DE 99-099

PSNH

PSNH Proposed Restructuring Settlement

Second Order on Rehearing
Order Regarding Laws of 2000, Chapter 249:7, I Concerning Delay of Competition Day
Order Denying Motion to Intervene

O R D E R N O. 23,563

September 29, 2000

I. CRR Motion for Rehearing

On September 19, 2000, the Campaign for Ratepayers' Rights (CRR) moved for rehearing or reconsideration of the New Hampshire Public Utilities Commission's (Commission) Order No. 23,549, issued September 8, 2000. The motion alleged that the Order alters the original Order in this docket (Order No. 23,443 issued April 19, 2000) in regard to nuclear decommissioning.[1]

A. Background

The Settlement Agreement, which was the subject of hearings in this docket, provides, in Section VIII(K), that subsequent to a sale of Seabrook, Public Service Company of New Hampshire (PSNH) will continue to be responsible for payment of nuclear decommissioning costs for North Atlantic Energy Corporation's (NAEC) present ownership share of Seabrook, calculated on the basis of full funding by December 31, 2015, using an estimated decommissioning date of 2015 or as otherwise determined by the Nuclear Decommissioning Financing Committee. PSNH's customers will not be responsible for any increase in such nuclear decommissioning costs or payments.

[1]Please refer to Order Nos. 23,443 and 23,549 for Appearances and Procedural History.

During the hearing in Phase 1 of this docket, PSNH provided, in response to Q-RR-003 (marked as Exhibit 23) a clarification of its position as to how this provision of the Settlement Agreement may be interpreted in a manner consistent with the requirements of RSA 162-F:20, II.[2] PSNH stated therein that to the extent that there are any overpayments to the fund as a result of PSNH's customers payments via present bundled rates or future unbundled rates, these customers will be entitled to a refund of such overpayments through appropriate rate mechanisms.

In Order No. 23,443 the Commission interpreted RSA 162-F:20, II as requiring a complete return of any of the decommissioning fund's overcollections to ratepayers. It accepted PSNH's clarification in Exhibit 23 and also required the company to provide, prior to any sale of Seabrook, an explanation of how it will assure that an appropriate mechanism for handling such refunds was in place. In addition, the Commission determined that this statutory section also required that if, during the period of time when ratepayers were contributing to the decommissioning fund, the estimate to decommission Seabrook is reduced below that established as of the date Seabrook was sold, the surcharge to ratepayers must be adjusted downward.

In PSNH's May 1, 2000 Response to Order No. 23,443, it requested a "clarification" that if the Commission approved a sale of Seabrook in a manner that required PSNH to prepay the present value of its decommissioning obligation, then the Commission would not require a mechanism to

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2 RSA 162-F:20, II provides, in part, that:

> Upon completion of decommissioning, any earnings of the fund in excess of the specified amount, after deducting the reasonable expenses of administration, shall be returned to the owner or owners required to make deposits in such fund and shall cause an adjustment of the rates paid by the utility's customers.

adjust downward the decommissioning costs *prior* to facility shutdown. PSNH agreed, however, that *subsequent* to facility shutdown and decommissioning, if there were no change in RSA 162-F:20, II, it would credit back to ratepayers any amounts that were overcollected in the fund. Tr. 5/17/00.

The Governor's Office of Energy and Community Services (GOECS) and the Commission's Settlement Staff (together the "State Team"), in their comments filed on May 15, 2000, argued that requiring a return to ratepayers of decommissioning "savings" after facility shutdown, or a flow through of projected savings during the period of operation by a new owner, could result in a lower offering price for Seabrook thereby resulting in less contribution towards stranded costs. They recommended that the Commission allow the Settlement Agreement's treatment of Seabrook decommissioning to apply to the extent that it is consistent with New Hampshire law as of the time of divestiture.

In Order No. 23,549 the Commission "decided to clarify Order No. 23,443 as requested by the State Team." (Order No. 23,549 at p. 46.) The Commission agreed with PSNH that "there should be flexibility in how the divestiture of Seabrook is structured so that the maximum value can be obtained for the NAEC share of Seabrook, thereby reducing stranded costs as much as possible," but that the flexibility must be limited by the laws relating to nuclear decommissioning funds then in effect. The Commission also noted that it has suggested in the past, and continues to suggest, that it would be appropriate for the Legislature to review and update the laws relating to nuclear decommissioning to meet the changes resulting from the deregulation of the industry and divestiture of generating facilities, and stated its support for the efforts of the Nuclear Decommissioning Financing Committee to participate in a discussion with the Legislature about changes to these statutes. Finally,

the Commission determined that in the absence of a specific divestiture proposal, it would not opine any further on what would or would not be consistent with the current law, and remained hopeful that the current law could be amended.

B. CRR Motion

CRR alleges that the Commission essentially granted the PSNH and State Team's request for clarification as to the treatment of Seabrook nuclear decommissioning costs, and appears to have endorsed a legislative change to permit the owner or owners of Seabrook to retain any excess in the decommissioning funds over the costs of decommissioning.

CRR opposes these changes, arguing that since the funds have come from ratepayers, it would be inequitable for any affiliate of PSNH or any new owner to retain those funds for the benefit of its shareholders. CRR alleges that this change provides an incentive to perform decommissioning in less than an optimum manner, and notes proposals

before the NRC from other plant owners to permit less than full "greenfields" site restoration. CRR also claims that the assertion that permitting a future Seabrook owner to retain any excess decommissioning funds is necessary in order to maximize its value at divestiture lacks any factual support in the record, and may achieve only a short term gain at the risk of greater long term costs, including costs to the public health and safety. Lastly, CRR argues that the current estimate of decommissioning costs is based upon the testimony of PSNH's affiliate's witnesses, and shareholders of PSNH or its parent company should not gain if this analysis ultimately proves to be too high.

C. Objections of PSNH and State Team

Objections to CRR's motion were separately filed by PSNH and the State Team on September 25, 2000. PSNH argues that CRR has no complaint regarding the treatment of decommissioning as long as the current statutory scheme is followed, and that since the Commission has agreed to be bound by the requirements of the law, CRR has no actionable complaint, and its motion is unripe. According to PSNH, unless and until there is a change in the law, there is not an opportunity for CRR to suffer any injury, nor can there be any effect on CRR, direct or otherwise, and due to the lack of immediate and direct harm, the motion must be denied. PSNH also claims that CRR's motion fails to satisfy the requirements of RSA 541:4, which requires a rehearing motion to "set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." PSNH states that the Commission's stated intent to comply with the law of the State, and holding open the decommissioning issue until a specific plan is presented is neither unlawful nor unreasonable, and therefore pursuant to the express provisions of RSA 541:4, the motion must be denied.

The State Team argues first that the Commission did not reverse its prior Order with respect to decommissioning, that it merely clarified its prior decision, and therefore there are no grounds for rehearing. According to the State Team, since the "New Order" did not change the substance of the prior decision on this issue, the original time-frames for seeking reconsideration and rehearing pursuant to RSA 541:3-6 apply, and CRR's motion is untimely. Alternatively, the State Team argues that even assuming that the Commission changed its determination with respect to the decommissioning issues, the motion is lacking as it has not provided "good reason" for it to be granted. The only support for CRR's argument, according to the State Team, is speculation about what might happen in the future, which cannot be the basis for a different outcome. Finally, the State Team submits that the

Commission's observation that "flexibility" will be needed to reach a final decision on decommissioning is reasonable and within the scope of the Commission's authority.

D. Analysis and Findings

The Commission has determined that good cause exists to provide further clarification on this matter. The Commission's decision on this issue in Order No. 23,443 reflects our interpretation of the requirements of RSA 162-F:20, II: that any over-collections in the decommissioning fund must be returned to ratepayers; that PSNH's refund proposal in this regard as set forth in Phase 1 Exhibit 23 is acceptable, provided that the company can assure that an adequate refunding mechanism will be in place; and, further, that if the decommissioning cost estimates are reduced during the time when ratepayers are paying the decommissioning surcharge, the surcharge must be adjusted downward to reflect the lower estimates. However, there is no actual divestiture proposal pending before the Commission. Rather than rejecting now the provisions in the Settlement Agreement and any particular form of divestiture proposal with regard to this issue, we have determined instead that we are interpreting the Settlement Agreement's provisions such that any decommissioning treatment proposed will be approved only to the extent that it is in compliance and consistent with New Hampshire law in effect as of the time of divestiture. Thus, under circumstances where there was no change to the requirements of RSA 162-F:20, II, the Commission's interpretation of those requirements as stated in Order No. 23,443 would apply to any proposal.

At this time the Commission does not endorse, support or oppose any particular change or amendment to RSA 162-F:20, II or any other provision of the decommissioning statutes. We lend general support to the efforts of the Nuclear Decommissioning Financing Committee to engage

in a discussion with the Legislature concerning issues arising from the restructuring of the electric industry and their impact upon nuclear decommissioning, and whether New Hampshire's decommissioning laws continue to be sufficient to address these issues.

II. Determination of Delay of Competition Day

Laws 2000, Chapter 249:7, I provides that "Competition Day for PSNH as defined in RSA 369-B:2, III shall be not later than October 1, 2000, unless the Commission finds due to circumstances beyond its control that further delay is in the public interest." Accordingly, in Order No. 23,549 (at page 62) the Commission required that the definition of Competition Day contained in the Settlement Agreement be modified to reflect this language.

In its September 22, 2000 letter announcing its acceptance of the conditions set forth in Order Nos. 23,549 and 23,550, and accompanying its filing of the Revised Conformed Settlement Agreement, PSNH requests that the Commission find that, due to circumstances beyond its control, further delay in Competition Day beyond October 1, 2000 is in the public interest. PSNH discusses several reasons that justify such a finding:

1. PSNH states that securitization is an essential prerequisite to implementing restructuring under the Settlement Agreement. Without the funds obtained from securitization PSNH cannot buydown the Seabrook Power Contract nor implement the recapitalization as required. These measures provide the basis for the rate reductions that are to take place as of Competition Day. At this time, the statutory time period for the submission of motions for rehearing or petition for appeal of the final orders in this docket has not run. As OCA witness Ryan testified during the Phase II hearings, the pendency of such petitions will delay the securitization process.

2. The securitization process cannot take place unless and until the Internal Revenue Service (IRS) provides a favorable opinion on PSNH's request for a

private letter ruling. The request was filed on June 14, 2000, but the IRS has not yet acted.

3. Order No. 23,549 required that PSNH make a further compliance filing of its proposed tariff by September 29, 2000, and provided that parties would have an opportunity to raise questions and concerns once the Tariff was filed. As a result, PSNH cannot have a final Tariff in place by October 1.

4. The Settlement Agreement provides a comprehensive plan for implementing competition and resolving numerous other claims and proceedings. Many of these components are tied to the occurrence of Competition Day, yet cannot occur until securitization takes place and the Rate Reduction Bonds (RRBs) are issued.

In light of these outstanding matters, PSNH expects that Competition Day will occur on the first day of the calendar month following the issuance of the RRBs. PSNH also states that the State Team agrees that circumstances beyond the control of the Commission support a finding that delay of Competition Day beyond October 1, 2000 is in the public interest.

Analysis and Findings: Competition Day, as defined in RSA 369-B:2, III, and employed in Laws 2000, Chapter 249:7, I, incorporates by reference the definition of that term in the original Settlement Agreement, as adjusted by subsequent modifications. In Order No. 23,549, the Commission required that the definition be modified to incorporate the language of Laws 2000, Chapter 249:7, I as well as retain the original requirement that the conditions contained in Section XVI of the Settlement Agreement be satisfied.

Section XVI of the Settlement Agreement contains six conditions that must be fulfilled as a condition precedent to implement the various terms of the Agreement. Two of these conditions (conditions "A" and "C") have been met: the Commission has approved the Agreement in a final order, subject to certain conditions, and those conditions have been accepted by the parties to the Agreement

as provided in Section XVII(D); Laws 2000, Chapter 249 has been enacted allowing securitization of assets and the issuance of RRBs in a manner fully consistent with the Agreement. Of the remaining conditions, the most critical one to the occurrence of Competition Day is the requirement that PSNH must close on the issuance of the RRBs.

As PSNH points out in its September 22, 2000 letter, at least two events must occur before the RRBs may be issued, and both are beyond the control of the Commission: 1) receipt of a favorable IRS private letter ruling regarding the tax effects of securitization; and 2) expiration of the statutory period for petitioning for rehearing or appeals of Commission Order Nos. 23,549 and 23,550. However, even though these events remain pending, and therefore issuance of the RRBs, and Competition Day, will be delayed for some period, the Commission continues to find that the Revised and Conformed Settlement Agreement is in the public interest and its implementation should be pursued by all reasonable measures. Therefore, as required by Laws 2000, Chapter 249:7, I, due to the circumstances discussed above which are beyond its control, the Commission finds that Competition Day cannot occur by October 1, 2000, and further delay is in the public interest. The Commission instructs its Staff to consult with PSNH on a regular basis and provide updated estimations of when Competition Day may be expected to occur.

Pursuant to RSA 369-B:3, IV(b)(3)(G), to the representations made by PSNH in its compliance filing of June 23, 2000, and to Commission Order No. 23,550, effective October 1, 2000 PSNH has agreed to temporarily reduce its current effective total rates (base rates plus FPPAC rates) by 5 percent across the board until either Competition Day or April 1, 2001, whichever occurs earlier. PSNH has filed revised proposed tariffs implementing this reduction, and this filing will be reviewed in

Docket DE 00-202. Order No. 23,549 provided, at page 64, that parties who had raised questions concerning elements of proposed tariff during the July 7, 2000 hearing would be afforded an opportunity to pursue those concerns once the Company had filed its Compliance Tariff. Accordingly, the proper forum for those questions and concerns is Docket DE 00-202.

III. Petition of Competitive Energy Services - New Hampshire, L.L.C. for Intervention

On September 6, 2000, a petition for intervention as a full party in this docket was filed on behalf of Competitive Energy Services - New Hampshire, L.L.C. (CES-NH). CES-NH states that it is an aggregator, registered with the Commission. CES-NH claims that issues and policies are being forged by the Commission in this docket that will have a direct impact upon the successful development of the competitive electric market in this State, and avers that its participation will not impair the orderly conduct of the proceedings.

RSA 541-A:32, II provides that:

> The presiding officer may grant one or more petitions for intervention at any time, upon determining that such intervention would be in the interests of justice and would not impair the orderly and prompt conduct of the proceedings.

CES-NH's petition for intervention was filed over five months after the issuance of Order No. 23,443, two months after the hearings on PSNH's motion for rehearing and petition for financing, and just two days before the issuance of Order Nos. 23,549 and 23,550, which address the motions for clarification and rehearing, amended Settlement Agreement and financing issues. CES-NH's petition contains no discussion of the basis for its intervention at this time, other than its statement that it is a registered aggregator. While it provides a recitation of the issues that are being "forged" by

the Commission in this docket, such a list could as well have been assembled when this matter was first docketed over one year ago. No explanation is offered as to why the petition has been filed at the very close of this docket, what the petitioner hopes to accomplish at this stage of the proceeding, or how the petitioner could participate in a meaningful manner without either impairing the conduct of the remaining portion of the proceedings (to the extent there are any) or severely prejudicing the rights of other parties. While RSA 541-A:32 affords the Commission the discretion to allow a party to intervene at any stage of a proceeding, where intervention is sought at any point after 3 days prior to the hearing as provided in RSA 541-A:32, I(a), it is incumbent upon the petitioner to provide meaningful answers to these questions and to demonstrate with specificity its rights and substantial interests that may be affected by the proceeding. A simplified petition to intervene such as the one at issue may pass muster at the initial stages of a proceeding, but once significant activity has occurred, a higher burden must be met. We find that CES-NH has failed to do so, and therefore deny the petition to intervene.

Based upon the foregoing, the Commission hereby

FINDS, pursuant to Laws of 2000, Chapter 249:7, I, that due to circumstances beyond its control, it is in the public interest to delay Competition Day beyond October 1, 2000 based upon the reasons set forth above.

Based upon the foregoing, it is hereby

ORDERED, that the issue of the Settlement Agreement's treatment of the funding for Seabrook nuclear decommissioning is clarified as provided above; and it is

FURTHER ORDERED, that in all other respects inconsistent with the opinion above, CRR's Motion for Rehearing is DENIED; and it is

FURTHER ORDERED, that CES-NH's petition to intervene is denied.

By order of the Public Utilities Commission of New Hampshire this twenty-ninth day of September, 2000.

Douglas L. Patch	Susan S. Geiger	Nancy Brockway
Chairman	Commissioner	Commissioner

Attested by:

Debra A. Howland
Acting Director