

THE STATE OF NEW HAMPSHIRE
before the
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

Public Service Company of New Hampshire - Distribution Service Rate Proceeding
Docket No. DE 09-035

PSNH'S MEMORANDUM IN SUPPORT OF TEMPORARY RATES

Introduction On April 17, 2009, Public Service Company of New Hampshire ("PSNH") filed a Petition for Temporary Rates. The Petition was accompanied by pre-filed direct testimony and exhibits of Gary A. Long, Robert A. Baumann and Stephen R. Hall. PSNH proposed an effective date of July 1, 2009 for the temporary rates. PSNH has yet to file its Notice of Intent to File Rate Schedules pursuant to N.H. Code Admin. Rule Puc §1604.5 or its permanent rate request with the Chapter Puc 1600 Tariff Filing Requirements; however, the tariff filing will be made on or before the proposed effective date of the temporary rates. Given this procedural framework, PSNH offers the following arguments in support of its legal position that the Commission has the authority to approve temporary rates for effect on July 1, 2008

Questions presented for discussion:

1. Can PSNH apply for and be granted temporary rates before filing its underlying request for permanent rate relief has been filed?

Temporary rates are governed by the following statute, RSA 378:27:

In any proceeding involving the rates of a public utility brought either upon motion of the commission or upon complaint, the commission may, after reasonable notice and hearing, if it be of the opinion that the public interest so requires, immediately fix, determine, and prescribe for the duration of said proceeding reasonable temporary rates; provided, however, that such temporary rates shall be sufficient to yield not less than a reasonable return on the cost of the property of the utility used and useful in the public service less accrued depreciation, as shown by the reports of the utility filed with the commission, unless there appears to be reasonable ground for questioning the figures in such reports.

A temporary rate proceeding can be initiated on the Commission's own motion or by a complaint of a customer, a utility or the Office of Consumer Advocate (OCA), notwithstanding the pendency of any permanent rate proceeding involving a particular utility. In that instance, the Commission would initiate a temporary rate proceeding in a case where the utility's reports regularly on file with the Commission indicate that the utility was earning over its previously allowed rate of return. This approach was the Commission's practice where RSA 378:27 permitted the Commission to declare existing rates as temporary rates or immediately reduce rates, while providing the utility protection from confiscatory rates through recoupment afforded by RSA 378:29. If a reduction in delivery service revenues is in the public interest, the Commission does not need to wait until the utility files its permanent rates case in order to put temporary rates into effect. If "the public interest so requires, [the Commission may] immediately fix, determine, and prescribe for the duration of said proceeding reasonable temporary rates". RSA 378:27. Although the temporary rate statute was used in the past to begin the process of possibly lowering rates, increasingly utilities were filing for rate increases along with requests for temporary rates. The enactment of RSA 378:30 provided customers with the protection from paying excess temporary rates during the course of the permanent rate proceeding through the refund process. *See discussion in Public Service Company v. State*, 102 NH 66, 68-69 (1959).

The reports on file with the Commission show that PSNH is earning substantially less than its last found return on equity. Direct Testimony of Robert A. Baumann at 2-3. It is appropriate to use the last found rate of return on equity or overall rate of return when setting temporary rates. *PSNH v. State, supra*, 102 N.H. at 69-70. The investigation of temporary rates is not dependent upon consideration of any permanent rate issues; therefore, the fact that the permanent case has not been filed has no bearing on the temporary rate case.

"The standard for establishing temporary rates is contained in RSA 378:27, which the PUC cited at the beginning of its analysis and applied in its report which was incorporated in the temporary rate order. This standard is 'less stringent' than the

standard for permanent rates, in that temporary rates shall be determined expeditiously, 'without such investigation as might be deemed necessary to a determination of permanent rates.'" *See New Eng. Tel. & Tel. Co. v. State*, 95 N.H. 515, 518, 68 A.2d 114, 116 (1949). *Appeal of the Office of Consumer Advocate*, 134 NH 651,660 (1991).

The Commission opened this docket in response to a Request for Waivers of Tariff Filing Rules filed by PSNH on February 23, 2009. PSNH's Petition for Temporary Rates filed on April 17, 2009 certainly qualifies as a "complaint" under RSA 378:27¹. The Petition cites inadequate earnings, increased investment in used and useful plant since PSNH's last rate proceeding and the extraordinary costs of the December 2008 ice storm as grounds for immediate rate relief pending a determination of PSNH's proper level of permanent rates. Consideration of temporary rates does not depend upon PSNH's filing of a permanent rate increase request. Even if some questions remain regarding the figures in a temporary rate filing they must be truly significant in order to delay or deny a temporary rate request. *Re: Connecticut Valley Electric Company*, 81 NH PUC 724,726 (1991).

To demonstrate why a permanent rate case filing is not necessary, consider the situation where the Commission on its own motion or a party requests a rate proceeding be opened based upon reports on file with the Commission that the utility is earning above its previously approved return on rate base. If the filing of a permanent rate case was a condition precedent to setting temporary rates, a utility could delay implementation of temporary rate decrease merely by delaying the filing of its permanent rate case. The statute was not intended to allow utility's to avoid a temporary rate change by not filing a permanent case and further demonstrates that the permanent rate filing need not be made before or at the same time as the temporary rate filing is made in order to evaluate the temporary rate filing. Furthermore, the permanent rate filing will raise issues which are not

¹ NH Code Admin. Rule Puc § 202.01(a) and (b) call for a petition to be filed when requesting a temporary rate change along with any applicable tariff filing requirements of Puc Chapter 1600.

traditionally taken up in the abbreviated temporary rate proceedings such as rate design.

2. Question: Is July 1, 2009 a legally appropriate effective date for temporary rates?

The Commission can only establish just and reasonable temporary rates and set an effective date for those rates if those decisions are permitted under New Hampshire law. It is clear that the Commission has the authority to set temporary rates and to set an effective date consistent with PSNH's request.

PSNH will file its Notice of Intent to File Rate Schedules on or before June 1, 2009 and file its permanent rate case with all of the filing requirements under NH Code Admin. Chapter Puc 1600 on or before July 1, 2009. If granted by the Commission, the temporary rates will be implemented on a service rendered basis. Puc § 1203.05(b). The supreme court case which definitively answers this question of the effective date for temporary rates is *Appeal of Pennichuck Water Works*, 120 N.H. 562 (1980):

Accordingly, we hold that the earliest date on which the PUC can order temporary rates to take effect is the date on which the utility files its underlying request for a change in its permanent rates. In no event may temporary rates be made effective as to *services rendered* before the date on which the permanent rate request is filed. Therefore, in the instant proceedings, the PUC can, if it deems Pennichuck entitled to them, authorize temporary rates to take effect on all services rendered by Pennichuck on or after December 29, 1978. In addition, the effective date for temporary rates shall be the same for all customers and shall not depend upon the vagaries of a utility's billing procedures. See *Nelson v. Public Service Co.*, 119 N.H. 327, 402 A.2d 623 (1979). 120 NH at 567

This decision was followed by the Commission in the last Unitil rate case.² The reason for the decision is that the Commission should avoid retroactivity in a rate change. The rendering of service by the company and the taking of service by the customer not only completes a contractual transaction; the utility's tariffs have the

² *Re: Unitil Energy Systems, Inc.*, Docket No DE 05-178, Order No. 24,585, 91 NH PUC 40, 41 (2006).

force and effect of law. *Id.* at 566. Retroactivity of tariff rates is akin to retroactive laws. Customers must be made aware of a potential for a rate change, which the *Pennichuck* decision pegs at the date the underlying request for a permanent case is filed.³ In the instant proceeding, notice has been published of the temporary rate hearing to be held on June 16, 2009. Because bills will be prorated as of July 1, 2009, the temporary rates will only be applied to service rendered after the change in rates becomes effective.

Question 3: If PSNH files a tariff for effect after the effective date of the temporary rates, should PSNH be allowed to recoup any difference between permanent rates and temporary rates back to July 1, 2009?

The statute governing recoupment, RSA 378:29, requires the computation of the amount to be “such sum as shall represent the difference between the gross income obtained from the rates prescribed in such temporary order and the gross income which would have been obtained under the rates finally determined if applied during the period such temporary order was in effect.” (emphasis added) If the effective date of the new tariff were used for the date of recoupment, the period for recoupment or refund would be the period related to when the filed tariff was suspended under RSA 378:6. Nothing in RSA 378:6, 378:29 or 378:30 suggests that the Commission has the discretion to use the tariff suspension period for refunds or recoupment as opposed to the period during which the temporary rate order was in effect.

³ *Re: Kearsage Telephone Company*, DT 01-021, Order No. 24,056. 87 NH PUC Rep. 649, “The OCA recommended that the Commission set temporary rates for KTC at the level of current rates effective as of the November 16, 2001 Order of Notice in this docket. The OCA argues that the Order of Notice is sufficient notice to ratepayers that rates may be changed in this docket. OCA believes that this recommendation properly balances the interests of the company and ratepayers and is consistent with NH RSA 378:27 and applicable case law.” 87 NH PUC at 650. Note: Temporary rates were at issue because there was an allegation that the company was over earning.

The testimony of Messrs. Gary A. Long and Robert A. Baumann clearly demonstrate a current need for rate relief.⁴ This need has been present for all of 2008, continues and is increasing. There is no authority to require that temporary rates be reconciled back to the date when the underlying permanent rate tariff would have been effective. The temporary rate statute works both ways; it has been used both for increases and potential decreases. The example provided above, where a utility's rates are being investigated for a potential decrease, demonstrates that permanent rates are reconciled back to the date that temporary rates take effect. Otherwise, if current rates are established as temporary rates in order to investigate potential over-earning, the utility could be in the position of controlling the date for refunds under RSA 378:30 by delaying the filing of its underlying permanent case.

Conclusion The Commission has the authority to allow temporary rates to go into effect no earlier than the date the underlying permanent rate tariff is filed. There is no need for the permanent rate filing to be reviewed in order to evaluate the temporary rate evidence. "The legislature has set forth RSA 378:27, temporary rates, to be the easiest to obtain as far as standard of proof. A utility need only submit records of the utility demonstrating a failure to earn the rate of return last set by the commission."⁵ If the date of the permanent rate filing is the same date as the effective date of the temporary rates, as specifically permitted under *Pennichuck, supra*, there is no reason to alter the date to which temporary and permanent rates will be reconciled.

⁴ "As of December 31, 2008, the actual 2008 distribution ROE for PSNH, as reported to the Commission, was 6.26%, well below past and current industry standards of a fair and reasonable return, and well below the 9.67% level authorized by the Commission in the 2006 case. With no temporary rate relief in 2009, PSNH projects a calendar year 2009 distribution ROE of approximately 4% and continued decline into 2010." Direct Testimony of Robert A. Baumann at 2-3.

⁵ Re Hudson Water Company, Docket No. DR 80-218, Supplemental Order No. 14,963 66 NH PUC 234, 235 (1981)

Respectfully submitted,
Public Service Company of New Hampshire

May 13 2009
Date

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CERTIFICATE OF SERVICE

I hereby certify that, on the date written below, I caused the attached Memorandum in Support of Temporary Rates to be hand delivered or served pursuant to Puc § 203.02 and Puc § 203.11(c) to the persons on the attached Service List.

May 13 2009
Date

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