

DE 03-166

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Petition for Authority to Modify Schiller Station

Order Following Hearing

O R D E R   N O.   24,276

February 6, 2004

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**I. PROCEDURAL HISTORY**

On August 28, 2003, Public Service Company of New Hampshire (PSNH) filed a petition with the New Hampshire Public Utilities Commission for approval under RSA 369-B:3-a of a proposed modification of its Schiller Station in Portsmouth. PSNH presently owns and operates three coal-fired boilers (with backup oil-burning capacity) at Schiller Station and seeks authority to modify one of them, Unit No. 5, to allow it to burn wood fuel as well as coal. RSA 369-B:3-a provides that PSNH may "modify or retire" any of its generation assets upon a finding

by the Commission "that it is in the public interest of retail customers of PSNH to do so" and so long as the Commission "provides for the cost recovery of such modification or retirement." Notwithstanding the restructuring of New Hampshire's electric industry, RSA 369-B:3-a also requires PSNH to retain its current portfolio of generation assets until at least April 30, 2006.

The Commission issued an Order of Notice on September 4, 2003, scheduling a Pre-Hearing Conference for September 17, 2003, waiving the 14-day notice requirement in the Commission's rules, and establishing a deadline for intervention petitions. Timely petitions were received from New Hampshire Timberland Owners Association (NHTOA), Local 1837 of the International Brotherhood of Electrical Workers (IBEW), which is the collective bargaining agent for some of PSNH's employees at Schiller Station, the Office of Energy and Planning (OEP) and four existing wood-fired New Hampshire power producers: Pinetree Power, Inc., Pinetree Power-Tamworth, Inc., Bridgewater Power Company, L.P. and Hemphill Power & Light Company, appearing jointly (collectively, the "Existing Wood-Fired Plants"). In addition, the Commission received a petition for limited intervenor status from the City of Portsmouth. The Office of Consumer Advocate (OCA) entered an appearance on behalf of residential ratepayers pursuant to RSA 363:28.

The Pre-Hearing Conference took place as scheduled. At the Pre-Hearing Conference, the City of Portsmouth withdrew its intervention request; all other pending intervention requests were granted without opposition. Following the Pre-Hearing Conference, the parties and Staff conducted a technical session at which they agreed upon a proposed procedural schedule to govern the remainder of the proceeding. The Commission approved the proposed schedule in Order No. 24,211 (Sept. 25, 2003). On September 23, 2003, the City of Portsmouth submitted a letter from its city manager, noting concerns about the increases in traffic congestion, air quality, noise, and road maintenance as a result of the project and the truck traffic it would generate.

On September 30, 2003, the Commission received a late-filed intervention request from Steven Hart, a Portsmouth resident and PSNH customer. Mr. Hart indicated his willingness to abide by the procedural schedule approved in Order No. 24,211. The Commission granted Mr. Hart's intervention request by secretarial letter on October 7, 2003.

Discovery ensued. PSNH filed motions for confidential treatment with respect to certain documents furnished in discovery: PSNH's bid proposal to the Massachusetts Technology Cooperative in connection with Renewable Energy Certificates (RECs) and the Company's boiler specifications and other

construction bid documents associated with the project. The Existing Wood-Fired plants objected to the motion and accompanied their pleading with a Motion to Compel Discovery and a request that the Commission resolve the dispute expeditiously. On October 22, 2003, PSNH advised the Commission by letter that it had furnished the construction bid documents to counsel for the Existing Wood-Fired Plants, subject to an agreement by the Existing Wood-Fired Plants to limit disclosure of the contents of the documents to counsel and expert witnesses for these jointly appearing intervenors. The Existing Wood-Fired Plants thereafter withdrew their discovery motion.

The New Hampshire Department of Resources and Economic Development (DRED) filed a letter in support of the PSNH proposal on October 8, 2003. On October 10, 2003, Local 1837 of the IBEW submitted a letter in support of the project.

On October 15 and 16, 2003, the Commission received pre-filed direct testimony from Mr. Hart, the NHTOA, the OCA and the Commission Staff. PSNH, the Existing Wood-Fired Plants and the OEP submitted legal briefs on October 20, 2003. On October 22, 2003, PSNH filed a settlement agreement it had entered into with the NHTOA, resolving all issues between those two parties. The Existing Wood-Fired Plants submitted a letter clarifying one issue in their brief on October 31, 2003.

The Society for the Protection of New Hampshire Forests submitted a letter in support of the project on October 23, 2003. The Business and Industry Association of New Hampshire and the Audubon Society of New Hampshire likewise filed statements of support on October 24, 2003, as did the Greater Portsmouth Chamber of Commerce on October 27, 2003.

Evidentiary hearings began on October 27, 2003. The Commission granted the pending PSNH confidentiality motions. Noting that the legal brief submitted on behalf of Mr. Hart raised issues of due process related to notice and the timing of the hearings, as well as the applicability of RSA 162-H (the site evaluation statute) to the instant proceeding, the Commission ruled that to the extent Mr. Hart's pleading comprised a motion to dismiss or a motion for extension of time it would be denied. The Commission noted that it followed established practice in this case with respect to notice and scheduling matters, and concluded that nothing in RSA 162-H precluded this proceeding from moving forward concurrently with any separate proceedings before the Site Evaluation Committee pursuant to that statute.

After a full day of testimony, the hearing was reconvened on October 31, 2003 and, at the conclusion of that day's proceedings, an additional day of hearings was scheduled for November 6, 2003. On November 4, 2003, the Commission

received several filings. PSNH submitted certain documents it had received from project bidders. The Existing Wood-Fired Plants filed a motion for expedited hearing and for an order for PSNH to show cause why it should not be subject to fines and other penalties, arising out of a previous ruling at hearing that PSNH should produce certain documents relating to the bidding process. PSNH submitted a pleading in opposition to the motion.

On November 5, 2003, the OSPE filed an opposition to the motion of the Existing Wood-Fired Plants, the plants themselves submitted a pleading in support of their motion and Mr. Hart submitted a pleading joining the motion. On November 6, 2003, PSNH filed an objection to the pending motion and an additional motion seeking reconsideration of the Commission's oral ruling concerning the production of documents received by PSNH from bidders.

When the hearing resumed on November 6, 2003, Mr. Hart was among the witnesses who testified. On cross-examination by PSNH, Mr. Hart was asked whether he would support the project if a Portsmouth contractor who does not use union labor but pays competitive wages were engaged to build the boiler. See tr. 11/6/2003 at 122. At this point, through counsel, Mr. Hart submitted a written motion to prohibit the cross examination of Mr. Hart with respect to his "concerted activity," which the

motion asserted enjoys such protection under the National Labor Relations Act. The Commission took the motion under advisement, invited written responses to Mr. Hart's motion by November 12, 2003 and excused Mr. Hart from the stand, subject to recall on an additional hearing day, i.e., November 14, 2003.

The Commission also took up the pending motion related to the bidders' documents and urged the parties to resolve the dispute by agreement, taking a recess for that purpose. Following the recess, the parties reported an agreement resolving the dispute and providing for the filing and disclosure of certain documents provided to PSNH by bidders, but with the identity of the bidders (and related identifying information) redacted, in light of the fact that the process of reviewing the bids and negotiating with bidders was then still ongoing. The Existing Wood-Fired Plants withdrew their motion without prejudice. PSNH filed the documents in question on November 10, 2003.

On November 12, 2003, the Commission received pleadings from the OSPE, PSNH and the Commission Staff in opposition to Mr. Hart's motion concerning his testimony. By secretarial letter the following day, the Commission ruled on Mr. Hart's motion. The Commission determined that (1) it was not necessary to resolve Mr. Hart's contentions with respect to the National Labor Relations Act, because inquiry into Mr.

Hart's union membership would be prohibited on the ground of irrelevance, and (2) Mr. Hart could be cross-examined with respect to the circumstances under which he would support the Schiller project. Specifically, the Commission ruled that inquiry was proper into whether the reference to "good jobs" in Mr. Hart's pre-filed direct testimony could be equated with "union jobs" and whether he was proposing that, as a condition of approving the proposal, the Commission require PSNH to employ union labor. The Commission further determined that Mr. Hart's motives for intervening in the case were not relevant but that it would be fair to inquire of Mr. Hart how he as an individual might benefit from the position he was recommending to the Commission.

The Commission received two filings on November 13, 2003. Mr. Hart filed a motion to strike certain portions of Staff's memorandum in opposition to his motion related to cross-examination. The City of Portsmouth, through its city manager, submitted a letter reiterating its concerns about PSNH's plans for transporting wood fuel to Schiller Station. The City noted that consideration of alternative modes of transportation, specifically rail transportation, could affect the overall cost of the project and thus whether it meets the standard set forth in RSA 369-B:3-a.

The hearing resumed, and concluded, on November 14, 2003. Mr. Hart withdrew his motion related to the Staff brief at hearing. The Commission asked PSNH to file the contract documents it executes with the successful bidder, when available, for inclusion in the record. The parties and Staff made closing arguments and the Commission took the matter under advisement.

On December 22, 2003, the Commission advised the parties by letter that it wished PSNH to file, for inclusion in the record, a full description of the fuel transportation plan associated with the project. PSNH filed a response to this request on December 24, 2003. On January 6, 2004, the Commission similarly requested that PSNH submit for inclusion in the record a copy of the Company's entire application with respect to the project filed with the City of Portsmouth's planning board. PSNH filed the requested documents on January 12, 2004.

PSNH submitted a copy of the executed contract documents on January 9, 2004, accompanied by a motion for confidential treatment. Mr. Hart interposed a partial objection to the confidentiality motion on January 15, 2004, to which PSNH responded on January 21, 2004.

On January 23, 2004, the Existing Wood-Fired Plants submitted a motion to strike from the record a portion of PSNH's

contract filing of January 9, 2004. In response, PSNH agreed in a filing of January 26, 2004 to withdraw the challenged materials from the record but asked, instead, that they be treated as a supplemental response to discovery queries previously posed to the Company. In reply, the Existing Wood-Fired Plants modified their request on January 29, 2004 to require any copies provided to the Commission or anyone advising the Commission be returned to PSNH.

The Site Evaluation Committee issued a written decision on January 29, 2003 with respect to whether the proposed modification of Schiller Station required approval of that Committee pursuant to RSA 162-H. It was the decision of the Site Evaluation Committee that, accepting the representations of PSNH about the project to be correct, "the replacement of one coal-burning unit with the proposed wood burning unit" at Schiller Station does not trigger the jurisdiction of the committee. The Site Evaluation Committee stressed that if any circumstances of the proposal were to change, the Committee might find jurisdiction.

## **II. POSITIONS OF THE PARTIES AND STAFF**

### **A. Public Service Company of New Hampshire**

According to PSNH's pre-filed direct testimony, the Company's Schiller generating station consists of three fossil-fired units -- Nos. 4, 5 and 6 -- that can burn either coal or

oil as a fuel, as well as a combustion turbine generator. The three fossil-fired unit boilers were originally built in the 1950s and, in 1984, PSNH complied with a Commission directive to convert the three units from oil to coal as their primary fuel source. According to PSNH, because of their low fuel cost, the three units generally run as "base load" generation. PSNH now proposes to install what it characterizes as a "high efficiency, low emission" fluidized bed boiler for Unit 5, capable of using wood or coal as fuel, to replace the existing Unit 5 boiler fired by pulverized coal. PSNH intends to use the existing Unit 5 turbine and avers that, upon completion of the project, Schiller Station would have the same rated power capacity -- 45 megawatts -- as it presently has.

According to PSNH, burning wood at Schiller Station would also require the addition of a wood storage area, fuel handling and conveying equipment, a wood storage bin, particulate control equipment and a stack. The wood chips would be delivered by truck to a receiving yard, with covered storage built to house a supply of 10 to 20 days of wood chips. PSNH further notes that it is possible that wood chips could be delivered to the site by rail and/or ship but that such methods are currently expected to be more expensive than truck transportation.

In its initial filing, PSNH indicated that its target date for completion of the project was December 31, 2005. PSNH cited "proposed federal legislation" that could provide additional value, in the form of tax credits for open-loop biomass generation facilities, if the project were completed by that date. By the conclusion of the hearings, Congress had not passed the legislation and it remained pending.

According to PSNH, employing a fluidized bed boiler at Unit 5, equipped with various emissions control technologies, would result, when burning wood, in lower emissions of oxides of nitrogen (NO<sub>x</sub>), sulfur dioxide (SO<sub>2</sub>), mercury and carbon dioxide. The PSNH witnesses estimated that NO<sub>x</sub> would be reduced by more than 70 percent, SO<sub>2</sub> by more than 95 percent, mercury by approximately 90 percent and carbon dioxide by 100 percent (the latter based on the fact that renewable energy projects such as this one are considered carbon dioxide "neutral"). PSNH contends that these emissions reductions would have significant economic benefits because they would reduce PSNH's need to purchase emissions credits on the open market and could, in some circumstances, create emissions credits that PSNH could either bank for future use or sell. PSNH noted that in connection with the New Hampshire Multiple Pollutant Reduction Program, which is the state's emissions trading and banking program, SO<sub>2</sub> credits were trading at more than \$180 per ton and increasing, and NO<sub>x</sub>

credits during "ozone season" had recently ranged between \$2,700 and \$8,100 per ton.

PSNH testified that it expects the new boiler to use approximately 400,000 tons of wood annually. According to PSNH, it would operate the boiler under a permit from the Department of Environmental Services (DES), which will limit air emissions in a manner that would impact the fuel selected to operate the boiler. PSNH further avers that an additional source of limitations on air emissions will be its need to comply with the Renewable Portfolio Standards (RPS) established in Massachusetts and Connecticut will create an additional reason to limit air emissions at Schiller. This is because PSNH intends to support the project in part by selling Renewable Energy Certificates (RECs) to entities in those states that must comply with the applicable RPS.

Following its initial filing, but prior to hearing, PSNH entered into an agreement with the NHTOA relative to the procurement of fuel for the Schiller project. The agreement with the NHTOA committed PSNH to purchase certain minimum amounts of wood fuel from New Hampshire sources, escalating to 40 percent in 2008, provided that such fuel is "available on essential terms," i.e., "price, quality, quantity, timeliness and consistency of delivery." PSNH also committed to entering into long-term procurement contracts (i.e., contracts having a

duration of 12 months or longer) for at least 10 percent of its wood fuel supply in 2006 and a minimum of 15 percent in 2007 and 2008. The agreement further contains provisions requiring PSNH to track the amount of wood fuel purchased in 2006 and 2007 that complies with certain defined "good forest management standards," with PSNH and the NHTOA agreeing to enter into a further agreement in 2008 that would establish a minimum annual percentage of wood to be purchased by PSNH that meets such standards. Similarly, PSNH and the NHTOA agreed that in 2008 they would enter into a successor agreement covering in-state fuel sources and long-term fuel procurement contracts.

RECs are a key aspect of PSNH's proposal. According to PSNH, one REC is received for each megawatt-hour of energy generated by a qualifying generating unit as long as the unit remains within a prescribed maximum level of air emissions. PSNH notes that the task of measuring and validating RECs falls to the New England Independent System Operator (ISO-NE) that also operates the region's electricity grid.

PSNH testified that Massachusetts, Connecticut and Maine have enacted RPS programs. Specifically, according to PSNH, the RPS enacted by Massachusetts and Connecticut include a requirement that a certain percentage of the power supply portfolio of each energy supplier or load-holding entity in the state be generated by an approved renewable power source as

defined by that state. According to PSNH, the Massachusetts RPS included a requirement that in 2003 one percent of each such power supply portfolio be generated by an approved renewable power source, with the percentage escalating by 0.5% annually from 2004 through 2009 and escalating by 1% in 2010, 2011 and 2012. PSNH further testified that the Connecticut program involves two requirement classes, with annual percentage requirements defined for each. Overall, according to PSNH, the percent requirement of the two classes combined increases from 6% in 2004 to 10% in 2012. According to PSNH, its wood-fired generation facility at Schiller Station would meet the RPS standard in Massachusetts as well as the Class I standard (which is the more restrictive of the two standards) in Connecticut.

In its initial filing, PSNH indicated that it had already initiated the approval process in connection with the Massachusetts RPS. During the pendency of these proceedings the Company received a favorable advisory ruling from the Massachusetts Department of Environmental Protection with respect to the project's technical compliance with that state's RPS. Assuming that the project, as built, is compliant with the standards, Schiller Station would be able to sell RECs to Massachusetts entities needing them, according to PSNH.

It is PSNH's position that the RECs associated with the wood-burning facility at Schiller Station would meet only a

small portion of the increasing requirements for renewable energy imposed by Massachusetts and Connecticut. PSNH notes that the REC market, while new, was already in place in Massachusetts and has yielded prices for the year 2004 in the range of \$35 to \$40 per REC. According to PSNH, there is an upper limit to the price of RECs, equivalent to the penalty prices set by each state: \$50 in Massachusetts, \$55 in Connecticut.

The PSNH witnesses testified that the Massachusetts Technical Collaborative (MTC) has been established to support the Massachusetts RPS program and had recently sought proposals from potential generators of RECs for purchase and sales agreements with respect to future RECs. The witnesses indicated that PSNH had made a proposal to the MTC, communications with the MTC were ongoing but that the MTC had not yet decided whether to accept it.

It is PSNH's testimony that an overall capital investment of approximately \$69 million is required for the Schiller project. The construction price specified in the contract submitted to the Commission in January 2004 is consistent with the estimated construction price that PSNH used to derive this overall estimate. PSNH estimated the variable costs associated with the new wood boiler (e.g., fuel, fuel handling, ash management) to be approximately ten percent higher

than those associated with the existing boiler, with fixed operating costs only slightly higher. PSNH testified that, as a result of the project, the overall operating costs at Schiller Station would increase approximately 2 percent annually.

PSNH identified five possible sources of either new revenue or avoided costs that would offset the proposed capital investment. Those sources are: (1) additional generation of low-cost power, which would be available to meet the needs of PSNH customers for Transition and/or Default Service, (2) reduced air emissions, which would lower compliance costs, (3) the sale of RECs, (4) the federal open-loop biomass production tax credit, if enacted by Congress, and (5) incentives available through New Hampshire's Multiple Pollutant Reduction Program and NOx Budget Program. PSNH provided details of each source.

According to PSNH, additional low-cost power would be available as a result of the modification because the new boiler would have a higher availability and capacity factors than the existing one. Specifically, PSNH testified that the current Unit 5 boiler has historically achieved an availability factor (i.e., the percentage of the time the unit is available to generate electricity) in the range of 80 to 85 percent and a capacity factor (i.e., the percentage of the unit's total theoretical capacity for energy output that is actually achieved) in the range of 70 to 75 percent. PSNH estimated the

availability and capacity factors of the new boiler to be approximately 90 to 95 percent. Testifying that the fixed portion of the unit's operating costs would not increase as a result of the additional generation, and predicting the cost of additional energy to be below the spot price of electricity in New England, PSNH expects savings to result and notes that such savings would inure to the benefit of customers under the existing cost recovery mechanism.

With respect to emissions, PSNH testified that during the first three years the new boiler would be in operation the Company would achieve an annual savings of approximately \$720,000 arising out of a reduced need to purchase SO<sub>2</sub> credits that presently cost approximately \$180 per ton. Similarly, according to PSNH, based on the current prices of NO<sub>x</sub> credits, reduced NO<sub>x</sub> emissions would yield savings of approximately \$650,000 annually.

It was PSNH's estimate that the sale of RECs associated with the wood-fired boiler at Schiller Station could generate revenue of between \$6.3 million and \$16.9 million. According to PSNH, the \$6.3 million figure assumes an 80 percent capacity factor and a REC price of \$20 per megawatt-hour, whereas the \$16.9 million figure assumes a 95 percent capacity factor and a REC price of \$45 per megawatt-hour.

The PSNH witnesses estimated that the proposed three-year federal production tax credit for open-loop biomass projects would produce \$5.3 million per year in value for the project. This assumes a \$15 tax credit per megawatt-hour of energy generated and a 90 percent capacity factor.

According to PSNH, various combinations of these five possible sources of new revenue or avoided costs would provide sufficient value to offset the cost to customers of investing in a new wood-fired boiler at Schiller Station. The PSNH witnesses conceded that it is possible to imagine a set of unfavorable conditions that would result in what they characterized as a "slight increase" in overall costs. However, it was the testimony of the PSNH witnesses that the Company believes the project will result in at least a "breakeven" financial result for customers. It was their estimate that the project would lead to a net incremental revenue requirement of \$681,000 in 2006 (assuming the project goes into service that year), offset by negative net incremental requirements in 2007 and 2008 of \$1,466,000 and \$1,886,000 respectively, assuming that the capacity factor increases to what they characterized as a "more typical" range of 90 to 95 percent in those years. The witnesses pointed out that 2006 includes one-time costs of \$3 million associated with retiring the existing boiler and removal costs of \$1 million. PSNH characterized this scenario as

"conservative" because it does not include the federal production tax credit nor incentives available through the New Hampshire Multiple Pollutant Reduction Program or NOx Budget Program. The witnesses explained that they left these two potential sources of revenue out of their calculation because the fate of the federal tax credit in Congress remained uncertain and because PSNH had not yet been granted emissions allowances under the two state programs.

Because the REC revenue would be a key source of incremental revenue, the PSNH witnesses calculated a price per REC required for the project to break even from 2006 through 2020. The price ranged from \$32 in 2006, decreased to \$25 in 2007 and declined thereafter from \$24 in 2008 to less than \$10 in 2020. According to the PSNH witnesses, it is highly likely that the benefits of the project would outweigh the projected costs overall.

With respect to RSA 369-B:3-a, and its reference to cost recovery, the PSNH witnesses testified that the Company seeks to recover the costs of the project through the existing Transition Service and Default Service charges and, if necessary, through the Stranded Cost Recovery Charge (SCRC) mechanism whereby any deficiencies (or surpluses) in Transition and Default Service revenues are accounted for. PSNH noted that when Transition Service revenues exceed costs, the difference is

credited to what are referred to in the Commission-approved Agreement to Settle PSNH Restructuring (Restructuring Agreement) as Part 3 stranded costs. They noted that when Transition Service costs exceed revenues, the difference is added to Part 3 costs, which increases the unrecovered balance of those costs and delays their full recovery.

In the Restructuring Agreement, Part 3 Stranded Costs comprise those recoverable stranded costs for which PSNH assumed some risk of non-recovery at the time the agreement was reached in 1999. It now appears likely that PSNH will be in a position to recover all Part 3 stranded costs, at which time the Restructuring Agreement calls for a corresponding decrease to the Stranded Cost Recovery Charge paid by PSNH customers. According to the PSNH witnesses, once Part 3 stranded costs are fully recovered, any going-forward costs of the Schiller project and any other costs associated with the Company's generation portfolio that are not recovered via Transition and Default Service charges would thenceforth be recovered as Part 2 stranded costs. Under the Restructuring Agreement, Part 2 stranded costs were defined as those stranded costs PSNH would eventually fully recover but were not subject to the securitization process. See RSA 369-B:3 (authorizing securitization subject to certain conditions) and *PSNH Proposed Restructuring Settlement*, 85 NH PUC 154, 247-49 (2000)

(approving securitization). Because PSNH estimated that the capital investment cost of the Schiller project would be more than offset by the combination of new revenue and new avoided costs associated with the project, PSNH predicted that the project will cause a net decrease in rates paid by PSNH's customers.

In its legal memorandum, PSNH flatly rejected any suggestion that its proposal is not a request to "modify" a generation facility as that word is used in RSA 369-B:3-a. Citing excerpts from the legislative history of the 2003 measure that enacted this statute, PSNH contends that the Legislature was explicitly aware that PSNH was contemplating the conversion of a boiler at Schiller Station to allow the option of burning wood fuel. PSNH refers to its own legislative testimony as well as explicit references to the Schiller project by legislators.

With respect to the "cost recovery" language in RSA 369-B:3-a, it is the position of PSNH that in the absence of other guidance the Commission should apply traditional ratemaking principles. Citing RSA 378:27 and 28, PSNH contended that such principles involve a determination that "the new boiler will be used and useful, construction costs are prudently incurred, and operating costs are just and reasonable." PSNH Legal Memorandum at 5-6. However, PSNH stressed that it is only seeking a determination under RSA 369-B:3-a that its decision to

modify Unit 5 at Schiller Station is in the public interest of PSNH retail customers, not "a predetermination that the final costs of the plant are prudent, just and reasonable." *Id.* at 6. That determination, according to PSNH, would take place when Transition Service costs and revenues are reconciled in a Stranded Cost Recovery Charge proceeding.

Although not included in their pre-filed testimony, the PSNH witnesses testified at hearing that the Company would be willing to enter into what they described as a "risk sharing" arrangement. The risk to be shared involves the possibility that revenues associated with the RECs and other revenue sources will be insufficient to cover the project's marginal costs. The PSNH witnesses indicated that PSNH would be willing to enter into an arrangement whereby incremental revenues of between \$4 million and \$10 million per year would be treated in the traditional manner, but that (1) the responsibility for shortfalls generated by incremental revenues below \$4 million would be shared on a 50/50 basis by PSNH and its customers, and (2) incremental revenues in excess of \$10 million annually would be similarly shared on a 50/50 basis between the Company and the ratepayers. PSNH witness Rhonda Bisson testified that the \$4 million revenue figure corresponds to REC prices of \$12.69 and the \$10 million figure corresponds to REC prices of \$31.74.

**B. Staff**

Staff recommended that PSNH be authorized to proceed with the proposed modification and be allowed to recover the costs in the manner requested by the Company. Staff witness Steven Mullen noted that, based on 2006 forecasted sales of 7,863,000 megawatt-hours, the Schiller project would add approximately \$0.0015 per kilowatt-hour to PSNH's Transition Service rate assuming no revenue offsets or new avoided costs. According to Mr. Mullen, this would represent an increase of \$0.75 per month, or \$9 on an annual basis, to a typical PSNH residential customer using 500 kilowatt-hours of energy per month.

Staff noted that PSNH used a projected energy market price of \$37.40 per megawatt-hour to calculate the lower end of its estimate of revenue the project would produce via additional generation. Mr. Mullen stressed that he is not a market forecaster and could not offer an opinion about the reliability of PSNH's estimate. However, he noted that when the independent wood-fired generation facility in Whitefield shut down and it was necessary for PSNH to replace this power, PSNH obtained this replacement power at a price of approximately \$37 per megawatt-hour. Mr. Mullen also testified that recent energy clearing prices in New England and New Hampshire had been higher than

\$37.40. According to Mr. Mullen, taking these items into consideration, the PSNH estimate appears to be reasonable.

According to Staff, the capacity factor for Unit 5 at Schiller Station ranged from 59.3 percent to 68.2 percent between 2000 and 2003, with the years 2000, 2002 and 2003 in the range of 66 to 68 percent. With regard to PSNH's projected capacity factor increase to 90 percent, Mr. Mullen noted that PSNH relied on information from a vendor showing that fluidized bed boilers presently in service had availability factors over 90 percent. Mr. Mullen also noted that Schiller station is a baseload unit, and its costs are not expected to change as a result of the modification. Thus, the plant's capacity factor can be expected to be high because the unit will be economic to dispatch.

Mr. Mullen concluded that it is reasonable to assume that a new boiler using advanced technology would achieve better performance than an existing boiler that has been in service for approximately 50 years. He also concluded that the estimated high capacity and availability factors are justified given the facility's baseload status. However, Mr. Mullen noted that the information provided by a boiler vendor relates only to certain selected boilers. Mr. Mullen said he had not seen enough information to determine whether the quoted availability factors

are also representative of the results that would be achieved using a larger sample of fluidized bed boilers.

Staff witness Maureen Sirois testified concerning the developing REC market in Massachusetts and Connecticut. She noted that the Massachusetts program was already in effect and that the Connecticut program would be starting on January 1, 2004. With respect to Connecticut, she explained that load-serving entities in that state would be required under the program to purchase at least one percent of their portfolio from Class I renewable resources such as the proposed Schiller unit, and that such purchase amounts increase steadily to a requirement of 7% in 2010. She also noted that, in addition to this Class I requirement, the Connecticut program requires load-serving entities to purchase at least three percent of their portfolios from either Class I or Class II renewable resources.

Ms. Sirois also testified about the Maine RPS. She explained that it requires load-serving entities in that state to purchase 30 percent of their energy from qualifying generators of renewable energy. She noted that, at present, there was a surplus of energy available in Maine that qualifies for the RPS. Thus, Ms. Sirois concluded that a REC is only worth \$1 to \$2 in Maine.

Ms. Sirois concluded that the total demand for RECs in Massachusetts and Connecticut was about 581,000 megawatt-hours

per year. She further concluded that at the time the new Schiller boiler was expected to become operational, demand for RECs in the two states would be approximately 2 million megawatt-hours.

The Staff witness noted that if the Schiller project goes on line, it would not be the only source of RECs for Massachusetts and Connecticut purchasers. She referred to a report of the energy broker Evolution Markets, which reported that RECs of 375,000 megawatt-hours were currently available, comprised of 275,000 megawatt-hours under the Massachusetts program and 150,000 megawatt-hours of Connecticut Class I. She testified that in 2006, when the Schiller project would be expected to be operational, the proposed Cape Wind project is also expected to be in operation. At that time, according to Ms. Sirois, the total supply of Massachusetts and Connecticut RECs is expected to be a little less than 2 million.

From these estimates, Ms. Sirois concluded that there will be a shortage of RECs in 2006 of approximately 300,000. She further concluded that as the renewable energy requirements of the Massachusetts and Connecticut programs increase thereafter, the shortage will likewise increase substantially. She stated that she derived these figures by assuming a 1.5% annual growth rate and adding the capacities of both the Cape Wind and Schiller projects.

According to Ms. Sirois, markets will react to this shortfall by causing load-serving entities to offer a higher price for each REC until the price reaches the monetary penalties established by the Massachusetts and Connecticut programs. She testified that, over time, these high REC prices will encourage generators to enter the REC market by building new facilities and/or retrofitting existing ones, increasing the supply of RECs. This, she said, will trigger a corresponding decrease in REC prices.

Ms. Sirois also testified about the current state of the REC market. She described the market as "in its infancy," noting that trading was sporadic and had mostly been occurring between generators and load-serving entities. She said this was typical of a newly developing market.

The Staff witness also addressed the question of whether it is reasonable to rely on price signals from a market that is only just emerging. She responded by noting that price signals usually reflect the relationship of the supply of the resource relative to demand. Here, she said, the estimates assumed that resources can move to meet REC demand in a relatively short period of time in order to check price increases. She said the REC market's ability to distribute resources efficiently was questionable, due to its newness and resulting lack of liquidity. She said the success of the market

was tied to its liquidity and that the banking of RECs and the purchasing of forward REC contracts will help but that a need exists for longer-term forward contracts in order to stimulate investment in renewable generation.

Ms. Sirois also alluded to regulatory risk, i.e., the possibility that one or both of the states would eliminate its RPS or modify it in a manner unfavorable to the Schiller project. She said it was unlikely that either state would eliminate its RPS altogether, given the level of participation in the markets.

According to Ms. Sirois, PSNH's estimated REC price of between \$30 and \$40 was reasonable, assuming that the RPS programs in Massachusetts and Connecticut continue to exist and that deficiencies in eligible generation will drive REC prices upward. However, Ms. Sirois stated that the price information is "questionable given the current status of this REC market."

Ms. Sirois noted that PSNH had taken certain steps to mitigate the uncertainty about future REC prices. She referred to PSNH's bid proposal to the Massachusetts Technology Collaborative (MTC) in connection with that agency's solicitation no. 2003-GP-01, which offers to purchase RECs and to provide what Ms. Sirois characterized as "other market price risk hedging products." Ms. Sirois also noted that the MTC plans other similar solicitations in 2004. As to the 2003

solicitation, she noted that the MTC has indicated an intention to give priority to projects with an in-service date prior to December 31, 2005.

Overall, Ms. Sirois stated that she supports PSNH's analysis of the effect of RECs on the project, but with reservations. She said she believed that PSNH must be aware of the uncertainties associated with this developing market and that the market signals relied upon by PSNH might yield different results than those assumed by PSNH.

With respect to cost savings connected to emissions reductions, Ms. Sirois testified that, using data from 2000, 2001 and 2002, and assuming a 90% capacity factor, she estimated that the new boiler would reduce NOx emissions by 466 tons per year and would reduce sulfur dioxide emissions by 2,241 tons per year. Both Staff witnesses noted that the achievement of such results is included in the performance guarantees in the draft construction contract that accompanied the request for proposals PSNH transmitted to potential boiler vendors. Ms. Sirois noted that PSNH excluded reduced compliance costs related to the New Hampshire Multiple Pollutant Reduction Program and NOx Budget Program from its revenue estimates in order to be conservative in its analysis.

Ms. Sirois noted that under the Clean Power Act enacted in 2002, new state-law limits on emissions by PSNH will

apply as of December 31, 2006. She testified that the statute allows PSNH to participate in emissions trading programs. She also stated that if PSNH reduces emissions before the compliance date, PSNH will be able to bank them as allowances. Ms. Sirois further testified PSNH would receive additional allowances for this purpose under the NOx Budget Trading Program.

It was also Ms. Sirois' testimony that PSNH can benefit from certain federal programs designed to reduce emissions. Specifically, she noted that PSNH had already received its emissions allowances under the federal acid rain program through the year 2030. According to Ms. Sirois, because the Schiller project would reduce SO2 emissions by 2,241 tons, it would have corresponding unused allowances under the federal program.

Overall, Ms. Sirois agreed with PSNH's assumptions about the amount of emissions reductions to be achieved by the Schiller project, but characterized as "optimistic" the Company's estimate of the value of the NOx and SO2 allowances. She explained that PSNH used an estimated SO2 allowance price of \$320 in its calculations, whereas data from the Platts Market Survey, published in Electric Utility Week, indicated a maximum price of \$183.50 per allowance in the second and third quarters of 2003. She further testified that, according to Argus Media, prices of future allowances for the years 2004 to 2010 show a

decline in value due to lack of trading volume. According to Ms. Sirois, PSNH data suggests the Company expects the price of SO2 allowances could be as high as \$600 in 2010. She assumed a price of \$180 in her calculations. With respect to NOx, Ms. Sirois noted a similar disparity between the PSNH assumed price of \$3,000 per allowance and data suggesting that the price could go as low as \$1,100 by 2010, with allowances having recently traded in the range of \$1,500 to \$1,850.

Despite Ms. Sirois' disagreement with some of the figures employed by PSNH, she derived a projected cost saving for the Schiller project in the range of \$1.2 to \$1.3 million per year. She noted that these results are similar to the PSNH projections.

Mr. Mullen testified that PSNH's financial analysis was conservative with respect to already-planned capital additions associated with Schiller Unit 5 that would become unnecessary (and thus not charged to ratepayers) if the present proposal goes forward. He said that PSNH identified \$1,860,000 in such capital additions that would be eliminated, but did not remove these costs in computing the costs of the proposed fluidized bed boiler. Mr. Mullen further testified that another example of PSNH's conservatism involves the projected amount of NOx and SO2 emission reductions (as opposed to the value of credits associated with such reductions, which were discussed by

Ms. Sirois). According to Mr. Mullen, PSNH used vendor-supplied figures of projected emissions and applied them to actual data from Schiller Station for 2001 and 2002 to obtain projected reductions of 452 tons of NOx emissions and 2,415 tons of SO2 emissions. However, Mr. Mullen noted, in estimating project benefits for the purposes of this case PSNH used estimates of 400 tons and 2,250 tons, respectively.

Mr. Mullen praised what he characterized as PSNH's conservatism in this regard. He said the use of conservative estimates allows for fluctuations, either up or down, in the actual results without causing financial harm compared to the no-modification scenario.

Of the various sources of project revenue discussed by PSNH, Mr. Mullen testified that the REC revenue is the most important to the economics of the project. Mr. Mullen testified that if the Commission were to approve PSNH's application, it would not be passing judgment on such things as the actual capital costs of the project or PSNH's actual trading activities in the REC market. He said the results PSNH obtains through such activities would be subject to review during future Stranded Cost Recovery Charge reconciliation proceedings.

According to Mr. Mullen, under the PSNH proposal it is the utility's customers who would bear the ultimate financial risk associated with the project. He noted that PSNH proposes

using the current regulatory framework (i.e., having the costs of Schiller Station paid for out of Transition and Default Service revenue, with any shortfalls or surpluses reconciled via the Stranded Cost Recovery Charge paid by all PSNH customers regardless of their source of energy) in order to satisfy the RSA 369-B:3-a requirement that the Commission provide for cost recovery in connection with the project. He testified that PSNH currently expects its Part 3 stranded costs to be fully recovered some time in the latter part of 2006, at which time that part of the Stranded Cost Recovery Charge will no longer exist and, according to PSNH's proposal, the reconciliation related to the Schiller modification project would affect Part 2 stranded costs. Mr. Mullen described this mechanism as consistent with the Agreement to Settle PSNH Restructuring and, on that basis, recommended that it be approved.

### **C. New Hampshire Timberland Owners Association**

The NHTOA urged the Commission at hearing to approve the PSNH proposal in light of the agreement between the NHTOA and PSNH concerning wood fuel. The pre-filed direct testimony of NHTOA's witness, Executive Director Jasen Stock, involved (1) an argument that the "public interest" standard applicable in this case requires a broader inquiry than merely focusing on the price of power to PSNH retail customers, and (2) contending that it is important from a public policy standpoint for PSNH to

commit to utilizing New Hampshire grown and/or harvested timber and timber that is harvested in accordance with generally accepted sustainable forestry standards.

With regard to the latter argument, Mr. Stock testified that the annual impact, direct and indirect, from New Hampshire's wood energy plants is a market for 1.2 million tons of low-grade wood that adds approximately \$1 million to the economy for each megawatt-hour of energy generated. He also testified that low-grade wood markets are important to silviculture because they enable landowners, loggers and foresters to practice silviculture economically. Specifically, according to Mr. Stock, low-grade wood markets are a home for the wood generated by the weeding and thinning of timber stands, which he described as a practice used to remove malformed and poor quality trees and thereby making room for more desirable and marketable species.

Mr. Stock testified that New Hampshire was currently growing enough wood to supply the new boiler at Schiller Station as well as the state's four existing (and operating) wood-fired facilities. He said the total volume of wood consumed by all plants in a year would be 1.6 million tons.

#### **D. Office of Energy and Planning**

The OEP did not sponsor testimony. However, the agency expressed support for the PSNH proposal.

According to the OEP, PSNH's petition enjoys the support of the Governor, the Commissioner of the New Hampshire Department of Resources and Economic Development, the New Hampshire Business and Industry Association, the Society for the Protection of New Hampshire Forests, the New Hampshire Timberland Owners Association, several legislators including the chair of the House Science, Energy and Technology Committee, and economists and attorneys on the Staff of the Commission. The OEP asked the Commission to contrast that list of supporters with its characterization of the opponents of the project. According to the OEP, opponents consist of a "handful of wood-fired power plants, all nearing the end of their rate agreements with PSNH, a single citizen from Portsmouth, who works in the utility industry" and, at least in part, the Office of Consumer Advocate. The OEP conceded that the case should not be decided as if it were a popularity contest, but suggested that it is important for the Commission to bear in mind the breadth of support that the project enjoys.

The OEP characterized PSNH's proposal as a creative approach to power generation, for which the time is right because it improves the environment, diversifies the fuel supply devoted to electrical generation in New Hampshire and takes advantage of the developing REC market as well as the possibility of federal open-loop biomass tax credits. According

to the OEP, PSNH should be commended for seeking to strengthen markets for low-grade wood. In the view of the OEP, providing a more stable market for low-grade wood is an added benefit. This benefit, according to the OEP, is not a justification for project approval under RSA 369-B:3-a, but is a significant advantage.

The OEP offered an interpretation of the phrase "public interest of retail customers of PSNH" contained in RSA 369-B:3-a. Conceding that it is an "odd phrase," the OEP argued that there are two ways to interpret it. One, according to the OEP, is to focus on the direct interest of ratepayers and assume that the word "public" is somewhat superfluous or contradictory in its context. The other approach, favored by the OEP, is to assume that the Legislature deliberately used the words "public interest" and to conclude that it requires what the OEP characterized as a "more expansive examination of the potential benefits of the Schiller modification."

According to the OEP, under either interpretation of the statute there is ample evidence from which the Commission can and should conclude that the project merits approval pursuant to RSA 369-B:3-a. The OEP contends this is so because it is in the direct interest of retail ratepayers to have cleaner air, reduced emissions of greenhouse gases, a more diverse fuel supply and, possibly, a modest decline in rates.

Further, according to the OEP, to the extent that burning 400,000 tons of wood per year at Schiller Station would help strengthen the forest products industry, and thereby improve the state's overall economic health, there is at least an indirect if not a direct public benefit to PSNH customers, who comprise 70 percent of the state's electricity ratepayers.

The OEP conceded that the Commission's determination probably turns on the likelihood of a robust market in RECs. According to the OEP, PSNH did its homework before presenting its analysis of the REC market to the Commission. The OEP characterized as "highly likely" the possibility that the REC market will remain at or above the \$30 level that PSNH identified as the breakeven point. The OEP added that it regards as notable the fact that the Staff of the Commission reached a similar conclusion.

The OEP additionally conceded that uncertainty exists as to the future course of the REC market, and that it is possible that some of the pessimistic forecasts advanced in this case could become reality. The OEP urged the Commission to consider that the risk of what it characterized as a worst-case scenario -- involving not only the failure of RECs to sell at the levels PSNH predicted, but also the non-materialization of the other incremental revenue sources cited by PSNH - would,

according to the OEP, lead to an impact of merely one percent on customer bills.

According to the OEP, the Commission should balance this minimal risk against what the OEP characterized as the benefits of the project: (1) a more diverse fuel base and an attendant increase in energy security, (2) improved reliability, (3) substantially cleaner air, and (4) to the extent the timber industry impacts the state's economy overall, a stronger state economy.

Regarding the possibility of risk sharing between PSNH and its customers, the OEP took the position that any such sharing would also have to involve a corresponding policy of sharing any rewards, i.e., increases in Schiller Station's incremental revenue. The OEP expressed support for the sharing mechanism described by the PSNH witnesses, and suggested that the Commission instruct the parties to return in a set period of time - perhaps 6 or 12 months - to craft an acceptable mechanism. According to the OEP, in light of PSNH's expressed willingness to share risks and rewards, it is unfair to characterize the Company as seeking to make a \$69 million investment that places all risks arising out of that investment on customers.

The OEP took exception to certain legal arguments of other parties. Specifically, the OEP contended that RSA 369-

B:3-a and the "public interest of retail customers of PSNH" standard can be harmonized with the requirements of the Electric Industry Restructuring Act, RSA 374-F, because RSA 369-B:3-a reflects a refinement and modification of the policy principles in the Restructuring Act that are cited by the OCA. With respect to the argument that the Site Evaluation Committee review process set forth in RSA 162-H has some significance here, the OEP contends that the Site Evaluation Committee is the correct forum to decide whether that statute applies to the PSNH proposal and the Commission need not stay its hand pending determinations by the Site Evaluation Committee. The OEP agreed with PSNH, however, that the Stranded Cost Recovery Charge recovery mechanism is the appropriate method for assuring that cost recovery is provided for as required by RSA 369-B:3-a, provided that any such cost recovery is tailored to assure that PSNH does not recover on construction work in progress. See RSA 378:30-a (prohibiting such recovery).

Finally, it was the OEP's position that an order approving the PSNH proposal does not foreclose further efforts to address some of the issues raised by other parties. Alluding to air quality concerns expressed by Mr. Hart, OEP noted that PSNH remained obligated to obtain an air permit from the Department of Environmental Services. With regard to his concerns about traffic and noise, the OEP noted that such issues

were before the City of Portsmouth Planning Board. The OEP noted that some issues may also be considered by the Site Evaluation Committee.

#### **E. Office of Consumer Advocate**

The OCA urged the Commission to reject the PSNH proposal in its present form. According to the OCA, the scope of the project exceeds what might reasonably be construed a "modification" within the meaning of RSA 369-B:3-a. In the view of the OCA, if the Commission were to adopt PSNH's implicit definition of "modification" then the Company would be free to convert all of its generation facilities to alternative fuel sources and even increase their capacities, returning full-scale to the electricity generation business but without any least-cost planning or, possibly, consideration of traditional regulatory notions of prudence and the recoverability of assets because they are used and useful in the provision of utility service. Nevertheless, according to OCA witness Kenneth E. Traum, the OCA would not oppose the project if PSNH's customers were "kept indifferent" to the risks of the conversion.

In the view of the OCA, this imperative means that if approving the project, the Commission must establish a methodology at the outset that would determine what the cost of generation would have been for Schiller Unit No. 5 without the project, in order to establish a benchmark for measuring what

project-related costs must be allocated to PSNH. According to Mr. Traum, this allocation could be based on the actual allocated costs from units 4 and 6 at Schiller Station, as well as a clear valuation process in connection with any divestiture of Schiller Station.

The OCA argued that the PSNH proposal marks a return to the past, in the sense of the electric industry as it existed prior to the industry restructuring described in RSA 374-F. In particular, the OCA cited the imperative of "harnessing the power of competitive markets" set forth in RSA 374-F:1. According to the OCA, PSNH's customers are currently paying a sizeable stranded cost charge to compensate the Company for historical investments on which it could not otherwise recover in a restructured industry. The OCA further contended that state officials, including the OCA, saw stranded cost charges as the price that had to be paid (in light of unfavorable determinations in the federal litigation filed by electric utilities to challenge restructuring as it was planned in 1997) to permit New Hampshire to move to a competitive electricity marketplace.

In such a marketplace, according to the OCA, generators or suppliers (and their shareholders), and not utility customers, bear the risk of generation projects that produce energy at costs that are in excess of the market price.

According to the OCA, PSNH in its present proposal is seeking to return to the pre-restructuring paradigm in which customers assume such risks. It is the argument of the OCA that nothing in the present record would support a determination that either PSNH or the Commission is more equipped now than in the past to make generation investment decisions better than the marketplace would.

The OCA drew the Commission's attention to the standard it said would have applied prior to restructuring. According to the OCA, that standard appears in RSA 378:37, which would have required the Commission to consider whether PSNH, by moving forward with the project, was providing its customers with energy at the lowest reasonable cost while taking into account issues of reliability, diversity of energy sources, safety and the environment. Such an inquiry, according to the OCA, would have required consideration of alternatives to the Schiller project - something that the OCA contends did not take place here. This is significant, according to the OCA, because the policy principles set forth in the Restructuring Act, specifically RSA 374-F:3, IX, specify that "[i]ncreased future commitments to renewable energy resources should be consistent with the New Hampshire energy policy as set forth in RSA 378:37." The OCA also draws the Commission's attention to the additional language in subsection IX reciting that

"restructuring should allow customers the possibility of choosing to pay a premium for electricity from renewable resources." According to the OCA, this language means that if this project moves forward, its output should be offered as an optional "green" Transition Service that is paid for by willing customers.

The OCA avers that it cannot determine whether the project, if constructed, would provide a financial benefit or loss to whomever bears the risk of unfavorable results. The OCA complained in its pre-filed direct testimony that PSNH expressed confidence in its projections while remaining unwilling to assume any of the attendant risk itself. The OCA said it is unwilling to "gamble" ratepayer dollars on Renewable Energy Credits that could disappear or produce insufficient value. In particular, the OCA pointed to the risk that Massachusetts and Connecticut could simply repeal their RPS programs. The OCA also argued that the very purpose of the currently applicable Connecticut and Massachusetts legislation is to encourage generator entry into the renewable energy marketplace, thereby driving down REC values.

Relying on certain data responses provided by PSNH in discovery, the OCA contended that PSNH had failed to conduct a due diligence investigation of the risks of the REC market. These responses, which were attached to the OCA's pre-filed

direct testimony, indicated *inter alia* that PSNH had not hired consultants or advisors to estimate future REC prices, had not conducted any risk analysis of the relevant market forces, other than regulatory changes, had not studied the present and expected level of market penetration of REC sellers and its effect on REC prices, and had not conducted a formal study of the risk of regulatory change affecting RECs.

The OCA further contends that, regardless of whether the proposed conversion benefits customers, a presentation made by PSNH President Gary Long (a witness in this proceeding) to the board of PSNH's parent company shows that stockholders would see a multimillion-dollar increase in earnings as a result of additions to rate base.

In its closing argument, the OCA invoked the notion in the Restructuring Act of equitable sharing of stranded costs. See RSA 374-F:3, XII. Applying this logic to the instant case, according to the OCA, the Commission should consider the possibility of equitably sharing both the risks and the rewards associated with the Schiller project. The OCA urged the Commission to make any such determinations at the outset, to foreclose the possibility of PSNH successfully arguing that it made an investment decision in reasonable reliance on assumptions about shareholder risk that the Commission later obviated.

**F. Steven Hart**

Mr. Hart opposes the PSNH proposal in its present form. He avers that he is a resident of Portsmouth and is a boilermaker who has been employed in the power plant industry for a number of years. It is his central contention that PSNH, and what he characterizes as "other special interests," are seeking to reap economic benefits at the expense of PSNH customers and citizens living near Schiller Station, while providing little or no economic benefit in return. He shares the opinion of other parties that the REC market is too speculative, and its future too uncertain, to justify reliance on it when assessing the economics of the project.

According to Mr. Hart, an additional troubling aspect of the proposal is the long-term fuel contracts sought by the NHTOA. Mr. Hart contends that PSNH's own data shows that wood is not the cheapest source of fuel for Schiller Station and, therefore, the project would result in PSNH customers paying what he characterized as the "guaranteed profits of the Timber Union." He argues that the NHTOA's members will reap these guaranteed profits while as a result PSNH customers suffer higher electricity rates and area residents suffer the effects of added congestion caused by fuel trucking.

Mr. Hart advanced certain procedural concerns. Specifically, he argues that the project requires a full

evaluation by the Site Evaluation Committee. Second, he contended that the Commission has failed to follow proper procedure in considering this case, by permitting an expedited review of PSNH's petition. These two problems, according to Mr. Hart, are resulting in a project that was moving forward without adequate public awareness and scrutiny.

Two experts testifying on behalf of Mr. Hart, George E. Sansoucy and Glenn C. Walker, argued that the Commission should defer its consideration of the project pending approval of the Site Evaluation Committee pursuant to RSA 162-H. They contended that the PSNH proposal, because of its scope, comprises an "energy facility" within the meaning of RSA 162-H and is therefore subject to such review.

The witnesses further testified that PSNH has failed to demonstrate that the proposal is in the public interest of PSNH's retail customers. According to Messrs. Sansoucy and Walker, it is not consistent with such interest for PSNH's retail customers to make significant investment in generation assets at this time, PSNH's reliance on the REC market is too speculative, the project's predicted emissions reductions are speculative and contingent on uncertain REC and fuel markets, PSNH could construct add-on pollution control equipment at existing facilities for approximately the same cost, and PSNH

has failed to demonstrate that its proposal represents the least-cost alternative for customers.

With respect to the propriety of making investments in generation at this time, the two witnesses testified that the New England region currently enjoys a generation capacity reserve margin of 30 percent, a situation they said was expected to continue in the future. Thus, they expressed the opinion that a significant investment in additional generation facilities is not prudent.

Messrs. Sansoucy and Walker complained of legislative uncertainties associated with the REC markets, and expressed the concern that investment in REC-eligible generation facilities could follow the same "boom and bust" cycle seen in the electric generation sector generally in the past. They said this could result in overconstruction that leaves PSNH customers unable to recover their investment in the project. The experts also testified that the example of emissions trading suggests that REC prices will decline rather than increase.

With respect to emissions reductions, Messrs. Sansoucy and Walker said the possibility of PSNH burning coal at a modified Schiller Unit 5 makes air pollution reduction a matter of speculation at this point. They contended that PSNH's projections of wood and coal prices do not include price escalation rates, assuming instead that the two fuel sources

have a static relationship, which they said makes PSNH's projected fuel costs unreliable.

Messrs. Sansoucy and Walker testified that PSNH data shows significant volatility in the price of wood fuel over the past 20 years. They said it was reasonable to assume that as the demand for wood fuel increases in light of the REC market, price levels will likewise increase to \$20 to \$25 per ton, a level they said has not been seen since the mid 1990s. According to the witnesses, PSNH should consider the effects of inflation on wood prices because wood fuels are both capital-intensive and labor-intensive and, thus, the cost of such fuel is likely to increase at least at the rate of inflation.

Messrs. Walker and Sansoucy testified that PSNH could install Selective Catalytic Reduction and/or Flue Gas Desulphurization measures at Schiller Station at a cost comparable to that of the PSNH modification proposal. According to the witnesses, these measures would achieve definite emissions reductions regardless of whether the markets for wood fuel and/or RECs are favorable.

Finally, Messrs. Walker and Sansoucy contended that PSNH data shows that virgin wood is the most expensive fuel alternative that would be available for the proposed new boiler. According to these witnesses, this demonstrates that PSNH should aggressively pursue other fuel sources. They said that use of

Schiller Station's water access has the potential to allow the project to minimize fuel costs and eliminate additional truck traffic generated by the project.

According to Mr. Hart, his greatest concern about the Schiller proposal is that PSNH will be allowed to spend \$70 million constructing a new boiler that does not provide any substantial reduction in emissions, with PSNH buying out "various long-term timber contracts," which he said would result in all costs being passed along to ratepayers. Mr. Hart testified that he would rather see PSNH spend the \$70 million on new pollution control devices at the existing Schiller Station.

However, Mr. Hart indicated that he could support the project in certain circumstances. Specifically, he said that PSNH customers should not be "subsidizing the Timber Union" and that PSNH should be required to "ensure the economic benefit extended to everyone, including providing contracts and good jobs to local companies and local residents during the construction of this project so that everyone benefits economically." Mr. Hart indicated on cross examination that he was referring to jobs compensated at the "area prevailing wage" as that concept is set forth in the federal Davis Bacon Act, 40 U.S.C. §276a et seq. (requiring contractors on federal projects to pay wages no less than the prevailing levels for such jobs in the geographic area).

**G. Pinetree Power-Tamworth, Inc., Bridgewater Power Company  
L.P. and Hemphill Power & Light Company**

The Existing Wood-Fired Plants urge the Commission to reject the PSNH proposal. They agree with the view of the OCA that it is unfair to place project risks on ratepayers while PSNH increases its earnings by an estimated \$3.1 million annually. And they took the position that PSNH customers would be at risk as long as PSNH were deemed to have acted prudently in the sale of RECs and in engaging in other project-related activities.

According to the Existing Wood-Fired Plants, the analysis conducted by PSNH is completely inadequate to justify placing \$70 million of ratepayer funds at risk. In the view of these parties, the record reveals that PSNH has essentially done no analysis of the REC markets. According to the Existing Wood-Fired Plants, PSNH is basing its projections of REC prices entirely on two trades that took place in the Massachusetts REC market, in the summer of 2003, three Connecticut market trades in August of 2003, and a press release. In these circumstances, according to these parties, PSNH's view of the future of RECs is "sheer speculation."

Similarly, the Existing Wood-Fired Plants complained that the Commission Staff prepared no estimate of future REC prices in expressing support for the project. They draw the

Commission's attention to the testimony of Ms. Sirois to the effect that Staff would have liked to have seen a sensitivity analysis but Staff did not do one and PSNH did not provide one.

With respect to sensitivity analyses, the Existing Wood Fired Plants noted that the record includes a report (Exh. 8), prepared for the Vermont Public Service Board by Synapse Energy Economics entitled "Potential Cost Impacts of a Vermont Renewable Portfolio Standard." According to the Existing Wood-Fired Plants, this report contains a sensitivity analysis. These intervenors further contended that it was the testimony of Mr. Traum of the OCA that Table 1.2 of the Synapse report, which *inter alia* calculates an "RPS Premium" that in the context of the report is the functional equivalent of a forecasted REC price through 2015, suggests that if the modified Unit 5 operates at a 90 percent availability factor PSNH customers will suffer a loss of between \$10.7 million and \$11.2 million through 2008.<sup>1</sup>

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<sup>1</sup> A review of Exhibit 8 reveals that Synapse calculated an "RPS Premium" on a New England-wide basis in Table 1.2 (as opposed to an RPS specific to Vermont) for the years 2006 to 2015. These premiums ranged from \$13.65 in 2006 to \$23.10 in 2009. Elsewhere in the report, Synapse describes what it means by an RPS Premium:

We prepare a supply curve of eligible renewable resources in New England and the region, and compare the costs of the renewables to the costs of the wholesale market price in New England. The difference represents a renewables premium, which then provides an estimate of the total cost of meeting the RPS.

The Existing Wood-Fired Plants further complained that PSNH did not evaluate any rulings of the Massachusetts Department of Telecommunications and Energy (DTE) that would potentially affect REC prices. According to the Existing Wood-Fired Plants, PSNH witnesses were unaware that the DTE had directed utilities within its jurisdiction to file plans demonstrating how they plan to minimize their REC purchase costs.

These intervenors shared the concern of other parties that Massachusetts or Connecticut could by legislation simply abolish their RPS programs. According to the Existing Wood-Fired Plants, PSNH would be unable in such circumstances to bind REC purchasers based, e.g., on a theory of detrimental reliance. The Existing Wood-Fired Plants further contended that PSNH had done little investigation or analysis of potential increases in REC supplies, and was unaware that the Massachusetts RPS statute (1) specifically provides for administrative additions to the types of eligible REC sellers and (2) allows the agency that administers the Massachusetts REC program to suspend demand increases in REC purchase requirements.

Finally, according to the Existing Wood-Fired Plants, the suggestion in PSNH's pre-filed testimony of benefits from the project to the forest products industry is unfounded in light of PSNH's agreement with the NHTOA. According to the

Existing Wood-Fired Plants, the agreement does not actually obligate PSNH to purchase any wood from New Hampshire or to buy any amount of whole tree chips. The Existing Wood-Fired Plants argued that PSNH could comply with the NHTOA agreement by creating a New Hampshire affiliate, which would purchase Canadian wood and sell it to PSNH.

Therefore, according to the Existing Wood-Fired Plants, the Commission should determine that PSNH has made an inadequate showing with respect to the applicable standard for approval. In the opinion of these intervenors, PSNH has failed to conduct a prudent business analysis that would justify an investment of this magnitude.

In the alternative, the Existing Wood-Fired Power Plants argued that any approval from the Commission should include a cap of \$69 million on project expenditures. They further suggested that PSNH be required to bear any financial responsibility arising out of a failure of REC revenue to put customers at the break-even level with respect to the project. In other words, according to the Existing Wood-Fired Plants, at a minimum any increase in PSNH's net earnings should be offset on an annual basis by any project-related losses to PSNH customers. According to the Existing Wood-Fired Plants, notwithstanding RSA 369-B:3-a PSNH cannot use the Stranded Cost Recovery Charge mechanism to recover any revenue shortfalls

associated with the present proposal. To that end, they invoke the statutory definition of stranded costs contained in RSA 374-F:2, which explicitly limits stranded costs to costs of

(a) Existing commitments or obligations incurred prior to the effective date of [RSA 374-F];

(b) Renegotiated commitments approved by the commission; and

(c) New mandated commitments approved by the commission . . . ."

The Existing Wood-Fired plants further agree with those parties arguing that the Commission must apply the least-cost planning principles in RSA 378:37 to this case and that PSNH may not recover any costs related to construction work in progress.

### **III. COMMISSION ANALYSIS**

#### **A. Threshold Issues**

We begin our discussion with certain threshold issues that all raise the issue of whether it is appropriate for us to consider the PSNH proposal to modify Schiller Station at this time.

First, Mr. Hart's contention that his due process rights have been violated because we employed an expedited process in this case is without merit. The New Hampshire Supreme Court has determined that three factors are relevant to

the question of whether an administrative litigant's due process rights have been violated:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Appeal of Office of Consumer Advocate*, 148 N.H. 134, 138 (2002) (citation omitted). Assuming *arguendo* that Mr. Hart accurately characterizes this proceeding as expedited, his due process argument ignores two significant realities: (1) that Mr. Hart neither sought intervention prior to nor appeared at the Pre-Hearing Conference, at which a procedural schedule was agreed upon by the participants and subsequently approved by the Commission, and (2) he has made no effort to show what he was unable to do as a result of the pace at which the proceeding has progressed to hearing and decision. Thus, Mr. Hart has failed to make the showing required by *Appeal of Office of Consumer Advocate*.

Second, Mr. Hart's contentions with respect to RSA 162-H are moot. The January 29, 2004 written ruling of the Site Evaluation Committee lays out that body's determination that it lacks jurisdiction over the Schiller modification as PSNH has

proposed it. In any event, the question of whether the Site Evaluation Committee has jurisdiction over PSNH's proposal has no bearing on our RSA 369-B:3-a review.

Third, we do not agree with the OCA that PSNH's petition must be rejected because the Schiller project as proposed by PSNH goes beyond an effort to "modify" a generation facility as that term is used by RSA 369-B:3-a. As required, we ascribe the "plain and ordinary meaning" of "modify" as that word is used in the statute. *Nilsson v. Bierman*, 2003 WL 23018170 (N.H., Oct. 9, 2003). In our view, a utility clearly seeks to "modify" a generation facility when it asks for authority to make changes to it that do not increase its capacity. Moreover, even if the word were deemed ambiguous as used in the statute, and recourse to legislative history is necessary, we agree with PSNH that the Legislature's explicit awareness of PSNH's plans for Schiller Station would foreclose any argument that such a proposal is not within the RSA 369-B:3-a ambit.

Finally, we disagree with those parties contending that the restructuring policy principles contained in RSA 374-F:3 preclude our approval of the PSNH proposal. These policy principles are themselves "interdependent" and intended as a "guide" rather than as a set of rules. See RSA 374-F:1, III. Moreover, as we have previously observed, these policy

principles are themselves part of an evolving statutory scheme covering the restructuring of PSNH that has taken into account the changing circumstances of the Company, its customers and the electric power industry in New England overall. See *Public Service Co. of N.H.*, DE 02-166, Order No. 24,117, (January 30, 2003) slip op. at 25-50 (describing such evolution in detail as it relates to Transition Service pricing). In these circumstances, it is not appropriate to take one, or even a few, of the RSA 374-F:3 policy principles in isolation and deem them to preclude what a later enactment, RSA 369-B:3-a, explicitly permits.

One additional and minor issue, raised by recently filed pleadings, requires our consideration. When PSNH filed its contract documents on January 12, 2004, it apparently included with the filing what purported to be a summary of the contract terms. PSNH agreed on January 26, 2004 to withdraw the document from the record but asked that the parties, including the Commission Staff, retain it as a supplemental response to previously interposed (but unspecified) data requests. In reply, the Existing Wood-Fired Plants modified their motion so as to ask that the Commission and anyone advising the Commission return any copies of the summary document to PSNH and not rely on it here.

In making our decision on the merits of this proceeding, we have neither relied on nor reviewed the document PSNH has agreed to exclude from the record. In the absence of any designations of any "decisional employees" among of the Commission Staff pursuant to RSA 363:32, we deem it inappropriate and unnecessary to require anyone on our Staff to return discovery materials to PSNH or eschew their review, regardless of whether such materials are of record.

#### **B. Cost Recovery and Revenue Allocation**

The substantive issues we must decide in this case concern whether it is in the public interest of PSNH's retail customers for PSNH to modify Schiller Unit 5 as proposed and, if so, how to provide for the cost recovery of such modification. Several parties have presented evidence that the project will result in many benefits, such as substantially reduced air emissions, assistance to the state's timber industries, fuel diversity, potential revenue sources from emissions credit trading programs and a \$19.3 million benefit to the economy in the Portsmouth area. However, a public interest determination is not limited to an examination of the anticipated benefits of the proposed modification. We must also examine whether the financial aspects of the proposal are in the interest of PSNH's retail customers. More specifically, we must decide the extent to which PSNH's customers should be exposed to the risk that

they will ultimately be responsible for the costs of PSNH's proposed modification of Schiller Unit 5 even if the projected incremental revenue never materializes. Thus, RSA 369-B:3-a essentially requires that we decide two questions in these circumstances: To what extent is PSNH entitled to an assurance by the Commission that it will recover all prudently incurred costs associated with the project? And, how does the "public interest of retail customers" standard require us to allocate the risks and benefits associated with the incremental revenue to be generated by the plant?

While we recognize that PSNH's analysis of the economics of the project relies on best estimates, we believe that at this point it would be neither appropriate nor required by RSA 369-B:3-a to provide PSNH with a guarantee of full cost recovery, whatever those costs turn out to be. However, we find that the record, particularly the contract documents filed by PSNH on January 12, 2004, supports a determination that the original PSNH projection of the project's cost (approximately \$70 million) is reasonable. Of that total amount, PSNH expected that approximately \$45.6 million would be paid to a vendor to construct the boiler. The \$45.6 million has been confirmed through PSNH's filing of the final contract it signed with its selected vendor. The remainder of the \$70 million total capital costs consists of other costs (e.g., permitting and dismantling

of the existing boiler) to be incurred by PSNH. The contract price is consistent with the estimate advanced by PSNH at hearing.

In addition to the capital costs, PSNH has included its estimate of the incremental revenue requirement resulting from the conversion project. To calculate this figure, PSNH compared the status quo situation of three coal/oil-burning boilers at Schiller Station with the proposed scenario of two coal/oil-burning boilers and one fluidized bed, wood/coal-fired boiler. Taking into account the expected capital costs of the project and the differences in fuel and other costs, PSNH determined the incremental revenue requirement stemming from the conversion from the first year of operation through the year 2020. See Attachment SEM 11 to Exh. 14. The incremental revenue requirement ranges from \$12,123,000 in 2006 (the first year the new boiler was expected to be in operation), gradually declining to \$5,625,000 in 2020, largely because of decreasing returns on rate base as the result of depreciation. Applying PSNH's sales forecast for 2006, Staff determined that in the absence of any offsetting revenues, the incremental revenue requirement would increase the Transition Service rate by \$0.0015 per kilowatt-hour, thereby adding approximately \$9 to the annual bill of a typical residential customer. As the incremental revenue requirement declines in later years, the

rate effect would likewise also decline. We find these estimates of the incremental revenue requirement and their likely effect on rates to be reasonable.

It is also our finding that, apart from PSNH's prediction that incremental revenues will exceed incremental costs for the project overall and thus provide rate relief, there are certain additional benefits of the project. Specifically, these benefits are (1) the existence of a sustainable market for low-grade wood products, which will have a positive effect on the New Hampshire economy, both within and without the PSNH service territory,<sup>2</sup> (2) lower emissions at Schiller Station, which will improve air quality in the PSNH service territory, (3) adding to the fuel diversity of the sources of power available to PSNH customers, and (4) improvements to reliability as the result of an improved availability factor for the unit.

However, we also find that, if PSNH moves forward with the project as presently planned, there is a possibility that the incremental revenue generated by the new boiler will not cover the project's costs. It is clear that, by far, the most significant factor in this regard is the question of what

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<sup>2</sup> Specifically, it was the determination of Innovative Natural Resource Solutions in a report commissioned by PSNH that the project would have an annual economic impact of \$19.3 million on the region's economy. The consulting firm reported that in reaching that estimate it used a methodology it had previously applied in work conducted for the Department of Resources and Economic Development.

revenue will be generated by PSNH's sale of Renewable Energy Certificates associated with the project. Neither the analysis of PSNH nor that of our own Staff permit us to determine definitively how this emerging market will develop. The problem is not, as some have suggested, the depth of the analysis but, rather, the paucity of available data and the uncertainty about what entities will participate in this nascent market in the future and whether it will be modified by statutory or regulatory changes in other states.

In light of this uncertainty, it is our determination that it would not be in the public interest of PSNH's retail customers for PSNH to modify Schiller Unit 5 under the terms contained in the Company's proposal. Thus, we do not approve the proposal under RSA 369-B:3-a in its present form.

However, we note PSNH's expressed willingness to revise its proposal so as to redistribute the relevant risks and rewards. In our judgment, in order for this modification to be in the public interest of PSNH ratepayers under RSA 369-B:3-a there must be a sharing of the risk that revenues will be insufficient to cover project costs.

Specifically, we will hold PSNH to its estimate of capital costs. The Company's recovery of capital costs will be limited to prudently incurred capital costs up to a maximum of

\$70 million, subject to further possible limitations described below.

In addition, PSNH must, in effect, guarantee incremental revenues in a base amount equal to what it has termed conservative estimates for the expected revenues from incremental power generation, reduced air emission compliance costs and the sale of RECs. To the extent that incremental revenue is less than the incremental revenue requirement the shortfall between (1) the higher of the PSNH base amount or actual revenue and (2) the incremental revenue requirement may be recovered from customers through the Transition Service rate.

To illustrate how this mechanism would function, we will apply it to PSNH's estimate of incremental revenues and costs for 2007. Attachment 6 to the PSNH testimony indicates that for 2007 it estimated the incremental revenue requirement to be approximately \$11.8 million. PSNH also estimated that it would receive approximately \$1.2 million of revenue from incremental power generated at the Schiller facility, that it would save approximately \$1.4 million in air emission compliance costs and would receive a minimum of \$6.3 million in REC revenue, based on a capacity factor of 80% and a REC price of \$20.<sup>3</sup> Adding the \$1.2 million of expected revenue from

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<sup>3</sup> By way of contrast, the same attachment to the PSNH testimony predicts \$16,852,050 in incremental revenues based on its high-end predictions of a 95% capacity factor and a REC price of \$45.

incremental power generated at the plant, the \$1.4 million of expected reduced emissions costs and the \$6.3 million estimate of REC revenue results in \$8.9 million of expected offsetting revenue. We will establish that level of annual offsetting revenues as the base amount for which PSNH is at risk of non-recovery. When we determine cost recovery related to the Schiller conversion in PSNH's Transition Service proceedings, applying PSNH's estimate of an incremental revenue requirement of approximately \$11.8 million for 2007, the maximum amount of incremental revenue for which customers could be responsible is approximately \$2.9 million. If offsetting revenues are received in 2007 from any source, including the production tax credit pending in Congress as well as the New Hampshire Multiple Pollutant Reduction Program and NOx Budget Program, in an amount equal to the \$11.8 incremental revenue requirement, PSNH will have fully recovered its costs and no costs will have to be recovered from either PSNH customers or its shareholders.

As shown in Attachment SEM 11 to Exhibit 14, the incremental revenue requirement is expected to decline after 2007 as the plant depreciates. As the incremental revenue requirement approaches the \$8.9 million amount for which PSNH is potentially at risk, the amount PSNH's customers are potentially liable for will likewise decline until it reaches zero. Once the incremental revenue requirement declines below \$8.9 million,

the amount PSNH is potentially at risk for if offsetting revenue does not materialize will be the same as the incremental revenue requirement.

In our judgment, this modest allocation of risk to PSNH customers is justified by the additional benefits of the project beyond the predicted rate relief. We conclude that factoring such additional benefits into the equation is consistent with the "public interest of retail customers" standard of RSA 369-B:3-a. We also conclude that the mechanism we describe above is consistent with the requirement in RSA 369-B:3-a that we provide for cost recovery and consistent with our responsibility under RSA 363:17-a to balance the interests of ratepayers with those of utility shareholders.

We also agree with those parties asserting that a sharing of project risks also requires a sharing of project benefits. PSNH testified that it is highly likely that incremental revenues will exceed the annual incremental revenue requirement. In that event, we will require that the first \$5 million of annual incremental revenue received in excess of PSNH's incremental revenue requirement be shared on a 50-50 basis between PSNH and its customers. In addition to being equitable, this will provide PSNH with an incentive to control costs and maximize the revenue stream of the project. Customers, on the other hand, will get the benefit of a

reduction to PSNH's overall transition service costs. In the event that revenues received are more than \$5 million in excess of PSNH's incremental revenue requirement, those revenues shall go 100% to PSNH's customers. This, in essence, allocates any windfall revenues to customers and permits an equitable sharing of all reasonably anticipated incremental revenues.

The risk-reward reallocation we require as a condition of project approval turns on a reasonable and accurate determination of the actual incremental requirement of the modified Schiller Station. We expect this determination to be made in connection with PSNH's annual Transition Service filing or any appropriate successor proceedings. In such proceedings, PSNH will be required to compare the actual revenue requirement at the entire Schiller plant to a revenue requirement determined using actual Unit 4 and Unit 6 costs, extrapolated as if the three current coal-burning boilers were still in operation, and historical capacity factor information for the existing coal boiler at Unit 5 (currently at approximately 65-70%).

We make one final point with respect to cost recovery. As with any utility project planned for inclusion in rate base, the recovery of any costs associated with this project will continue to be subject to the provisions of RSA 378:30-a regarding construction work in progress.

### C. The Prudence Question

We address one other substantive issue, in light of the arguments made at hearing and in order to foreclose future regulatory uncertainty. Some parties, PSNH notably not among them, have argued that to the extent we grant RSA 369-B:3-a approval here, we are blessing the project in a manner that precludes any review in the future of the prudence of the costs PSNH incurs in building or operating the project. We disagree.

"In a prudence review, the PUC takes a fresh look at what was done in the past." *Appeal of McCool*, 128 N.H. 124, 159 (1986) (King, J., dissenting); see also *Appeal of Conservation Law Foundation*, 127 N.H. 606, 637 (1986) (prudence review "requires the exclusion from rate base of costs that should have been foreseen as wasteful) (citations omitted); *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989) (tracing history of prudence principle in cost-of-service ratemaking). Thus, the term "prudence" as it has come to be understood as a term of art in the realm of traditional, cost-of-service ratemaking principles are inapplicable here. When we review a proposal under the "public interest of retail customers" standard contained in RSA 369-B:3-a, we cannot substitute our expertise for the sound business judgment and due diligence required of investor-owned utilities. This is so even when, as here, the petitioner has filed its contract documents and, thus, its specific terms are

available for scrutiny. A prudence review, as we understand the concept, involves an after-the-fact review of investment decisions, in light of actual performance, but limited to what was reasonably foreseeable at the time of the decisions. The before-the-fact scrutiny we apply here is not a prudence review. Accordingly, we do not intend our decision today to foreclose future prudence reviews of the Company's actions in connection with this project. See RSA 378:28.

#### **D. Motion for Confidential Treatment**

The last issue we confront is PSNH's request for confidential treatment of the contract documents it filed on January 9, 2004. We grant the motion in part and deny it in part.

The New Hampshire Right-to-Know Law provides each citizen with the right to inspect all public records in the possession of the Commission. See RSA 91-A:4, I. The statute contains an exception, invoked here, for "confidential, commercial or financial information." RSA 91-A:5, IV. In *Union Leader Corp. v. New Hampshire Housing Finance Authority*, 142 N.H. 540 (1997), the New Hampshire Supreme Court provided a framework for analyzing requests to employ this exception to shield from public disclosure documents that would otherwise be deemed public records. There must be a determination of whether the information is

confidential, commercial or financial information "and whether disclosure would constitute an invasion of privacy." *Id.* at 552 (emphasis in original, citations omitted). "An expansive construction of these terms must be avoided," lest the exemption "swallow the rule." *Id.* at 552-53 (citations omitted). "Furthermore, the asserted private confidential, commercial, or financial interest must be balanced against the public's interest in disclosure, . . . since these categorical exemptions mean not that the information is *per se* exempt, but rather that it is sufficiently private that it must be balanced against the public's interest in disclosure." *Id.* at 553 (citations omitted).

Our applicable rule is designed to facilitate the employment of this balancing test. We require a motion for confidentiality to contain (1) the specific documents or portions thereof for which confidential treatment is sought, (2) reference to statutory or common law authority favoring confidentiality, (3) "[f]acts describing the benefits of non-disclosure to the public, including evidence of harm that would result from disclosure to be weighed against the benefits of disclosure to the public," and certain evidence. Puc 204.06(b). The evidence must go to the issue of whether the information

"would likely create a competitive disadvantage for the petitioner." *Id.* at (c).

In support of its motion, PSNH contends that (1) the contract was negotiated in confidence and disclosure of its terms would be harmful to the supplier in competing with other boiler manufacturers because the contract reveals the boiler's unique design, (2) other suppliers may not want to contract with PSNH in the future if their contract and price terms are likely to be disclosed in public, (3) the technical information and drawings in the contract constitute trade secrets, and (4) the contract documents are voluminous and were costly and time-consuming to produce. In response to Mr. Hart's objection, PSNH further argues that (1) "it is inappropriate to release the name of the successful bidder until the project is approved by the Commission for the simple, straightforward reason that there will be no project without that approval . . . . The name of the vendor and the price will be meaningless if the project cannot be approved," (2) the name of the vendor can be made public when Commission approval is obtained, thus presumably satisfying the public's interest in knowing the identity of the contractor, (3) the contract itself contains an agreement by PSNH to "maintain the confidentiality of the document and to minimize disclosure of the terms subject to an exception for legally compelled disclosure," (4) the identity of the successful bidder has not

been made public, despite assertions to that effect by Mr. Hart, (5) given that the negotiated price is within the parameters discussed at hearing, it is not in the public interest to disclose the price publicly, and (6) Mr. Hart has incorrectly alleged that PSNH's confidentiality request is an attempt to shield the contractor from public scrutiny and criticism.

In our judgment, applying the requisite balancing test to PSNH's asserted bases for non-disclosure requires us to be mindful of the significance of the contract to our decision. To the extent that we relied on the contract in today's order, the public's interest in disclosure, so as to facilitate public scrutiny of the work of the Commission and thus achieve the purposes of the Right to Know Law.

The decision on the merits of this case does not turn on the trade secrets of the contract filed by PSNH. By "trade secrets," we mean descriptions in the contract of how the contractor proposes to complete the project in a technical and/or engineering sense, to the extent that such information is not otherwise generally available. We do not mean information as to any costs to be paid by PSNH and the timing of such payments. Balancing the significant privacy interest regarding the trade secrets against the public's relatively attenuated interest in disclosure, we find that the portions of the

contract that reveal technical terms constituting trade secrets are not subject to public disclosure.

The name of the contractor is not entitled to confidential treatment. We have not based our decision on the identity of the contractor. We have not undertaken the task of analyzing whether PSNH chose the correct bidder in any respect. However, PSNH has advanced no cognizable privacy interest in the name of the successful bidder, either of PSNH or the contractor itself. Therefore, the public's interest in disclosure of this information, although relatively small, outweighs any privacy interests.

Finally, we turn to the financial terms of the contract - most notably the contract price. By "financial terms," we mean all information in the contract that reveals the timing, nature and extent of PSNH's financial obligations to the contractor. This subject was one of considerable interest and controversy at hearing. Much of the controversy is resolved by the fact that the negotiated price is consistent with the projections PSNH advanced during the hearings themselves. The public's interest in verifying this important fact is relatively high, even though in substance our decision today insulates customers from at least some of the risks associated with the contract price. The financial terms are relevant to our determination, and the public is generally entitled to

scrutinize the facts that bear upon our decision making, particularly when such facts were of such interest at hearing.

We agree with the implicit assertion of PSNH, however, that the balance with respect to the financial terms varies depending upon whether the project moves forward or not. If, for example, PSNH were to deem the conditions we attach today as unacceptable and opted to abandon the project, the public would have less interest in knowing what financial terms PSNH was able to negotiate. But, in that circumstance, there would be public disclosure of facts that are competitively sensitive to the parties to the contract, since both are likely to enter into similar negotiations in the future. On the other hand, if PSNH moves forward with the project on the stated financial terms, the public has a relatively high interest in disclosure because it will then be able to assess fully the risk/reward allocation under which the modification will affect the public interest of PSNH's retail customers.

Therefore, we grant the confidentiality motion insofar as it seeks to shield from public disclosure trade secrets of a technical nature in the contract filed on January 9, 2004. We deny the motion in all other respects.

#### **IV. CONCLUSION**

We conclude in this proceeding that modifying Schiller Unit 5 by installing a fluidized-bed combustion boiler to burn

wood is in the public interest of retail customers of PSNH subject to the cost recovery mechanism described in detail above. While the evidence suggests that it is likely that the incremental revenue from the project will over time exceed the incremental revenue requirement, the possibility of a shortfall does exist. Accordingly, we have designed a cost recovery mechanism that balances company risk and customer risk in a manner that holds PSNH to certain basic cost and revenue representations and thereby protects customers by limiting their exposure in the event capital costs exceed \$70 million or REC market revenues are substantially below PSNH's estimates.

Furthermore, we conclude that the small measure of risk that does exist for customers is reasonable in light of the other benefits provided by the project in terms of cleaner air, productive use of New Hampshire forests and indirect positive economic effects. In addition, we have designed a sharing mechanism to be applied to a band of revenues in excess of the incremental revenue requirement that provides an incentive to the company to proceed with the project, encourages PSNH to manage the project efficiently, provides the opportunity for rewards to both the company and customers, and appropriately addresses the respective risks of the company and customers with respect to the potential of under-recovery of revenues.

Finally, we have limited the level of revenues to be collected

by the company for the benefit of its shareholders such that in the event REC revenues are much higher than anticipated the benefits will go to customers.

We find this approach to be consistent with the transitional nature of RSA 369-B:3-a in the evolution of the electric industry in New Hampshire from an environment where investments in generation were subject to traditional rate regulation (i.e., where all prudently incurred and reasonable expenses were recovered) to one in which market forces alone will determine cost recovery for investments in generation. In this instance, PSNH seeks to invest in a modification of Schiller Unit 5 when traditional concepts of rate regulation are not applicable to generation. In this case, cost recovery at such modification is not subject to market forces, but is rather permitted by Statute. In these circumstances we find the cost recovery mechanism set forth herein corresponds to the transitional nature of the electric industry peculiar to PSNH in that it holds PSNH to certain basic representations, limits customer risk in the worst case, provides a sharing of rewards between customers and the company in the more likely case, and avoids a windfall to the company in the best case. Should PSNH determine that it is willing to proceed subject to the cost recovery mechanism described herein, it may move forward with

the project without seeking further approval from the Commission under RSA 369-B:3-a.

**Based upon the forgoing, it is hereby**

**ORDERED**, that the petition of Public Service Company of New Hampshire for approval pursuant to RSA 369-B:3-a of its proposal to modify Unit 5 of its Schiller Station is hereby GRANTED IN PART AND DENIED IN PART as described more fully herein; and it is

**FURTHER ORDERED**, that the motion of Public Service Company of New Hampshire for confidential treatment of the contract documents filed on January 9, 2004 is hereby GRANTED IN PART AND DENIED IN PART as described more fully herein; and it is

**FURTHER ORDERED**, that the determination as to confidential treatment of documents is subject to the ongoing authority of the Commission, on its own motion or on the motion of Staff or any member of the public to reconsider such determination in light of RSA 91-A, should circumstances so warrant.

By order of the Public Utilities Commission of New  
Hampshire this sixth day of February, 2004.

\_\_\_\_\_  
Thomas B. Getz  
Chairman

\_\_\_\_\_  
Susan S. Geiger  
Commissioner

\_\_\_\_\_  
Graham J. Morrison  
Commissioner

Attested by:

\_\_\_\_\_  
Debra A. Howland  
Executive Director & Secretary