

THE STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

Public Service Company of New Hampshire

Determination Regarding PSNH's Generation Assets

Docket No. DE 14-238

INITIAL SCOPING DOCUMENT OF
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

I. INTRODUCTION

In 2014, the New Hampshire Legislature passed, and the governor signed, HB 1602 (Laws 2014, Chapter 310) which amended various laws, including RSA chapter 369-B and RSA chapter 374-F, with the express purpose of requiring “the public utilities commission to determine if divestiture of Public Service Company of New Hampshire’s (PSNH) remaining generation assets is in the economic interests of PSNH’s retail customers . . .”. Laws 2014, 310:1. The Legislature concluded that in making the required determination the New Hampshire Public Utilities Commission (“Commission”) should look to “maximize economic value for PSNH’s retail customers, minimize risk to PSNH’s retail customers, reduce stranded costs for PSNH’s retail customers, promote the settlement of outstanding issues involving stranded costs, and, if appropriate, provide for continued operation or possible repowering of PSNH’s generation assets.” *Id.* To that end, the Legislature required that the Commission open a docket to “commence and expedite” a proceeding to begin making the necessary determinations regarding PSNH’s continued ownership and operation of its generating assets. *See* Laws 2014, 310:2. Furthermore, the Commission was, for the first time, provided explicit authority to order that PSNH’s generating assets, or some of them, be divested if the Commission ultimately

concludes that the “economic interest of retail customers of PSNH,” would be served by such divestiture, and so long as the Commission provides for the recovery of costs associated with the divestiture. *Id.*

For background, and as described more fully later in this document, PSNH, like other utilities in New Hampshire, began divesting itself of generating assets years ago as part of the state-wide restructuring of the electric industry. Before PSNH was able to complete its divestiture, however, and in response to concern about market volatility and the potential for brown outs, the Legislature intervened and determined that PSNH should retain, for a time, the generating assets that it still owned in 2001. By subsequent acts, the Legislature extended the period for which PSNH was required to retain its generating assets to continue the protections for New Hampshire customers. For many years, retaining PSNH’s generating assets produced substantial benefits for customers, *see* June 7, 2013 Report of Staff and Liberty Consulting in Docket No. IR 13-020 at 7 (noting that for years PSNH was the “low-cost supplier”), and PSNH’s assets continue to produce substantial value. *See, e.g.,* Charles Arlinghaus, *For Now, PSNH’s Bow Plant Saves Ratepayers Millions*, N.H. Union Leader, April 1, 2014, <<http://www.unionleader.com/article/20140402/OPINION02/140409911/1004/opinion>>, last accessed December 4, 2014. By acting as a hedge on high market prices, PSNH estimates that over approximately the last 13 years its generating facilities have saved customers about \$700 million. In light of recent shifts in energy markets, however, the Legislature determined that the Commission should begin this review.

On September 16, 2014, the Commission issued an order of notice identifying certain “preliminary issues” potentially affecting its review, and setting a prehearing conference for October 2, 2014. Prior to that prehearing conference, the Commission received petitions to

intervene from Office of Energy and Planning; the City of Manchester; the City of Berlin; the International Brotherhood of Electrical Workers, Local #1837; the Business and Industry Association of New Hampshire; TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast Inc.; the New England Power Generators Association, Inc.; the Retail Energy Supply Association; Granite State Hydro Association; the Conservation Law Foundation, Inc.; the Sierra Club; the New Hampshire Sustainable Energy Association d/b/a NH Clean Tech Council; and Pentti J. Aalto. On October 2, 2014, PSNH responded to the petitions to intervene, objecting to some. On November 6, 2014 in Order No. 25,733, the Commission granted all requests to intervene, albeit under differing standards depending upon the specific party.

At the prehearing conference the commissioners set a technical session (later confirmed in a secretarial letter dated October 30, 2014) for November 6, 2014 in the docket for the purpose of attempting to limit or define the scope of issues in this matter, to determine whether any issues would be amenable to settlement, and to determine what matters may require written briefs or “scoping documents.” The Commission required that initial scoping memoranda be filed on December 5, 2014 by all parties, and that replies be submitted on January 7, 2015. In this submission PSNH provides its initial discussion of certain relevant issues for purposes of helping to define the scope of matters to be considered by the Commission in making its determination.

At the outset, PSNH notes that there are many substantial questions of law, policy, and procedure that may need to be addressed throughout this matter. PSNH does not intend to provide an exhaustive discussion of such issues in this submission and notes that as facts develop or change and as positions become more focused, PSNH may be required to amend, supplement, or otherwise refine its positions. Through this submission, PSNH points out many of the considerations that it believes will need to be addressed, and its preliminary understanding of the

potential impacts of various decisions in this docket. For clarity of organization in this filing, PSNH will roughly follow the structure set out in the text of HB 1602. Accordingly, PSNH presents its considerations relative to: PSNH’s “remaining generation assets”; “economic interests of PSNH’s retail customers”; stranded costs (and PSNH’s Restructuring Settlement Agreement¹); and divestiture or continued operation of PSNH’s facilities.

II. Generation Assets

In the purpose section of HB 1602, the Legislature directs that the Commission’s review encompass considerations affecting PSNH’s “remaining generation assets.” Laws 2014, 310:1. Later in that same statute the Commission is instructed to determine “whether all or some of PSNH’s generation assets should be divested.” Laws 2014, 310:2. Accordingly, for the Commission to conduct the necessary review and make the necessary determinations, the Commission must first understand and make clear what is included under the umbrella of PSNH’s “generation assets.”

At present, PSNH owns and operates fossil-fired generating units fueled by coal, oil, natural gas, and jet fuel; a biomass-fired unit; and nine hydroelectric units, all totaling approximately 1100 megawatts of rated capacity. *See, e.g.*, Report of La Capra Associates dated March 31, 2014 in Docket No. IR 13-020 at 11-14 for a description of PSNH’s facilities. In addition to these generating facilities, PSNH has two long-term power purchase agreements (PPAs), one with a wind farm generator (24 megawatts of nameplate capacity) that has an initial term ending in 2023, and one with a biomass-fired generator (75 megawatts of nameplate capacity) and an initial term ending in 2031. *Id.* at 14-17. It appears to be evident from the language of HB 1602 that the generating units PSNH owns and operates, regardless of fuel type,

¹ References to the Restructuring Settlement Agreement, or simply the Agreement, are intended to be to the Revised and Conformed Settlement Agreement signed September 22, 2000 and submitted in Docket No. DE 99-099.

are incorporated within the ambit of PSNH's generation assets under review. It appears, however, that the PPAs are not intended to be included.

In the report in Docket No. IR 13-020 produced by La Capra Associates, the review of the various PSNH generation-related assets included analyses of the PPAs identified above. Accordingly, in a prior docket relating to determinations about the present and future status of PSNH's generation, the Commission, through its Staff and consultant, included a review of not just the generation PSNH owns, but also other entitlements which it supports through the PPAs. That review, however, was conducted prior to the passage of HB 1602 and the commencement of the instant docket. As such, regardless of the Commission's prior inclusion of the PPAs, additional clarity is required to understand whether the Commission's determinations relating to PSNH's "generation assets" are to encompass the PPAs.

Retaining the entitlements through these PPAs may have an economic consequence to PSNH and its customers. However, the PPAs are not, strictly speaking, "generation assets" of PSNH and appear to be covered by a statute, RSA 362-F:9, that was not amended or addressed by HB 1602. Thus, those PPAs appear to be outside this review regardless of their economic merits.

Further, HB 1602 itself distinguishes between the concepts of "generation assets" and "commitments or obligations." In Laws 2014, 310:4, which amends RSA 374-F:2, IV, and its definition of "stranded costs," subsections (a), (b), and (c) discuss existing, renegotiated, and new "commitments," respectively, while subsection (d) references "generation assets." To give meaning to the words used in the statute, there must be a differentiation between what the Legislature meant when it used the term "generation assets" and the terms "commitments or obligations."

Similarly, the Restructuring Settlement Agreement carefully differentiated between “generating assets” and “entitlements” or “supply arrangements.”² Throughout the Restructuring Settlement Agreement, the term “generating assets” was used to describe PSNH’s fossil and hydro assets that were detailed in Appendix G of that Agreement. It would have been unnecessary to distinguish between such hard “generating assets” and other contractual obligations if they were intended to have the same meaning.

Moreover, divestiture of certain entitlements or supply arrangements may be complicated, or perhaps prevented, by operation of federal law. Under the Public Utility Regulatory Policies Act (“PURPA”), 16 U.S.C. § 2601, *et seq.*, utilities such as PSNH continue to have an obligation to purchase the output from certain “qualifying facilities” at avoided cost rates established by the state regulatory authority or pursuant to bi-lateral contracts. *See, e.g.*, 18 C.F.R. §292. A divestiture process that attempted to supplant the PURPA rights of certain generators may run afoul of federal law.

For these reasons, PSNH believes that the scope of the “generation assets” covered by HB 1602 that are relevant to this proceeding is limited to the actual fossil and hydro generating facilities owned by PSNH as described in Appendix G of the Restructuring Settlement

² *See* Restructuring Settlement Agreement at line 483, discussing the output of the Company’s “generating assets and entitlements”; line 514, discussing stranded costs “for any generating unit, entitlement or obligation”; line 544, discussing stranded cost “in generation, storage, or supply arrangements”; line 666, discussing “The revenue requirement associated with any generating asset, entitlement, and purchased power obligation”; line 679, discussing revenues “from any generating asset, entitlement or purchased power obligation”; line 891, discussing the sale of output “from PSNH’s generating plants, power purchase obligations and entitlements”; line 1150, discussing divestiture “of its power generation assets and power purchase agreements”; line 1161, discussing the sale of “the power generation assets and power purchase agreements”; line 1507, discussing PSNH’s obligation “for prudently operating its fossil/hydro generating assets, and for prudently managing the generation-related entitlements and purchase obligations”; line 1516, discussing “the prudent marketing of the output of any generating assets, entitlements, or purchase obligations”; line 1519, discussing revenues from “PSNH’s generating stations and entitlements.”

Agreement, and that other commitments, entitlements, and purchase power agreements are outside the scope.³

III. Economic Interests of Retail Customers

a. Economic Interests

In adopting HB 1602, the Legislature retained the use of the term “economic interest” as the standard for determining whether divestiture of PSNH’s facilities is appropriate. At the same time, the Legislature amended the standard for determining whether modification or retirement of PSNH’s facilities is appropriate by replacing the term “public interest” with “economic interest.” Accordingly, the Legislature has made clear that the proper standard for a review of the treatment of PSNH’s generating assets is the “economic interest” standard, rather than the “public interest” standard. What the Legislature has not made clear, however, is how the “economic interest” is to be judged. Accordingly, it is essential to clarify the meaning of that standard and the manner in which it will be applied to PSNH’s generating assets.

In *Appeal of Pinetree Power*, a case relating to PSNH’s wood-fired generating facility, the New Hampshire Supreme Court was called upon to determine whether the then-existing “public interest” standard for modifying one of PSNH’s facilities included consideration of issues beyond “rate relief.” *Appeal of Pinetree Power*, 152 N.H. 92, 96-98 (2005). The Court contrasted the “public interest” standard for modification with the “economic interest” standard for divestiture and noted that because the public interest standard referenced issues beyond rates, such as environmental and security benefits, the “statutory scheme supports the conclusion that the ‘public interest’ of PSNH’s customers encompasses more than simply rates.” *Id.* at 97.

³ PSNH notes that the rate treatment of these PPAs may need to be addressed in the future depending upon the ultimate conclusions reached in this docket, or in related proceedings. At that time consideration must be given to potential restrictions on the disposition of these agreements in state and federal law, as well as in the PPAs themselves. For purposes of this filing, however, PSNH observes only that the PPAs should be excluded from the scope of the review here.

Ultimately, the Court found that “By the plain language of the statute, the public interest standard for modification is broader than just economic interests.” *Id.* Accordingly, based upon the Court’s analysis, the broader “public interest” standard may include issues such as environmental or security benefits, whereas the narrower “economic interest” standard might not. Despite this conclusion, and while noting that the relevant statutes did not actually define “public interest” or “economic interest,” the Court took no steps to define either term or to set out a means for determining, with certainty, what matters reside within the smaller subset described as the “economic interest” standard. Thus, it must be the Commission, in the first instance, to make such distinctions.

In its analysis the Court repeatedly described the “public interest” standard as something more substantial than a review of rates or rate impacts. *See id.* at 96 (“Thus, the customer benefits of restructuring clearly include rate relief.”), 97 (“This statutory scheme supports the conclusion that the ‘public interest’ of PSNH’s customers encompasses more than simply rates.”), 99 (“The PUC concluded, based upon the evidence presented, that the project would yield certain economic benefits and environmental improvements, and that these positive contributions, combined with the likelihood of customer-favorable rate effects, were the basis of its determination that the project was in the public interest of PSNH’s retail customers.”). The implication of these provisions is that a review of the “economic interest” may, in fact, be limited only to the rate impacts on PSNH’s retail customers.

Despite this apparent implication, it may yet be that certain items appearing to fall outside the scope of “economic interests” are determined to be within it. For example, the law states that one of its express purposes is to “minimize risk to PSNH’s retail customers.” Section 310:1. The “security benefits” referenced by the Court would seem to include the minimization

of the risk of impairing reliable electric power capacity needed to provide necessity electric service to customers. In light of New Hampshire's and New England's reliance upon natural gas, which has been scarce at times, and will likely remain so for years, the fuel diversity value of PSNH's fossil and hydro generation assets clearly minimize risk to PSNH's retail customers. To that same end, PSNH outlines other considerations presenting similar classification concerns:

- **Environment:** General concerns about the environment and public health or the potential impact on it from PSNH's facilities appear not to directly implicate "economic interests" of PSNH's retail customers, but are more akin to "public interests." Accordingly, the scope of potential environmental issues must be identified and delimited.
- **Taxes:** Divesting or retiring the facilities could likely have the effect of lowering the tax base of the municipalities in which the facilities are sited, and thereby shift the tax burden. For those municipalities, and their residents, this would have a direct economic effect upon them. It is not clear, however, whether such an effect would qualify as an economic interest at issue in this docket.⁴ Similar effects may occur on state-level taxes.
- **Jobs and local expenditures:** PSNH's generating facilities employ hundreds of people throughout the state and the continued operation of those facilities requires those employees as well as the work of numerous contractors and material suppliers. Operating PSNH's facilities also requires purchasing significant quantities of raw materials, parts and equipment from throughout the State every

⁴ PSNH also notes that there may be other impacts on municipalities and their citizens from the retirement or divestiture of the generating facilities. For example, presently PSNH purchases make-up water from the City of Portsmouth for two of its facilities. Should those facilities no longer operate, the City would no longer collect revenue from PSNH that supports the City's water distribution system, and the costs of that system would be spread to others.

year. Retiring or divesting PSNH's facilities will have an economic effect on the persons and entities who provide labor and materials for the facilities, but it is not clear whether that effect is to be considered when reviewing the economic interest of PSNH's retail customers (beyond the costs of the "employee protections" described in Section 310:3 of HB 1602).

- Rate stability and continuity: While the Supreme Court's opinion in *Pinetree Power* appears to make clear that rate impacts are within the ambit of the "economic interest," it is less clear whether those rate impacts are to be a strict comparison of the relative costs of various courses of action, or whether they are to be coupled with other traditional regulatory concerns such as rate stability. See, e.g., *Aquarion Water Company of New Hampshire, Inc.*, Order No. 25,539 (June 28, 2013) at 26 (approving the utility's specific infrastructure replacement program, in part, as a means to avoid rate shock); *Investigation into Implementation of the Energy Policy Act of 2005*, Order No. 24,763 (June 22, 2007) at 20 (Commission agreeing that customers value rate stability but concluding that this customer interest needed to be balanced with other interests); *Public Service Company of New Hampshire*, Order No. 24,369, 89 NH PUC 523 (September 2, 2004) at 20 (noting the Commission's interest in avoiding "a return to the former era of rate shock" when approving PSNH's rate settlement). The rates charged to support PSNH's generation have traditionally been relatively

stable and reliable, while recent market-based rates have been volatile and unpredictable.⁵ Rate stability should factor into the Commission's analysis.

- Impacts on competitive generators or suppliers: While PSNH divesting or retiring its generating facilities may have some effect on the market for electricity, the potential impacts on competitive generators or suppliers would appear to be outside the scope of the "economic interest of retail customers of PSNH" standard established by the Legislature. Further, while the Commission has granted intervenor status to many such unregulated generators, suppliers, and aggregators, their profit-motive interests are clearly excluded from consideration in this proceeding.
- Capacity Market: Should PSNH's generating assets be retired, either prior to or following divestiture, it would remove substantial capacity from the New England market. Doing so would, all else being equal, cause forward capacity market prices to rise even more than has occurred recently, which would have an effect on PSNH's customers. Whether that is a sufficiently distinct or direct impact to include in this analysis is not clear.

While there may be other considerations, this list serves to demonstrate that PSNH, and in fact all parties to this proceeding, need additional clarity about the scope of issues that will fall within the Commission's review. PSNH does note in passing, however, that to the extent the Commission finds the restructuring principles in RSA 374-F:3 applicable to the economic interests in this proceeding, PSNH would caution against relying on the general pronouncements therein to direct the docket. Through HB 1602, the Legislature has expressly concluded that the

⁵ As the Commission is aware, ISO-NE has implemented a winter reliability program over the last few years to address this very issue. PSNH's ability to participate in this program has resulted in economic benefits to PSNH's customers.

economic interest of PSNH's retail customers is the standard by which any determinations should be measured. Accordingly, the Commission must determine whether the interests and issues that may arise in this docket are indeed "economic interests" or if they are more akin to "public interests" that merely touch upon economic considerations. Conclusions on these matters will frame any economic analysis of the value of PSNH's facilities to PSNH, its customers, and the state.

b. Retail Customers

At present, PSNH, like all other electric utilities in the state, has essentially two distinct sets of customers. For all customers within its franchise territory, PSNH provides the traditional "poles and wires" delivery service, and charges customers for the costs of providing that service. Through these delivery charges, all customers pay for the costs of PSNH's distribution system.⁶ By this measure, every customer connected to PSNH's electric distribution system is a "retail customer" of PSNH.

Additionally, for those customers choosing to avail themselves of it, PSNH (like other utilities) provides the electricity flowing over its wires, and charges its actual, prudent and reasonable costs of such electricity through its default energy service rate. Broadly speaking, for PSNH the energy service costs paid by customers are the costs of PSNH continuing to own and operate its generating facilities and to otherwise procure electricity on the customers' behalf if it is not supplied by PSNH's generating facilities, for example, through PPAs. For those customers procuring their energy from sources other than PSNH, they pay for those sources of energy through arrangements made with their chosen providers. For those customers, however, PSNH must, and does, stand ready to serve them at any time should they be unwilling or unable to be

⁶ In addition, all distribution customers pay for PSNH's "stranded costs" (discussed more fully in section IV of this memorandum). Those stranded costs have included the legacy costs of generating facilities previously owned by PSNH, and would include certain costs relating to PSNH's current facilities, should PSNH divest them.

supplied by another provider. The ever changing group of customers purchasing energy service from PSNH represents a separate subset of “retail customers” to PSNH.

As a result of the fact that PSNH has two groups of customers – one consisting of all distribution customers and the other being the ever varying subset of all customers who purchase energy service from PSNH – and that each group of customers may have different types of costs for which they would be responsible, the interests of each group must be examined. If PSNH is to divest itself of its generating facilities, such divestiture may create stranded costs. In that HB 1602 specifically directs the Commission to provide a means for PSNH to recover the costs of divestiture, the Commission would be required to craft a method by which those costs are to be recovered. Pursuant to the Restructuring Settlement Agreement, PSNH has a right to have such costs recovered through a non-bypassable charge levied on all distribution customers.

Accordingly, the economic interests of all distribution customers, including those not taking energy service from PSNH, would be affected by determinations on PSNH’s generation-related costs.

Further, divesting PSNH’s facilities will mean that those customers taking energy service from PSNH will no longer be paying costs attributable to PSNH’s generating facilities through their energy service rates, but would be paying the costs of energy procured by some other method. As such, they would likely lose the rate continuity and stability to which they are accustomed, and the Commission would have diminished oversight of the rates charged for energy. In exchange, however, those customers would pay for energy based upon the market rates for such energy, which are presumed to be controlled by market forces. The economic interests of those customers in obtaining market-based rates for energy, which have recently been

extremely volatile⁷, would need to be balanced against their economic interests in having PSNH retain its facilities, which reduce volatility.

PSNH believes that the Commission must conduct its analysis by reviewing the economic interests of, and potential or anticipated impacts on, each subset of PSNH's retail customers – those that take energy service from PSNH, and those that do not. In that the interests of these groups differ, the Commission's analysis must cover all groups to ensure that the analysis sufficiently addresses their concerns.

IV. Stranded Costs and PSNH's Restructuring Settlement Agreement

As noted above, the divestiture of PSNH's facilities, should it occur, would likely create stranded costs. That potential was known years ago when restructuring began, and has not changed. Provisions were once made to address those costs for PSNH and its customers, but the delay in realizing the completion of restructuring has likewise delayed the implementation of those provisions. The issue of recovery of stranded costs was resolved by the Restructuring Settlement Agreement, which remains binding (except for certain matters impacted by *force majeure*), and is not a matter within the scope of this docket. The Commission can, and should, conduct the docket under the belief and conclusion that PSNH will be entitled to recover all of its stranded costs, whatever their amount, should it divest some or all of its facilities.

When the Legislature determined that restructuring of the electric industry should occur in the 1990s, it required the Commission to develop a plan for restructuring the state's incumbent utilities and existing regulatory framework. *See* RSA chapter 374-F (Supp. 1997). Pursuant to the law and the Commission's plan, the state's electric utilities were to exit the business of

⁷ *See, e.g.*, the Commission's November 24, 2014 Order of Notice in Docket No. DE 14-337, noting residential overall electric rate increases for Liberty Utilities and Unital of 47% and 44%, respectively (as a result of energy rate increases of 79.7% for Liberty Utilities (Order No. 25,719) and 84.8% for Unital (Order No. 25,720)).

owning and operating electric generating facilities and would leave electric generation services to be provided by unregulated entities.

PSNH challenged the Commission's plan in various forums as violating certain state and federal laws as well as the State and Federal constitutions. For relevant background *see, e.g., Public Service Company of New Hampshire v. Patch*, 962 F. Supp. 222 (D. N.H. 1997); *Public Service Company of New Hampshire v. Patch*, 173 F.R.D. 17 (D. N.H. 1997); *Public Service Company of New Hampshire v. Patch*, 136 F.3d 197 (1st Cir. 1998). Ultimately, this litigation and certain other issues surrounding the restructuring of the electric industry in New Hampshire generally, and PSNH's restructuring specifically, were resolved through a Restructuring Settlement Agreement. This settlement was deemed by the Legislature to be a reasonable means of resolving the financial issues caused by restructuring. *See* RSA chapter 369-A. The Restructuring Settlement Agreement, as ultimately revised and conformed, was signed on September 22, 2000, by Jeanne Shaheen as Governor of the State of New Hampshire; Philip McLaughlin as Attorney General for the State of New Hampshire; Thomas Getz as Executive Director and Secretary of the New Hampshire Public Utilities Commission; Deborah Schachter as the Director of the Governor's Office of Energy and Community Services (now the New Hampshire Office of Energy and Planning); Michael Morris as Chairman, President and Chief Executive Officer of Northeast Utilities; and Gary Long as President and Chief Operating Officer of Public Service Company of New Hampshire. That Agreement was submitted to and considered by the Commission in Docket No. DE 99-099.

Following extensive discovery, hearings, and briefing, the Commission initially approved the Restructuring Settlement Agreement subject to certain conditions in Order No. 23,443 issued on April 19, 2000. That order noted the participation of nearly thirty parties in the docket,

including numerous members of the executive and legislative branches of New Hampshire state government; numerous municipalities; electric generation, transmission and distribution companies and entities; environmental groups; community action organizations; and customer advocacy groups, in addition to the parties to the Agreement.

Once initially approved, actually consummating the settlement agreement required, among other things, the passage of new legislation relating to PSNH's ability to "securitize" certain stranded costs. In response to this need for legislative action, the Legislature passed SB 472 (Laws 2000, Chapter 249, and later codified as RSA chapter 369-B) which became effective on June 12, 2000. That law ratified the Commission's April 19 order, and, at the same time, required amendments to the terms of the order and the underlying settlement agreement if restructuring was to proceed. *See* Order No. 23,549 at 63 (noting that although the law did not specifically amend the Restructuring Settlement Agreement, it effectively produced that result). PSNH and the other settling parties agreed to the amendments as provided in the law, and, following additional process, on September 8, 2000, the Commission issued Order Nos. 23,549 and 23,550 approving the amended settlement agreement and the terms for PSNH's "securitization" of certain costs. As noted above, the revised and conformed settlement agreement was signed on September 22, 2000 to comport with the Commission's orders and the legislation.

Following the approval of the Restructuring Settlement Agreement, certain parties appealed the Commission's decision to the New Hampshire Supreme Court. *See generally, Appeal of Campaign for Ratepayers Rights*, 145 N.H. 671 (2001). On appeal, the petitioners contended on various bases that the Restructuring Settlement Agreement unlawfully permitted PSNH to recover its stranded costs from customers. *Id.* at 674. The Court, however, upheld the

Agreement and its treatment of stranded costs and affirmed the Commission's order approving the Restructuring Settlement Agreement. *Id.* at 673.

In passing on the Restructuring Settlement Agreement, the Court noted that what created "stranded costs" was "the deregulation of generation services." *Campaign for Ratepayers Rights*, 145 N.H. at 675, and that, "[a]bsent deregulation, PSNH would likely recover these costs through its rates." *Id.* In other words, had deregulation never occurred, PSNH would have recovered the costs of its generating facilities from customers through traditional ratemaking and it may not have had to address the creation of stranded costs. If the law had not changed, the Commission would have reviewed the facilities to ensure that the costs of investments in them, and the operation of them, were prudent, and that the resulting rates to recover those costs were just and reasonable. Because, however, generation services were deregulated by the Legislature, and the facilities were to be divested, upon divestment the prudent costs of the investments in those facilities, above the revenues procured through a sale, would not be recovered in the traditional way, and another means was required.

As part of the Restructuring Settlement Agreement, and to mitigate the overall amount of stranded costs, PSNH was required to take a pre-tax write off of approximately \$367 million. In essence, \$367 million in shareholder value was simply to be wiped from PSNH's books. PSNH wrote off that amount in late 2000. PSNH also wrote off an additional \$6 million relating to the settlement of stranded costs pertaining to the New Hampshire Electric Cooperative.

Additionally, to bring certainty to the process, PSNH was required to dismiss, with prejudice, various existing lawsuits related to restructuring. PSNH sought and received such dismissals. Therefore, through the Agreement, PSNH both shared in the costs of restructuring, and gave up

its right to pursue then on-going litigation, in exchange for being able to collect its remaining stranded costs from customers.

In 2001, PSNH was in the process of divesting itself of its fossil and hydro generating facilities as required by the Restructuring Settlement Agreement. As noted in the Restructuring Settlement Agreement, PSNH anticipated receiving approximately \$360 million in proceeds from those sales, though the final amount would not be known until the sales were complete. Under the Restructuring Settlement Agreement, the actual proceeds received from any sales, if above the net book value of the facilities, would be credited to the non-securitized, Part 3, stranded costs and would reduce the total amount customers would pay. If, however, the sale proceeds turned out to be below the net book value of the facilities, the unrecovered amount would be added to the non-securitized, Part 3, stranded costs and would be recovered from customers. Restructuring Settlement Agreement at 22. In either event, the stranded costs to be paid by customers were required to include the amounts attributable to the divestiture of PSNH's fossil and hydro generating facilities, regardless of the ultimate amount received.

In 2001, in response to substantial volatility, price spikes, and concerns about supply shortfalls (*i.e.*, brown outs) in other restructured electric markets, the Legislature passed HB 489 (Laws 2001, Ch. 29), which amended various laws including portions of RSA chapter 369-B. This new law expressly prevented PSNH from divesting itself of its fossil and hydro generating assets prior to "33 months after competition day as defined in RSA 369-B:2, III." Laws 2001, 29:13. Competition day, as defined, occurred on May 1, 2001. Accordingly, despite PSNH's actions taken to comply with the Restructuring Settlement Agreement and the prior law by divesting its fossil and hydro generating facilities, PSNH was barred from divesting itself of its

fossil and hydro generating assets prior to February, 2004.⁸ Notably, included in this session law was the express finding of the Legislature that:

Changes to RSA 369-B and RSA 374-F which are designed to protect PSNH customers from current price volatility must be accomplished in a manner that shall not affect the validity, effectiveness, or finality of Order No. 23,550 issued by the public utilities commission, and does not diminish the value of the settlement agreement to either PSNH or PSNH's customers.

Laws 2001, 29:4.⁹ Accordingly, the value of the settlement agreement, including its provisions on the treatment of stranded costs relating to PSNH's fossil and hydro generating facilities, was to be preserved, irrespective of this new restriction on PSNH's ability to divest its generating assets.

In 2002, the Legislature passed HB 284 (Laws 2002, Ch. 130) and created the "Multiple Pollutant Reduction Program," which was codified in RSA chapter 125-O. This legislation was specifically directed at the generating assets PSNH was required to retain until at least 2004. In fact, the law specifically defined the "affected sources" to which it related as the:

fossil fuel burning steam electric power plant units in this state, specifically Merrimack Units 1 and 2 in Bow; Schiller Units 4, 5, and 6 in Portsmouth; and Newington Unit 1 in Newington, excluding any of these units that may be repowered.

RSA 125-O:2, I.¹⁰ Thus, the Legislature was well aware of the generating facilities it was referring to in passing this law. As concerns the matter of stranded costs, the Legislature made specific findings about how such costs would be addressed by stating:

⁸ See also Order No. 25,545 (July 15, 2013) at 5-6 (Commission agreeing that the 2001 legislation required PSNH to retain its generating assets until 33 months after competition day).

⁹ PSNH notes that the omission of this express finding from codification in RSA chapter 369-B, or elsewhere, does not diminish its effect; as part of the session law it remains the law in the State of New Hampshire and applies with equal force as a law that was ultimately codified. See 41 N.H.B.J. 32, 36 (2000) ("*The session laws are the laws enacted by the legislature from a particular legislative session. . . . The distinguishing factor between permanent session laws and permanent RSAs is the range of application. Permanent RSAs are of general applicability, but permanent session laws are not.*" (emphasis added)).

¹⁰ PSNH's Schiller Unit 5 was repowered to burn wood chip fuel beginning in 2006, though it must use some of the plant common to all Schiller units to operate.

The general court finds that the economic interests of ratepayers will be best served through the flexible implementation of an integrated, multi-pollutant emission reduction strategy as electric industry deregulation proceeds in New Hampshire. The advance knowledge of the requirements of this act, and a flexible regulatory approach used to implement them, will reduce uncertainty and risk for prospective buyers of Public Service of New Hampshire's existing fossil fuel burning steam electric power plants, thus enhancing their value at divestiture. Providing prospective buyers a significant time period in which to recover their investment will also enhance the divestiture value of these facilities. Combined, these factors will maximize recovery from the divested power plant assets, correspondingly reduce ***the stranded costs that must be paid over time by ratepayers***, and thus allow electric rates to decline further or faster than they would otherwise.

Laws 2002, 130:1 (emphasis added). Accordingly, pursuant to this enactment, the Legislature continued to conclude that at the point PSNH might divest itself of its generating facilities, the stranded costs of such divestment "must be paid" by customers. Thus, for the second time since the final approval of the Restructuring Settlement Agreement, the Legislature confirmed that the obligation to pay for the stranded costs of PSNH's fossil and hydro facilities remained with customers.

In 2003, the Legislature passed SB 170 (Laws 2003, Ch. 21) and again forbade PSNH from divesting its fossil and hydro generating facilities until a later date. Under the latest provisions, PSNH was specifically precluded from divesting its facilities until after April 30, 2006. Laws 2003, 21:4. After that date, PSNH was permitted, but not required, to divest its generating facilities, but could only do so after the Commission first determined that divestiture would be in the economic interest of PSNH's retail customers. Laws 2003, 21:4; RSA 369-B:3-a (Supp. 2003). Additionally, to comply with the law when rendering a determination on the economic interest of divesting the facilities, the Commission was required to provide for the recovery of PSNH's costs relating to divestiture. Laws 2003, 21:4; RSA 369-B:3-a (Supp. 2003). Thus, for the second time, the Legislature prevented PSNH from fulfilling the divestiture

requirements of the Restructuring Settlement Agreement, but, for the third time, confirmed the obligation of customers to pay the stranded costs of any divestiture.

As noted previously, in 2014 the Legislature passed HB 1602 requiring the Commission to “commence and expedite” a process of determining whether some or all of PSNH’s generating assets should be divested. Again, however, to comply with the law the Commission was required to provide PSNH a means to recover the costs of divestiture. Laws 2014, 310:2.

Additionally, HB 1602 amended the definition of stranded costs in RSA 374-F:2, IV to include costs relating to retirement or divestiture of PSNH’s facilities pursuant to RSA 369-B:3-a. Laws 2014, 310:4. In other words, the Legislature broadened the definition of stranded costs to ensure that any costs of divestiture or retirement would be included. The Commission Staff, in its April 1, 2014 report titled “Preliminary Status Report Addressing the Economic Interest of PSNH’s Retail Customers as it Relates to the Potential Divestiture of PSNH’s Generating Plants” in Docket No. IR 13-020, noted that without the change to RSA 374-F:2, IV it was possible that post-2003 capital additions to PSNH’s generating facilities might not be included as stranded costs. The Staff concluded, however, that the 2014 amendment to RSA 374-F:2, IV was “sufficient to encompass the impacts of a potential future plant divestiture” by including those costs within the definition of stranded costs. *See* April 1, 2014 Preliminary Report of Commission Staff at 12-13.

In its Report, the Staff further notes relative to stranded costs: “‘Stranded costs’ can generally be defined as uneconomic assets or investments that an electric utility would reasonably expect to recover under the regulatory structure that existed prior to electric industry restructuring, but would not be recovered under the restructured industry regulatory structure without the provision of a specific recovery mechanism.” Staff Report in Docket No. IR 13-020

at 7, fn. 9.¹¹ Thus, PSNH's stranded costs, whatever their amount and whenever incurred, are the costs of generating facilities that PSNH would no longer be able to recover because of the restructuring of the electric markets. The passage of time and multiple products of legislation have done nothing to undermine that definition, nor limit PSNH's right to recover its stranded costs.

Thus, approximately 15 years ago PSNH, NU, and the State of New Hampshire entered into a settlement which was approved by the Commission, ratified by the Legislature, and affirmed by the Supreme Court, that required PSNH to divest its interests in all of its generating facilities and which provided for recovery of stranded costs. Before PSNH could complete the process all had agreed to, but after PSNH had written off hundreds of millions of dollars in shareholder value and voluntarily dismissed its legal challenges, the Legislature determined to delay the process, while yet concluding that PSNH was still entitled to the benefits of the Restructuring Settlement Agreement as it relates to stranded costs.

The Restructuring Settlement Agreement contains a fair and equitable resolution for the treatment of PSNH's stranded costs. Certain of the costs would be paid by customers over time, and other costs would be paid by PSNH's shareholders.¹² To the extent that it has not been fully realized, PSNH expects and anticipates that all parties to the Restructuring Settlement

¹¹ See also, September 15, 2010 Testimony of Daniel Allegretti on Behalf of Constellation NewEnergy, Inc., Constellation Energy Commodities Group, Inc., and the Retail Energy Supply Association in Docket No. DE 10-160 at 19-20 (Noting that stranded costs recovery is a mechanism intended to permit the utility to recover its costs to serve customers following "the amendment of the regulatory compact through the introduction of customer choice.")

¹² As to PSNH's shareholders, "The agreement require[d] PSNH to write off nearly \$400 million of its stranded costs. In this way, the agreement require[d] PSNH's investors to bear a portion of its stranded costs." *Campaign for Ratepayers Rights*, 145 N.H. at 675. PSNH, as noted, took the required write off in late 2000 and in so doing lived up to its obligation to have its shareholders bear a portion of the costs. Accordingly, PSNH has fulfilled its obligations under the Restructuring Settlement Agreement by sharing in the disposition of the stranded costs. Therefore, PSNH not only has a vested right in the execution of the remainder of the Agreement, but to deny that right when PSNH has satisfied its obligations would be manifestly unfair, would violate due process and would constitute a taking as well as a repudiation of the Restructuring Settlement Agreement. Should the value of the Agreement to PSNH be denied, PSNH would have Constitutional and contractual rights to recoup the value of the write off it took in 2000, with carrying costs.

Agreement will not repudiate the Restructuring Settlement Agreement, but will continue to abide by their obligations under that Agreement and ensure that PSNH is able to recover its stranded costs.¹³

PSNH also notes that throughout Docket No. DE 99-099 numerous parties raised voluminous arguments about PSNH's stranded costs and which of those costs, if any, should be recovered and in what way they should be recovered, if at all. Ultimately, and over the various objections and arguments, the Commission approved, and the Supreme Court affirmed, the Restructuring Settlement Agreement. Therefore, the manner of stranded cost recovery has been litigated and decided. Upon any divestiture of its fossil and hydro assets, PSNH must credit customers for amounts received above its net book value, and has the right to charge customers for the amounts below the net book value.

Moreover, as the Commission conducts this docket and considers the economic interests of customers in determining a course for the disposition of PSNH's generating facilities, operating under the certainty of PSNH's recovery of stranded costs will eliminate perhaps the most contentious issue and allow for an orderly and prompt process. As noted above, in Docket No. DE 99-099 numerous parties raised voluminous arguments about how PSNH's stranded costs would be defined and recovered, the State (through the Governor, Attorney General, *et al.*) agreed to a settlement on the issue, and the Commission and Supreme Court affirmed that resolution by upholding the Restructuring Settlement Agreement. There is no legal basis to relitigate the matter. Concluding that PSNH is entitled to full recovery of its stranded costs will: help define the scope of the docket; help direct the analysis of the economic interest of customers; avoid potentially protracted debate on a settled issue; recognize the Commission's

¹³ Restructuring Settlement Agreement at line 2131: "The Parties agree to support this Agreement before the PUC and in any related legal proceedings or legislative inquiries or hearings... ."

on-going approval of the Restructuring Settlement Agreement so long as necessary to fulfill the requirements of RSA chapter 369-B; and better enable the Commission to meet the requirement of the Legislature to expedite this review. There is no reason to conclude that the issue of PSNH's entitlement to the full recovery of its stranded costs under the Restructuring Settlement Agreement remains in debate. The law is settled, consistent, and clear – PSNH is entitled to full recovery of its stranded costs.

With respect to other issues in the Restructuring Settlement Agreement, PSNH acknowledges that the passage of time and intervening events may have made fulfillment of some of the requirements difficult or impossible and does not, therefore, contend that the Restructuring Settlement Agreement is, in all respects, inviolate. For example, in that the Part 3 stranded costs have now been fully amortized and the Recovery End Date has passed, any newly created stranded costs may require adjusting the precise manner in which recovery is obtained from that set out in the Restructuring Settlement Agreement. Accordingly, PSNH makes clear that although the issue of stranded cost recovery is settled, PSNH understands that there may, for various reasons, need to be alterations to the strict terms of the Restructuring Settlement Agreement to achieve the goals set out by the Legislature in this proceeding while protecting the *quid pro quo* bargained for by PSNH and NU when it wrote off hundreds of millions of dollars to effectuate that Agreement.

V. Repowering and Continued Operation

Lastly, HB 1602 states that among the issues to be reviewed are whether repowering or continuing to operate PSNH's generating units, rather than divesting or retiring them, is the more appropriate course. Though not express, it appears that the Legislature is concerned about issues such as the current winter reliability facing New England, caused in great part by over-reliance

on one fuel source, *i.e.*, natural gas, without an increase in the infrastructure needed to deliver the gas. Divesting PSNH's generation assets at any price – even one in excess of book value – which could result in capacity deficiencies leading to curtailments in the supply of a necessity service, cannot be condoned. PSNH notes that such a situation arose recently in the sale of the Brayton Point generating station, where a new owner found it beneficial to retire the plant because such retirement resulted in increased capacity revenues for existing generation within the owner's portfolio. Therefore, the Commission's analysis should include uninterrupted and reliable provision of electricity within the "economic interest" of customers that is the scope of this proceeding. Unless and until the region's generation capacity issues have been resolved, any divestiture must protect customers by requiring that no generation that uses fuels other than natural gas be retired.

Ultimately, should the Commission determine that retaining PSNH's generation portfolio is in the best interests of PSNH customers, provisions should be made to address the manner in which default service is provided. One potential resolution could be to establish a non-bypassable charge or credit that would be equal to the net difference between the revenues derived from the sale of the portfolio outputs, including those in the PPAs, into the wholesale spot markets netted against the costs of PSNH's generation portfolio. By such a mechanism, all customers would benefit equally from the decision to retain the generating assets. Separately, PSNH could then procure its default service requirements in a manner similar to other utilities. By such a method, PSNH's generation would not influence the competitive market and all utilities would operate similarly. At the same time, all customers of PSNH would share equally in the benefits of PSNH's generation, which would continue to act as a hedge against volatile gas prices, and which would ensure the retention of all capacity to protect reliability.

Respectfully submitted this 5th day of December, 2014.

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

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CERTIFICATE OF SERVICE

I certify that on this date I caused this document to be served to parties on the Commission's service list for this docket.

December 5, 2014



A handwritten signature in blue ink, consisting of several overlapping loops and lines, positioned above a horizontal line.