘binding with respect to matters contained herein’] shall be interpreted in a manner that is consistent with the statutory authority of the Commission and shall not create any greater binding or precedential effect than that which is normally accorded a final order of the Commission.”).¹ In other words, the terms of the settlement agreement itself do not bind the Commission to authorize otherwise unreasonable or inequitable outcomes. *See* Order No. 23,346 (November 16, 1999) at 9 (“[U]tility regulation under New Hampshire law should normally be an exercise of [the Commission’s] constitutional police power, grounded in sound public policy objectives, without contractual (or constitutional Contract Clause) implications.”).

While the agreement does not bind the Commission like a contract, the Commission should nonetheless be mindful of the agreement’s history, the balance of interests struck in the Commission’s approvals of the settlement, the Legislature’s subsequent pronouncements regarding divestiture of PSNH generating assets, and the other events of intervening years. In particular, the settlement agreement reflects the parties’ understanding that PSNH would immediately proceed to divest its generating assets, rather than retain them for more than a decade and continue to realize the financial benefits of regulated returns on equity. Actual experience should inform and influence the Commission’s approach to the questions at issue in this docket, which should above all seek to achieve the legislative objectives of Laws 2014, ch. 310, and RSA ch. 374-F.

III. The Commission Should Rely upon the Reports Filed in IR 13-020 as a Logical Starting Point for Discovery and Defining the Scope of Issues in this Docket.

¹ The Commission’s only stated exception to these rulings pertains to the binding legal effect of Rate Reduction Bonds issued in accordance with RSA 369-B and Laws 2000, ch. 249. Order 23,549 (Sept. 8, 2000), at 65; Order No. 23,346 (November 16, 1999), at 8-11.

Docket IR 13-020 began the most recent inquiry into whether it is now in the economic interest of PSNH retail customers for PSNH to divest its generation assets. At the technical session in this docket, both Staff and PSNH took the position that the reports filed in IR 13-020 should not be considered dispositive. Staff stated that they were skeptical of using the La Capra Report as a starting point. The Commission should reject this position for two reasons.

First, the La Capra and Liberty Reports reflect highly consistent, relevant, and recent expert analysis of the very issues at the center of this docket. While the events of intervening months (including the winter 2014-2015 retail price spikes for many New England utilities) no doubt require updates to the information presented in the reports, it is important—as Staff counseled a mere eight months ago—to avoid over-reading those events and discarding the relevant long-term prospective analysis contained in the reports. *See* IR 13-020, Tab 25: April 1, 2014 Preliminary Status Report by Staff at 2 (In many ways, our analysis and results mirror what was presented in our June 7, 2013 Liberty Report. While there have been developments in the fuel and energy markets since the Liberty Report— and there continue to be developments – it is important to not view the issues based on current events). In particular, there are times when – like the winters of 2012-2013, 2013-2014, and likely 2014-2015 – “PSNH’s ES rate may be below prevailing market rates, but those periods are the exception and not the rule,” and that must be viewed in context with much lower summer market rates and the potential PSNH rate increase associated with the scrubber, as well as long-term market outlooks. *Id.* at 5.

Second, using the La Capra and Liberty Reports as relevant starting points aids the Commission in fulfilling its legislative mandate to expedite this docket by avoiding the expense and time of redoing all the associated analytical work.

For these reasons, the Commission should commence its inquiry based upon the cumulative evidence set forth in the Liberty and La Capra Reports and their underlying data and analysis. The most recent La Capra Report can be used to help define the scope of issues, including the environmental compliance issues presented at a high level by ESS, which should be explored in further detail in this adjudicatory docket. The fact that Staff indicated that it would hire La Capra to update its analysis does not alter the fact that the existing report serves as a highly relevant launching pad for further inquiry and discovery. Any updated report and analysis that La Capra provides in this docket should build off the analysis in its prior report.

For the above reasons, the Commission should consider making the underlying data and analysis from the Liberty and La Capra Reports available to all parties, in exchange for an agreement, as needed, to keep certain categories of information confidential. Moreover, the Commission should use the La Capra Report as a starting point to set a schedule for this docket, regarding issues to be addressed and the order of discovery. For example, Staff and PSNH could provide updates to La Capra or other prefiled testimony by a date certain, and other parties could then propound data requests followed by designation of their own witnesses. Staff and PSNH could then propound data requests to other parties.

Conclusion

CLF thanks the Commission for the opportunity to help shape the scope of this important docket. CLF specifically reserves its right, in accord with the Commission's instructions in this docket, to further elaborate on its positions or to address other issues, in reply to scoping documents filed by other parties.

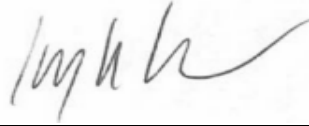
Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has on this 5th day of December been sent by email to the service list in Docket No. DE 14-238.



Thomas F. Irwin (NH Bar No. 11302)