

**Witness:**

**Request from:** New Hampshire Public Utilities Commission Staff

**Question:**

The current allocation method is based on a utility's revenues as a percent of the total revenues of all New Hampshire utilities.

- (a) Do you believe that the allocation method currently specified in statute is fair and reasonable ?
- (b) Why or why not?
- (c) If not, what different method(s) of allocation would you propose and why is that method (s) more fair and reasonable?
- (d) What statutory and/or rule changes would be required to utilize the method you propose ?

**Response:**

(a)&(b). No, PSNH does not believe the current allocation method is fair and reasonable nor is the current statute legal and constitutional. At present, RSA 363-A:2 requires that "The assessment shall be calculated by using the gross utility revenue of all public utilities and 33 percent of the gross utility revenue of rural electric cooperatives for which a certificate of deregulation is on file with the commission and allocating the expenses of the commission to each utility in direct proportion as the revenues relate to the total utility revenues as a whole. Each such expense allocation shall be assessed against each public utility and rural electric cooperative with a certificate of deregulation on file with the commission in an amount equal to its proportionate share." "Gross utility revenue" is not defined in the statute, but the Commission has traditionally included all of PSNH's revenues as reported on PSNH's FERC Form 1. This method is, at the same time, under-inclusive and over-inclusive and raises questions of equal protection under the New Hampshire and federal constitutions.

The current method is under-inclusive because it does not include all entities that should be subject to the Commission's assessments and because, although revenue from the provision of default energy service provided by the state's electric utilities is included, the current assessment process does not include revenues for the provision of electric energy by other market participants. The Commission's assessment process should include all entities and revenues that are regulated by the Commission.

RSA 374-F:7, I, provides that the Commission has authority to establish requirements on such competitive "electricity suppliers" (RSA 374-F:2, II) "including registration, registration fees, customer information, disclosure, standards of conduct, and consumer protection and assistance requirements." In other words, for all but price, the Commission regulates these entities. Moreover, these electricity suppliers routinely require the use of the Commission's resources, not only in the registration process, but as Petitioners and Intervenors in myriad proceedings. Their frequent use of and involvement in Commission proceedings ultimately increases the Commission's costs; those that benefit from such services should participate equally in the payment of those costs. As the Commission is the regulatory authority responsible for overseeing these entities and enforcing the requirements for them to operate in New Hampshire, those entities should be required to reimburse the Commission for its expenses.

PSNH notes that requiring electricity suppliers to pay assessments would be consistent with existing law, and would place them on a level competitive footing in two respects: 1) competitive telecommunications providers already pay assessments; in that the work of competitive energy providers and competitive telecommunications providers is in concept and execution little different, there is no reason to treat them differently under the law with respect to assessments; and, 2) RSA 374-F:3, VII requires that, "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." (Emphasis added.)

In determining PSNH's "gross utility revenue" the Commission includes PSNH's default service sales. Thus, PSNH's assessment is based, in part, on providing electricity to retail end users, which is precisely what electricity suppliers do. To include PSNH's default service sales in calculating an assessment, while not including any sales by any competitive electric supplier, when the products and services are identical is not fair, and is contrary to requirements of both statute and equal protection. *See Verizon New England v. City of Rochester*, 151 N.H. 263, 270 (2004) (New Hampshire's "equal protection guarantee is essentially a direction that all persons similarly situated should be treated alike."); RSA 374-F:3, VII. To the extent that incumbent and competitive companies are providing equal services in equal ways, the different entities should be treated "in a fair and consistent manner" for purposes of assessments.

Further, in recent years competitive suppliers of gas and electricity have used a significant portion of the Commission's resources. In 2012, there were eighty-five separate dockets relating to registration/re-registration of such suppliers. In addition there were other dockets where such suppliers appealed to the Commission for the redress of various grievances and for rulings relating to their businesses to further their interests in the competitive marketplace. *See generally*, Docket Nos. DM 12-075, DE 12-093, DE 12-097, DE 12-295. Also, such companies have fully participated in other Commission proceedings, not merely as interested customers or members of the public, but as regulated businesses claiming that they may be substantially affected by the work of the Commission. *See, e.g.*, Docket Nos. DE 11-250. Assuming that the Commission's assessments are essentially license fees, *see Appeal of Association of New Hampshire Utilities*, 122 N.H. 770, 772-73 (1982) and *Laconia v. Gordon*, 107 N.H. 209, 211 (1996), such fees are to be incidental to the regulation. In that these entities avail themselves of the protections and processes of the Commission, their regulatory authority, and that they do so in essentially the same manner as public utilities, these entities should be required to fund the Commission's expenses.

Lastly, PSNH notes that under RSA 358-A:3, trade and commerce subject to the jurisdiction of the Commission is exempt from the consumer protection law. However, as noted, under RSA 374-F:7, I, the Commission has authority to establish consumer protection requirements for competitive electric suppliers. If the grant of authority to the Commission under RSA 374-F:7 exempts the competitive electric suppliers from consumer protection laws applicable to other businesses, the Commission has a heightened responsibility to monitor these entities and enforce appropriate business practices. Therefore, it is clear that these entities are regulated by the Commission and should be subject to its assessments. Their absence in light of the Commission's regulation of them makes clear that the current assessment method is under-inclusive.

The Commission's current assessment scheme may also be over-inclusive in that it is based upon revenues outside the Commission's jurisdiction. Again, presuming that the Commission's assessments are not a tax, but are instead more akin to license fees, the fee must be incidental to the regulation. In other words, the assessment should be related to the Commission's work in regulating New Hampshire utilities. The current assessment is not.

As was raised by FairPoint in its original filing in DM 12-276, and as was raised by GSGT in the past, *see Re Granite State Gas Transmission, Inc.*, Order No. 17,788, 70 NH PUC 693 (1985) and *Re Granite State Gas Transmission, Inc.*, Order No. 16,165, 69 NH PUC 28 (1983), there are certain revenues included for assessment purposes that are not incidental to regulation by this Commission. PSNH, for example, earns revenue from the provision of transmission service which is regulated by FERC.

In previous orders, the Commission has noted that it is vested with authority to participate in interstate matters that affect New Hampshire. On that basis, the Commission has concluded that including federally regulated revenues in New Hampshire assessments is appropriate. *Re Granite State Gas Transmission, Inc.*, 70 NH PUC at 695. The Commission further stated in those orders that to the extent any federally regulated entities with a presence in New Hampshire were not assessed the Commission would assess those entities. *Id.* The Commission specifically stated that it would assess the Tennessee Gas Pipeline. *Id.* As far as PSNH is able to discern from the most recent assessment report, Fiscal Year 2013, List of Utility Assessments, available at: [http://www.puc.state.nh.us/Home/AboutUs/Assessment\\_Booklets.htm](http://www.puc.state.nh.us/Home/AboutUs/Assessment_Booklets.htm), various entities fitting the definition of public utilities under RSA 362:2 are not assessed. The Tennessee Gas Pipeline owned by Kinder Morgan is not presently assessed and neither are the Maritimes and Northeast Pipeline owned by Spectra Energy, or the Portland Natural Gas Transmission System. Accordingly, it is far from clear that the Commission's regulation bears a relationship to federally-related activities, or that it provides a basis for assessments based upon the Commission's state statutory authority to intervene at federal proceedings. To the extent the Commission determines that it should continue to include revenue of various companies which is derived from federally-regulated sources in its assessments, all such companies and all such revenue must be included.

- (c). PSNH believes that the current method of assessment would be appropriate if it properly included all companies and revenues that should rightly be considered when determining the amount of the assessments. However, if the Commission decided that "electricity suppliers" should not be included in assessment process, then, in order to comply with RSA 374-F:3, VII, it should similarly exclude revenues attributable to the provision of default energy service. Similarly, if the Commission were to exclude revenues subject to the jurisdiction of the FCC for telecom companies, or if it failed to include all federally-regulated sources in its assessments, then revenues regulated by the FERC for the state's electric utilities should similarly be excluded from the assessment process.
- (d). To ensure that the Commission's assessments are appropriately assigned to the entities subject to its jurisdiction various statutory amendments could be made. RSA chapter 363-A could be amended to avoid references to "public utilities" as that term is defined in RSA 362:2 so that different entities and revenues could be included. A new definitions section could be added to RSA chapter 363-A to describe the appropriate entities. In addition, or alternatively, RSA 374-F:7 could be amended to define competitive electric providers as utilities for purposes of assessments. A similar amendment could be made to RSA 365:8-a regarding competitive natural gas suppliers.

Currently, there are no rules specifically dedicated to assessments . To the extent the Commission may adopt rules, any such rules should be incorporated in , or be made in concert with other changes to, sections of the Puc 300, 400, 500, 600, 700, 1100, 1400, 2000, and 3000 rules. PSNH would recommend that in contemplating any rule amendments the Commission consider requiring companies to report revenues in a uniform manner to permit accurate assessment by the Commission across industries and companies .

An example of amendments to RSA Chapter 363-A necessary to implement PSNH's recommendations is attached hereto.