

STATE OF NEW HAMPSHIRE  
BEFORE THE  
PUBLIC UTILITIES COMMISSION

Public Service Company of New Hampshire  
Customer Migration and Power Procurement  
Docket No. DE 10-160

**POST HEARING BRIEF**  
**OF**  
**PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE**

Pursuant to the Secretarial Letter of January 21, 2011, and the extension of time granted by the Secretarial Letter of February 4, 2011, Public Service Company of New Hampshire (“PSNH” or “the Company”) hereby submits its post hearing brief.

**Introduction**

This docket is fundamentally about the dramatic decrease in natural gas prices in New England and the associated significant decline in the ISO-NE wholesale electricity prices. This dramatic decline in prices has come about due to domestic and world conditions including new drilling methods for domestic natural gas from shale gas, the deep recession, the ISO-NE Forward Capacity Market and world economic conditions. Had natural gas prices not fallen so dramatically, or if the Forward Capacity Market in New England had not been priced so far below the cost of new entry, it is unlikely this docket would even exist.

Prior to these unusual conditions, PSNH’s Energy Service rate was at or near the lowest in New England and PSNH’s customers received hundreds of millions of dollars of benefit during those several years. Currently, PSNH’s Energy Service rate is nearer the short term market price.

The fundamental question before the Commission is whether or not its policies regarding pricing structure and cost recovery are adequate during these unusual times. PSNH implores the Commission to take the long term view and resist the temptation to take dramatic short term actions which harm customers and the State in the longer

term. The electricity infrastructure is not a short term proposition, even though competitive suppliers who are focused on short term financial gains and gaining a market advantage would argue otherwise.

PSNH believes the solution to this so-called “migration” issue lies in the structure of its rates and the method of cost recovery rather than creating barriers to market entry or exit. The Commission has the authority to be creative in setting a rate structure so that customers continue to have the freedom to enter or exit the market while ensuring a fair allocation of costs and benefits between residential and small business customers and PSNH’s largest customers.

Our specific responses to the issues outlined in the Commission’s Secretarial Letter of January 21, 2011 follow.

#### **I. The Commission’s powers generally.**

One of the key issues in this docket is whether the Commission has the authority to implement ratemaking methodologies to address the cost shifting that has resulted from migration of customers from PSNH’s Energy Service to competitive suppliers. The regulation of utilities and the setting of appropriate rates to be charged for public utility products and services is the unique province of the legislature. *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 313, 109 S.Ct. 609, 618, 102 L.Ed.2d 646 (1989); *The Minnesota Rate Cases*, 230 U.S. 352, 433, 33 S.Ct. 729, 754, 57 L.Ed. 1511 (1913); *Appeal of Richards*, 134 N.H. 148 (1991); see *LUCC v. Public Serv. Co. of N.H.*, 119 N.H. 332, 340, 402 A.2d 626, 631 (1979). “The Commission ‘is a creation of the legislature and as such is endowed with only the powers and authority which are expressly granted or fairly implied by statute.’” *Appeal of Public Service Co. of New Hampshire*, 122 N.H. 1062, 1066 (1982) (citing, *Petition of Boston & Maine R.R.*, 82 N.H. 116, 116, 129 A. 880, 880 (1925)). The legislature has granted the Commission general supervisory power over the state’s public utilities. RSA 374:3. The Commission’s authority over ratemaking is broader than its general supervisory power, and has been described as “plenary”, limited only by specific statutory language which restricts that authority.

The statutory scheme dictates that the Commission's ratemaking power "is plenary save in a few specifically excepted instances." *State v. New England Tel. & Tel. Co.*, 103 N.H. 394, 397, 173 A.2d 728, 730 (1961), citing *Lorenz v. Stearns*, 85 N.H. 494, 506, 161 A. 205, 212 (1932). *Legislative Utility Consumers Council v. PSNH*, 119 N.H. 332, 341 (1979).

Except in narrowly defined instances, the ratemaking power of the Commission is plenary. *Legislative Util. Consumers' Council v. Pub. Serv. Co. supra*, citing *State v. New England Tel. & Tel. Co.*; *Lorenz v. Stearns, supra Bacher v. PSNH* 119 N.H. 356, 358 (1979).

As an example, the Commission's ratemaking authority once encompassed the authority to include Construction Work in Progress charges in rates (*LUCC v. PSNH, supra*); however, that authority was taken back by a specific statute, RSA 378:30-a. Absent a specific statute restricting the Commission's authority, the Commission has the authority to fashion a ratemaking response to cost shifting resulting from migration.

The Restructuring Law, RSA Chapter 374-F, has examples of the Commission's authority regarding a restructured industry and default service rates:

RSA 374-F:4, VIII, (a): The commission is authorized to order such charges and other service provisions and to take such other actions that are necessary to implement restructuring and that are substantially consistent with the principles established in this chapter. The commission is authorized to require that distribution and electricity supply services be provided by separate affiliates.

RSA 374-F:3, V, (d), Universal Service: The commission should establish transition and default service appropriate to the particular circumstances of each jurisdictional utility.

RSA 374-F:3, V, (e), Universal Service: Notwithstanding any provision of subparagraphs (b) and (c), as competitive markets develop, the commission may approve alternative means of providing transition or default services which are designed to minimize customer risk, not unduly harm the development of competitive markets, and mitigate against price volatility without creating new deferred costs, if the commission determines such means to be in the public interest.

It is important to keep these statutes in mind when considering whether to provide a remedy for the cost shifting that has been experienced in the default service rate. The

Commission has broad discretion to fashion a remedy if it finds that the cost shifting is unfair under RSA 374-F:3,VI.

**II. There is a legal barrier to PSNH bidding its generation assets into the pool and purchasing all of its default service needs pursuant to an RFP process.**

As noted above, “The Commission ‘is a creation of the legislature and as such is endowed with only the powers and authority which are expressly granted or fairly implied by statute.’” *Appeal of Public Service Co. of New Hampshire, supra*. One of the specific exceptions to the Commission’s authority is the ability to designate the source from which PSNH supplies the power for default service. Under RSA 369-B:3, IV(b)(1)(A), “From competition day until the completion of the sale of PSNH’s ownership interests in fossil and hydro generation assets located in New Hampshire, PSNH shall supply all . . . transition service and default service offered in its retail electric service territory from its generation assets and, if necessary, through supplemental power purchases in a manner approved by the commission.” This statute, specific to PSNH’s default energy service, directly supersedes the more general language describing default service in the restructuring statute:

RSA 374-F:3, V (c) Default service should be designed to provide a safety net and to assure universal access and system integrity. Default service should be procured through the competitive market and may be administered by independent third parties.

The PSNH-specific statute, RSA 369-B:3, IV(b)(1)(A), requires default service to be supplied from PSNH’s generating plants; however, RSA 374-F:3,V (c) suggests that default service should be procured through the competitive market. “When a conflict exists between two statutes, the later statute will control, especially when the later statute deals with the subject in a specific way and the earlier subject treats that subject in a general fashion.” *Board of Selectmen v. Planning Board*, 118 N.H. 150, 152 (1978); *quoted in, Petition of Public Service Company*, 130 N.H. 265, 283 (1987).<sup>1</sup> The restructuring statute was first enacted in 1996 while RSA 369-B:3 was enacted in 2000.

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<sup>1</sup> In *Appeal of Campaign for Ratepayers Rights*, 145 N.H. 671 (2001), the court ruled that RSA 369-B:1,X controlled over RSA Chapter 374-F. 145 N.H. at 678 (*citing, Petition of PSNH, supra*).

The word “shall” in the PSNH-specific statute is mandatory as opposed to the word “should” in the more general restructuring statute. The statutory requirement to supply default service first from PSNH’s plants is a clear legal barrier “to requiring PSNH bid all of its generating assets into the daily market and purchase all of its energy requirements through a request for proposal process similar to that used by Unitil Energy Systems, Inc. and Granite State Electric Company d/b/a/ National Grid.” Secretarial Letter, January 21, 2011, at 2.

**III. Selling all of the output of PSNH’s generating assets into the market and supplying all of the default service load through an RFP has already been rejected by the Commission twice before.**

The Commission has already ruled at length on this issue. In Docket No. DE 03-175, Constellation proposed the same approach as it proposed in this proceeding.<sup>2</sup> The Commission found that Constellation’s proposal to have PSNH sell its generation output to third party suppliers who would then provide the full requirements of PSNH’s energy service load did not comply with the statute, RSA 369-B:3,IV(b)(1)(A). Furthermore, the insertion of a third party supplier between PSNH and its default service customers would inevitably lead to higher costs for the customers.<sup>3</sup>

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<sup>2</sup> DE 03-175, Order No. 24,252, 88 NH PUC at 644-645 (2003).

<sup>3</sup> “We will not order PSNH to procure or supply Transition Service according to the bidding process proposed by Constellation. We believe Constellation’s proposal is inconsistent with RSA 369-B:3, IV(b)(1)(A). In our view, the plain language of this provision makes clear the Legislature’s requirement that PSNH procure and supply Transition Service in precisely the manner PSNH proposes: by employing its generation portfolio directly for that purpose and making appropriate market purchases for its additional requirements.

Moreover, we are required to read this provision in its overall context, and in a manner that advances the statute’s purposes considered as a whole. See, e.g., *New Hampshire Div. of Human Servs. v. Hahn*, 133 N.H. 776, 778 (1990); Order No. 24,211, [sic.24,117] slip op. at 25. Reading this provision in the context of the provision requiring PSNH to price its Transition Service according to its actual costs (if such costs are also prudent and reasonable) leads to the conclusion that the Legislature intended PSNH to use its generation portfolio directly for the benefit of its Transition Service customers, as opposed to consigning them to a third party for resale to PSNH’s customers. It is also our finding that, even assuming Constellation’s proposal was permissible under the statute, the record does not demonstrate that it would yield prudent and reasonable Transition Service prices. This is because of the likelihood that PSNH customers would pay more for PSNH-generated power under Constellation’s bidding proposal than they would under PSNH’s plan to use these resources directly to serve retail load. For instance, under the PSNH arrangement any forced

In this proceeding Mr. Allegretti went to great lengths to obfuscate Constellation's proposal, but, absent divestiture of PSNH assets, his proposal for the RFP would be as follows:

the Commission could require PSNH to deliver the generation assets' output to the ES suppliers in proportion to their share of the ES load. The suppliers would then pay PSNH the day-ahead clearing price for the power when the unit clears in the day-ahead market. PSNH would be free to establish the day-ahead bid. The impact of this structure is to keep the physical power, if any, that the plants produce within the supply portfolio that serves the ES customers as appears to be contemplated or required under RSA 369-B:3. From an economic perspective, the effect is the same as if PSNH simply bid the asset into the day-ahead market. Exhibit 16, at 20.

Constellation's proposal in this proceeding is the same proposal that it made in 2003. "[T]he Legislature intended PSNH to use its generation portfolio directly for the benefit of its Transition Service customers, as opposed to consigning them to a third party for resale to PSNH's customers." Docket No. DE 03-175, Order No. 24,252, 88 NH PUC 648. The Commission found that Constellation's proposal did not comply with the law, and it was bound to be more expensive than PSNH's approach. While Constellation has made an effort to distinguish its proposal in this docket from the proposal it made previously, it is a distinction without a difference. Nothing has changed in the Constellation proposal, and nothing has changed to reverse the Commission's previous findings and rulings of law. Constellation's proposal fails on two fronts. It not only fails to comport with the law, but it also fails to address how such a scheme would provide value and therefore provide economic benefits to customers.

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outages at the PSNH generation facilities resulting from imprudence would not be recoverable from customers. In the alternative, under Constellation's paradigm the third-party bidder would assume all risks associated with forced outages and, presumably, increase the bid price accordingly. Consequently, in comparing the two models it is fair to conclude that there would be no observable economic benefit to ratepayers from the Constellation paradigm. More generally, Constellation has not demonstrated how interposing a third party between PSNH generation and PSNH Transition Service customers will not inevitably lead to a higher price for PSNH-generated power since under such a paradigm there will be not one but two companies seeking to earn a return on this power supply as well as two companies incurring overhead and administrative costs. This is consonant with the Commission's previous observation that "it is not economically efficient for PSNH to sell its generation capacity into the regional wholesale market and then buy back its Transition Service-related needs." *Id.* at 60. DE 03-175, Order No. 24,252, 88 NH PUC 636, 648 (2003)

In 2007, Constellation again proposed that the Commission require PSNH to issue an RFP for its power requirements. The Commission found that Constellation proposal to be inadequate, eventually leading, in part to the opening of this proceeding.<sup>4</sup> *See*, Docket No. DE 10-160, Order of Notice. Even though his “overview of a proposal” did not meet the burden of proof in Docket DE 07-096, Mr. Allegretti deemed it important enough to resubmit his DE 07-096 testimony in this proceeding. *See*, Exhibit 16, Direct Testimony of Daniel W. Allegretti, Allegretti’s Ex. 1.2.

The parties seeking to change the design of how PSNH procures its default energy supply have the burden of proof. NH Code Admin. Rule Puc §203.25. PSNH does not have the duty to convince the Commission to retain the status quo because PSNH has consistently proved that its default energy supply has been generated and procured in a prudent manner. The Commission’s experts, Accion Group and previously Liberty Consulting, have made only minor recommendations to disallow costs of outages, and the consultants have never recommended a disallowance for supplemental power procurement. *See, e. g., Re Public Service Company of New Hampshire*, Docket No. DE 06-068, Order No. 24,711, 91 NH PUC 593, 597 (2006). The competitive suppliers who advocated for a change in energy supply design should have submitted “a fully detailed proposal” as directed by the Commission in Order No. 24,814, *Re Public Service Company*, Docket No. DE 07-096, 92 NH PUC 496 (2007). No party filed a fully detailed proposal, and when asked to provide greater detail of how a bid proposal would be put together Constellation objected. *See*, Exhibit 19.

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<sup>4</sup> “Finally, we note that there is a divergence of opinion regarding the merits of requiring PSNH to issue an RFP for power requirements not supplied from its own resources. Because competitive power suppliers in the state, as well as other parties, may have an interest in this proposal, we believe it would be inappropriate to rule on the issue based on the limited record created in this proceeding. In fact, Constellation characterized its testimony as an overview of a proposal for future consideration. With this in mind, we will wait for *Constellation to file a fully detailed proposal* on the implementation of a process whereby PSNH would solicit supply for its power requirements not supplied from its own resources.” DE 07-096, Order 24,814 slip op. at 19 (emphasis added) (2007).

**IV. There are no legal barriers to providing supplemental power through a request for proposal process; however, this approach would be more costly than PSNH procuring the supplemental supply.**

Unlike the specific use of PSNH's generation assets to supply default service, the acquisition of PSNH's supplemental power requirements, i.e., the "gap" between generation output and load, can be acquired "in a manner approved by the commission." RSA 369-B:3, IV(b)(1)(A). Providing this service through an RFP process as proposed by the competitive suppliers would be very expensive for PSNH's customers. Unlike load following service for PSNH's entire default energy service, bidders into an RFP process would have to take into account when and how PSNH's generating assets will operate to serve load. This greatly increases the risks that would be borne by the competitive supplier while reducing PSNH's flexibility to respond to changing conditions. Both of these matters will increase costs to consumers.

Currently PSNH's generation personnel work closely with the wholesale market marketing personnel. They plan ahead on yearly, seasonally, monthly, weekly, daily and at times hourly bases. It is difficult to assume that the winning bidder or bidders of an auction for supplemental power purchases could have the same knowledge, experience, and immediate access to operating data to be able to follow load, generation output, migration, fuel prices and power prices. Further, while the price of supplemental power would be fixed through this RFP process, the volume would not be fixed. Thus, this approach to fulfilling supplemental power would do nothing to manage over / under recoveries.

Mr. Hachey, who testified for TransCanada, initially proposed a load following RFP for the entire supplemental supply. Exhibit 14, at 8, lines 1-4. On the stand, Mr. Hachey retreated from that proposal.<sup>5</sup> The RFP for supplemental power would be just for strips of power. PSNH would still need to manage the supply on a daily and hourly basis as we do now, selling excess when the strips and PSNH's generation exceeded load and purchasing on the daily market when load was expected to exceed the strips

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<sup>5</sup> "I think there's been a lot of confusion that somehow an RFP is tied to a load-following product. Nothing is farther from my mind. An RFP is for whatever the RFP is for." Transcript, Day 2 at 54.



and PSNH's generation. PSNH's costs for administering the supply would not decline appreciably. No evidence was supplied to demonstrate that purchasing strips of energy through an RFP would yield lower prices than by purchasing through brokers on the same day the RFP was due or that the RFP process would produce prices material different from what the forward market prices would be on the day the RFP was due. Thus, there is no evidence in the record that this approach brings value to PSNH's default energy service customers over PSNH managing the supplemental power procurement. In fact, an RFP process would do nothing to reduce PSNH's default service customers' exposure to actual energy prices turning out differently than what the forward market reflected at the time the RFP purchases were made.

**V. The fixed costs which PSNH has proposed to be collected outside of default energy service are not stranded costs.**

The Commission directed the parties to address whether the costs that PSNH proposed to be collected through a non-bypassable charge would or should be regarded as stranded costs. Secretarial Letter at 2. PSNH does not believe these are stranded costs (albeit under a certain divestiture scenario a portion of these costs could be "stranded"). These costs are some of the fixed costs of the generation system which are incurred regardless of the energy service load. Mr. Baumann listed the costs as depreciation, property taxes and the debt service component of the capital structure that supports the generating system. Exhibit 1 at 4. These costs total approximately \$40 million annually. *Id.* at 5.

These generating assets are not "uneconomic assets" as stranded costs are defined. RSA 374-F:2, IV. The revenue requirements have been collected each month in the transition service charge and later in the default service charge. Currently the energy price (fuel plus margin) in the ISO-NE wholesale market is driven by natural gas-fired generation. This price is lower than the all-in costs of new and some existing generation due in part to the low Forward Capacity Market; therefore, PSNH's default energy service price during portions of the year is greater than the retail market prices offered to PSNH's largest customers by competitive suppliers. However, PSNH's

provision of transition and default service using its generation in conjunction with supplemental purchases of energy and capacity, when compared to the energy price or last resort service of distribution-only utilities, has provided hundreds of millions of dollars in benefits to customers since restructuring. The price of energy (last resort) service for the distribution-only companies in New England exceeded PSNH's price for its transition and default service for many years. It has only been since the latter part of 2008 that market prices have dropped precipitously to a level below PSNH's default energy service price. In fact, Clean Power Development ("CPD") stated in its recent closing statement in Docket No. DE 10-195 (Laidlaw):

"Although the prices to be paid by PSNH are greater than the current market price of electricity, if natural gas prices return to the levels they were at just 2½ years ago, the prices under the PPA will become less than the prevailing market price of electricity. No one knows exactly how long will take for natural gas prices to return to their previous levels, but they are very likely return to 2008 levels at some point." Docket No. DE 10-195, Closing Statement of CPD (February 14, 2011).

This admission by CPD, who shares counsel with Freedom Logistics/Halifax in this proceeding, is a clear demonstration that no one can predict how long the current low gas prices will remain. The current situation under which electricity market prices are below PSNH's Energy Service rate may well be short-lived. Exhibit 1, at 8, line 6.

The costs PSNH proposes to collect from all customers - - depreciation, property taxes and the debt - - are common to all generating sources. PSNH will still collect its variable costs, including fuel, through its default service rate. While PSNH's Energy Service prices are nearer the current market prices for similar service in New England, it is undisputed that PSNH's portfolio provides a significant hedge for its customers against increased fuel and capacity prices in the future.

**VI. A "stay out" provision may not be prohibited, but it would not cure the problem of cost shifting which has resulted from migration.**

Although "exit and entry fees are not preferred recovery mechanisms" (RSA 374-F:3, XII (d)), a pure stay out provision is not an exit or entry fee. Such a provision would bar a customer from returning to default service for a predetermined period of

time, for example one year. If reentry to default service was permitted before the one year period had expired in exchange for a one time fee to be paid or a rate higher than the default service charge, then an entry or reentry fee would be in play. Mr. Traum believes that such a rate should reflect the actual costs that customers returning from competitive suppliers would impose on the default service costs and that a rate could be fashioned that would not constitute a reentry fee. *See, Direct Pre-filed Testimony of Kenneth E. Traum, Exhibit 13 at 9.*

By stating that an exit or entry fee is not preferred, the law clearly does not prohibit these types of fees; however, the stay out provision appears to be anti-consumer and adds a chilling effect upon customer choice. Customers would have one more risk to consider when contemplating the move from default energy service to a competitive supplier. It would be difficult to impose such a new condition on customers who have already migrated to the competitive market because a new condition would be imposed retroactively on their choice of supplier. If PSNH was prohibited from imposing a stay out provision on customers who have already migrated because of the retroactive nature of such a restriction, a stay out provision on customers taking competitive supplier service in the future might impose an undue prejudice or disadvantage upon default service customers newly electing a competitive supplier under RSA 378:10. This obstacle of course could be remedied through an adequate advanced notice of this new pricing policy to allow current arrangements to expire. PSNH does not recommend a stay out provision, and such a measure would not significantly address the cost shifting issue which the migration case is all about.

**VII. If PSNH were to offer a different charge to encourage customers to return to default service, it may benefit all customers.**

“The price of . . . default service shall be PSNH's actual, prudent, and reasonable costs of providing such power, as approved by the commission.” RSA 369-B:3, IV (b)(1)(A). Although PSNH has always charged an average price over all kilowatt-hours, the statute does not require a rate based upon average costs alone as long as PSNH recovers all of its actual costs. Exhibit 3, at 6-7. If a rate was offered to customers who have already migrated to competitive supply which exceeds PSNH's marginal cost of

default service but is less than the average cost, all customers on default service would benefit by the amount of premium over the marginal cost of default service paid by these returning customers. Customers on competitive supply currently provide no contribution to default service costs; therefore, any premium paid above marginal cost would reduce default service costs for all customers taking default service. This price would be in the range of and would not exceed the actual, reasonable and prudent cost of providing default service. All distribution service customers taking competitive supply would be offered this rate for some specified period (or alternately, offered to only the largest customers who tend to move to and from the market), but the rate would not be mandatory. This rate could be implemented easily as it has been done before with the Retail Energy Service Program. *See*, Docket No. DE 03-193, Order No. 24,240, (2003). Mr. Hachey tended to support this approach. Transcript, Day 2 at 53.

There is precedent for offering a rate of this design. The Retail Energy Services Program was designed to encourage large customers to take service from the competitive market. PSNH's energy service rates were well below the wholesale market and the competitive suppliers were having difficulty gaining any customers. Order No. 24,240, 88 NH PUC at 596. In that proceeding, the Commission relied on several of the same statutes quoted above to approve an optional rate which deviated from the average price for Transition Service (now energy service).<sup>6</sup> Applying a credit to the transition service price was considered to be within the actual, prudent and reasonable cost of transition service.

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<sup>6</sup> "The Restructuring Act authorizes the Commission 'to order such charges and other service provisions and to take such other actions that are necessary to implement restructuring and that are substantially consistent with the principles established in [the Act].' RSA 374-F:4, VIII. This is a reference to the 'interdependent policy principles' mentioned at RSA 374-F:1, III and enumerated at RSA 374-F:3.

There are 15 such principles, several of which are relevant here: 'customer choice,' i.e., '[a]llowing customers to choose among electricity suppliers' because this 'will help ensure fully competitive and innovative markets,' RSA 374-F:2, II; the objective of assuring that restructuring is 'implemented in a manner that benefits all consumers equitably and does not benefit one customer class to the detriment of another,' *id.* at VI; the objective of 'lower prices for all customers than would have been paid' under the previous regulatory paradigm, *id.* at XI ('near term rate relief'); and the requirement that utilities 'take all reasonable measures to mitigate stranded costs', *id.* at XII(d)." 88 NH PUC at 596-597.

PSNH does not believe there is merit to offering a rate reflecting the real time market price. Customers can procure a real time market price from the market today, or they can become self supplying members of ISO New England. Moreover, this design would not address the problem of unfair cost shifting among customer classes. PSNH believes that most customers value predictability of price as much as a lower price. *See*, Rebuttal Testimony of Robert A. Baumann and Stephen R. Hall, Exhibit 3 at 3. PSNH concludes, therefore, that not many customers currently taking energy service from a competitive supplier will opt for a default service rate based upon the real time market or time of use pricing.

### **VIII. Purchase of Receivables.**

Currently, utilities are not allowed to disconnect service or send a notice of disconnection if “the unpaid bill results from other than basic utility service, such as merchandise, appliance sales, or repairs;” N.H. Code Admin. Rule § Puc 1203.11(d)(2). “Basic Utility Service” is defined under the Commission’s rules as “any tariffed fee or rate that has been filed with and approved by the commission, or with respect to service provided by a telephone utility, as defined in Puc 402.01.” N.H. Code Admin. Rule Puc §1202.02. Competitive supplier service is not a tariffed fee or rate filed and approved by the Commission. Ever since restructuring was implemented in New Hampshire and utilities were required to provide billing services for competitive suppliers, the utilities have never been allowed to disconnect service for any unpaid portions of the competitive supplier’s service. *Statewide Electric Utility Restructuring Plan*, Docket No. DR 96-150, Order No. 22,514, 82 NH PUC 122, 185 (1997); *Re Public Service Company of New Hampshire*, Docket No. DE 00-269, Order No. 23,659, 86 NH PUC at 170, 174 and 175 (2001). The Purchase of Receivables is not a good policy as it shifts risks away from the competitive market and onto PSNH’s customers, without reward, while further exacerbating the “migration” issue being addressed in this docket.

PSNH’s collection practices are heavily regulated, while those of the competitive suppliers’ practices are not. N.H. Code Admin. Rule Chapter Puc §1200. PSNH cannot discriminate and must serve all applicants within its service territory. Competitive

suppliers are free to limit their agreements to the most credit worthy customers that meet stringent credit requirements. They can terminate service with written notice of ten business days to a residential or small commercial customer and five business days to any other customer. N.H. Code Admin. Rule Puc §2407.08. Customers of competitive suppliers have no right to a conference with the Commission Staff. RSA 363-B:2, III.

Competitive suppliers can require deposits or other credit assurances to guarantee payment without any limits. Unrelated service providers and bill aggregators may use regulated utilities to collect their charges, but the utilities cannot disconnect for nonpayment of that part of the bill. RSA 378:47. Competitive suppliers, however, are specifically exempted from the definition of service providers. RSA 378:44, VII. The intervenors could not compliment themselves enough over how expert they were at managing risk, yet they were unable to explain why they cannot manage credit risk. They have many more tools at their disposal than the regulated utilities.

If the Purchase of Receivables is approved, all the risk of competitive supply uncollectibles shifts to PSNH and ultimately to either its default service customers or all customers. In recent years, the Commission has required PSNH to include the uncollectible expense associated with energy service in its energy service rate rather than in its distribution rates. Adding the uncollectible costs of competitive supply to only the default service costs only exacerbates the migration risk.

Constellation proposes to “syndicate the risk” of uncollectible accounts for smaller customers due to the high cost of transacting business with them. Transcript Day 2 at 117. In essence, competitive suppliers would be allowed to set their own level of reward, while simultaneously shifting the substantial risk of credit worthiness to PSNH’s customers. Constellation wants all customers to shoulder the cost of the risk of uncollectible accounts, yet they object to PSNH’s proposal to spread the fixed cost of generation to all customers. This position is further proof that suppliers are only interested in profit and shifting their costs of risk to PSNH’s customers while increasing the “migration” problem, the related instability and cost shifting caused by migration.

## **IX. PSNH is not required to divest under RSA 369-B:3-a.**

The Secretarial Letter of January 21, 2011, asked the parties if RSA 369-B:3-a “allows the Commission to require PSNH to divest its generation assets.” That statute allows PSNH to approach the Commission to request permission to divest generation assets, but it does not confer upon the Commission the power to require PSNH to divest its generation assets. The statute reads as follows:

### § 369-B:3-a. Divestiture of PSNH Generation Assets

The sale of PSNH fossil and hydro generation assets shall not take place before April 30, 2006. Notwithstanding RSA 374:30, subsequent to April 30, 2006, PSNH may divest its generation assets if the commission finds that it is in the economic interest of retail customers of PSNH to do so, and provides for the cost recovery of such divestiture. Prior to any divestiture of its generation assets, PSNH may modify or retire such generation assets if the commission finds that it is in the public interest of retail customers of PSNH to do so, and provides for the cost recovery of such modification or retirement.

Clearly the Legislature mandated that PSNH’s fossil and hydro generating assets could not be sold before April 30, 2006. The language in the first sentence is prohibitive, “shall not take place”. After April 30, 2006, however, PSNH “*may* divest its generation assets” if the Commission makes the required finding of economic interest and provides for recovery.

"In construing a statute as mandatory or directory, the courts may take into consideration the consequences which would result from construing it as... mandatory." 50 Am. Jur. p. 49, s. 26. "The intention of the Legislature as to the mandatory or directory nature of a particular statutory provision is determined primarily from the language thereof. Words and phrases which are generally regarded as making a provision mandatory include 'shall' and 'must.' On the other hand, a provision couched in permissive terms is generally regarded as directory or discretionary. This is true of the word 'may'...." *Id.*, s. 28. "It is the general rule that in statutes the word 'may' is permissive only, and the word 'shall' is mandatory." *North Hampton Racing and Breeding Association v. New Hampshire Racing Commission*, 94 N.H. 156, 158-159 (1946), quoting, *State v. Wymore*, 343 Mo. 98, 109.

In the *North Hampton* case, the plaintiff claimed to have completed an application to operate a horse racing track and was entitled to a license. The Racing Commission found “that granting of another permit to conduct horse racing with pari-mutuel wagering in the southeastern section of New Hampshire would not be for the best interest of the State.” *Id.* at 161. The court found that not granting the license was within the sound discretion of the Racing Commission even if a completed application had been presented. The Racing Commission’s authority to regulate horse and harness racing was broader than merely approving completed applications.

Within the specific statute, RSA 369-B:3-a, addressing modification, retirement or divestiture of PSNH’s generating assets, it is not the Commission that is specifically granted discretion, rather it is PSNH that has the discretion to request permission to divest. The Company may not divest without the Commission’s finding of economic interest; however, the statute cannot be reasonably read to empower the Commission to order PSNH to divest. Had the Legislature intended to require the Company to divest its plants upon a Commission finding, it would have used the word “shall.” As noted earlier, “The Commission ‘is a creation of the legislature and as such is endowed with only the powers and authority which are expressly granted or fairly implied by statute.’” *Appeal of Public Service Co. of New Hampshire, supra.* The Commission has general supervisory powers over public utilities and the plants owned or controlled by them in this state. RSA 374:3. It is not fairly implied that this supervisory power includes the authority to order divestiture if the utility disagrees.

It can be argued that the Company has a continuing duty to mitigate stranded costs through retirement and sale of uneconomic assets. RSA 374-F:3, XII. The costs of PSNH’s generating assets, however, are not stranded. If PSNH had been free to sell the capacity and energy in the restructured environment like merchant generators, it would have expected to recover the cost of these assets through sales in the ISO-New England market; therefore, they are not stranded costs as defined in RSA 374-F:2, IV. For years, PSNH’s plants produced power that was at a cost well below the market as evidenced by default service and last resort service rates approved for distribution companies that went the route of the Request For Proposals (“RFP”) process. The savings that have been enjoyed by PSNH’s customers in the first several years after



restructuring would have been moved below the line had PSNH been permitted to operate its plants as a merchant generator. As noted in the introduction to this Brief, migration has been caused by a combination of low natural gas prices setting the price for wholesale energy rates in New England, the recession, and disparities in the capacity market, all situations which may or may not continue into the future.

Transcript, Day 1 at 40-41. Migration of just the large customers has resulted in a shift of costs which makes PSNH's default service rate 8% higher than it would be without any migration. Exhibit 7. There is no evidence that these plants are permanently uneconomic justifying a declaration that they are stranded costs. Furthermore, even if such a finding of stranded costs was made, divestiture and retirement are governed by the PSNH-specific statute RSA 369-B:3-a, which does not *require* but *allows* PSNH to retire or divest its plants. PSNH is not asking for stranded cost recovery; therefore, it is not required to mitigate stranded costs through retirement or divestiture.

#### **X. Procedures that would be appropriate for a divestiture proceeding.**

The Commission clearly has authority to order continued unit operation studies to be performed for PSNH's generating plants.<sup>7</sup> The results of such studies may inform the Commission whether any additional retirement or divestiture inquiry is necessary. Retirement or modification of a generating plant require a public interest test, while divestiture requires an economic interest test under RSA 369-B:3-a.

The record in such a retirement or divestiture inquiry should have a clear conclusion based upon record evidence as to the market value for the plants that are recommended for retirement or divestiture. Before taking that irreversible step, it would be important, under the required economic interest test, to know the amount of proceeds that could be realized by a sale. The Commission would also need a detailed forecast of fuel and power supply costs to determine what costs would be incurred for default service in the event that a PSNH generating plant was no longer available. In any of these cases, however, the market view would be "static" and short lived. At best,

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<sup>7</sup> A continued unit operation study for Newington Station is currently before the Commission in PSNH's Least Cost Integrated Resource Plan proceeding. Docket No. DE 10-260.

the forecast would provide a short term “one time” payment that would not provide price stability or a hedge against increasing prices in the long term. Consequently, in addition to trying to estimate market value under one set of conditions, the Commission would need to consider additional scenarios and risks that could result from divestiture.

The Commission would also need to get some straight answers from the competitive supply market that would eventually supplant the power currently produced by PSNH’s generation assets. The Commission should know what risks, costs and profits will be included in the bid prices. In this proceeding no witness sponsored a “detailed proposal on the implementation of a process whereby PSNH would solicit supply for its power requirements not supplied from its own resources” as required under Order No. 24,814. When asked to provide greater detail as to how the components of a bid are put together, Constellation objected on the grounds that such information was “not likely to lead to the discovery of evidence that is relevant to the issues at scope in this proceeding.” Exhibit 19. Nothing could be more relevant than the components of the bids that the suppliers promoted as the answer to the migration issue.

When presented with an RFP process used to procure default service for distribution-only utilities, such as Unitil Energy Systems, Inc. and Granite State Electric Company d/b/a/ National Grid, how the suppliers arrived at their bids is not as important as what the winning bid is and the qualifications of the winning supplier that would provide the service. In a PSNH divestiture proceeding with the option to irrevocably discard the one true alternative to competitive supply, PSNH’s generation portfolio, there must be a sufficiently detailed record and a preponderance of the evidence that the RFP process will produce greater benefits to PSNH’s default service customers over the long term. Getting all the details behind the bidding process, and comparing that process to a default service managed portfolio supply that is examined each year in a prudence review, will be a difficult and complicated process. If a complete record could be generated, it would lead to evidence that is truly relevant to the issue of divesting or retiring PSNH’s generating assets.

## **XI. What the Commission can provide for in its final order in this proceeding.**

“Restructuring of the electric utility industry should be implemented in a manner that benefits all consumers equitably and does not benefit one customer class to the detriment of another. Costs should not be shifted unfairly among customers.” RSA 374-F:3, VI. There is adequate evidence to support a finding that default energy costs are being shifted unfairly from customers who have migrated to customers who do not have the option of selecting a competitive supplier. Restructuring contemplated access to the competitive market by all customers. “Choice for retail customers cannot exist without a range of viable suppliers. The rules that govern market activity should apply to *all* buyers and sellers in a fair and consistent manner in order to ensure a fully competitive market.” RSA 374-F:3, VII (emphasis added). Choice is not available for all customers, and the customers who have no access to the competitive market are shouldering an unfair burden.

If the Commission finds that restructuring has benefitted one customer class to the detriment of another and that an unfair shifting of costs is taking place, the Commission can fashion a remedy that can be addressed in further focused proceedings. The Commission could require PSNH to file a rate which would recover the \$40 million in depreciation, property taxes and the debt service portion of the capital structure that supports the generation assets from all customers. This rate would not completely supplant the 8% shifting of costs which are currently attributable to the effects of migration. This step would be an appropriate exercise of the Commission’s plenary ratemaking power to address the particular circumstances of PSNH, a utility that owns generation which it must use to supply default service. RSA 374-F:3, V(d). As competitive markets have developed, or not developed in the case of the small commercial and residential customers,

the commission may approve alternative means of providing transition or default services which are designed to minimize customer risk, not unduly harm the development of competitive markets, and mitigate against price volatility without creating new deferred costs, if the commission determines such means to be in the public interest. RSA 374-F:3, V(e).

A shift of \$40 million to all customers would not unduly harm the competitive markets.<sup>8</sup> It would be a flat rate charged to all customers, protecting small commercial and residential customers from risk and price volatility. No new deferred costs will be created.

It is not unfair to impose such a charge on all customers, including those who have chosen competitive supply. “Default service should be designed to provide a safety net and to assure universal access and system integrity.” RSA 374-F:3,V(c). Even though these large commercial and industrial customers served by competitive suppliers are not currently taking default service, they always have the option to return to PSNH’s default service; thus, they have a safety net and universal access.

It is not critical under restructuring that customers receive a direct measureable benefit in order to justify the imposition a charge that promotes the goals of restructuring. The benefit could be simply the option of choosing the default rate or the market rate. For example, the customers who have migrated, primarily large commercial and industrial customers, pay the low income portion of the System Benefits Charge. These customers cannot apply for the Electric Assistance Program, but they can return to PSNH’s default service at any time. PSNH’s generating system provides a system benefit to the large customers currently on competitive supply far greater than the Electric Assistance Program. The Commission could, therefore, allow recovery of the fixed costs of the generation system through an increase in the System Benefits Charge. RSA 374-F:3, VI. The Commission may also direct PSNH to file an alternative default service rate above its marginal cost of supply but below its average cost of default service as described in Section VII above. Development of such an alternative would require that the Commission open a docket for the purpose of receiving a proposal from PSNH.

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<sup>8</sup>  $\$40,000,000 \div 12 \text{ months} \div 701,317, 228 \text{ kilowatt-hours} = 0.475 \text{ cents per kilowatt-hour.}$   
(September 2010 delivery kilowatt-hours per Exhibit 10).

**XII. None of the competitive suppliers' proposals should be accepted.**

There is an inadequate record to support the Commission ordering any of the proposals made by the competitive suppliers. As noted in Section II above, bidding all of PSNH's generating assets into the market and issuing an RFP for all of PSNH's default service load is not permitted under RSA 369-B:3, IV(b)(1)(A). Issuance of an RFP for the gap between PSNH's generation output and its full default service load, i.e. supplemental power, is not unlawful; however, this proposal produces many complexities which were not explored in any detail on the record in this proceeding, and would increase costs to customers. *See*, Section IV above. The Commission cannot proceed to approve a full requirements RFP process for all of PSNH's default service load unless it finds that a divestiture proceeding is in order, conducts such a proceeding concludes that it is in the economic interests of PSNH's retail customers, and the sale or retirement of PSNH's generating assets are completed. By the language of RSA 369-B:3, IV(b)(1)(A), PSNH must supply default service from its plants until the sale or retirement is completed. The record in this proceeding should discourage the Commission from even beginning such a process. The complexity of such a proceeding and uncertainty of any net benefits to customers are described in Section X above.

The full requirements RFP process would result in the lowest bid but only the lowest among all of the bidders. The full requirements process would not result in the lowest cost as compared to a managed portfolio such as the integration of PSNH's generation assets and supplemental supply. The Northbridge Study offered by Constellation confirmed that "Suppliers bear costs and risks during the delivery period but require compensation to do so." Exhibit 16, Allegretti's Exhibit 1.3, Northbridge Study at 13. Mr. Allegretti confirmed that all the risks are included in the bid price in his testimony (Exhibit 16, at 10) and in Exhibit 18. Every bidder would include the risks of supplying PSNH's default service load in its bid. The successful bidder would be the one that was best at arranging for insurance, hedges and other risk-minimizing devices and was best at managing the portfolio after the bid was won in order to maximize profit. The Northbridge Study concluded that the cost of the all in Full

Requirements rate would always be about \$1 per megawatt-hour more than the rate under a managed portfolio approach. Exhibit 16, Allegretti's Exhibit 1.3, Northbridge Study at 12.

Mr. Hachey's recommendation that PSNH go out for an RFP process for its supplemental power can only be described as self serving. TransCanada uses its own generation to provide wholesale service to other utilities, like PSNH must do for default service. Transcript, Day 2, at 76. It uses brokers to arrange bilateral purchases to complete their portfolio of power supply not provided by their generation, as PSNH does. *Id.* TransCanada does not use an RFP process to acquire strips of power to supplement its generation (*id.* at 77), yet Mr. Hachey insists PSNH must do just that. It is incredibly telling that TransCanada is advocating for imposition of a requirement on PSNH to utilize an RFP process, yet it doesn't utilize one when it purchases supplemental power. If the RFP process truly produced lower prices, TransCanada would utilize such a process to give it an advantage over other competitive suppliers bidding for full requirements service or supplying large customers directly. The Commission should examine TransCanada's actions rather than listen to their words. TransCanada's principal concern is not transparency; it just wants a piece of the action.

### **XIII. Conclusion**

For the reasons stated above and based the record in this proceeding, the Commission need not make any radical changes to the system of supply which must first be provided by PSNH's generating plants and supplemented with purchases that have consistently been found by the Commission to be reasonable and prudent. No new evidence has been presented which would overturn the Commission's previous determinations that third party supply would add an extra layer of cost. The Northbridge study confirms this fact. There is no need to conduct a divestiture proceeding because PSNH's generation fleet remains economic.

Based upon the record in this proceeding, the Commission can find that there is an unfair shifting of costs among classes. The Commission's ratemaking authority allows it to fashion a partial solution to this problem. The Commission can authorize

PSNH to collect some of the fixed costs from all customers. In addition the Commission can approve a rate based on PSNH's marginal costs of default service supply, plus an adder. This charge will be offered to customers returning to default service, lowering the overall cost for all customers, but still be based on the actual, reasonable and prudent cost of default service.

Respectfully submitted,

Public Service Company of New Hampshire

February 25, 2011  
Date

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#### CERTIFICATE OF SERVICE

I hereby certify that, on the date written below, I caused the attached Post Hearing Brief to be served pursuant to N.H. Code Admin. Rule Puc §203.11.

February 25, 2011  
Date

Gerald M. Eaton  
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