

**STATE OF NEW HAMPSHIRE
BEFORE THE
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION**

DE 14-238

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Determination Regarding PSNH's Generation Assets

**Response to PSNH's Objection to
NEPGA's and RESA's Intervention Petition**

NOW COME the New England Power Generators Association, Inc. ("NEPGA") and Retail Energy Supply Association ("RESA") and, pursuant to the Commission's oral order at the October 2, 2014 prehearing conference in this docket, submit this response to the "Response and Objections of Public Service Company of New Hampshire to Petitions to Intervene" ("Response and Objections").

I. INTRODUCTION

NEPGA and RESA

NEPGA and RESA are entitled to intervene in this docket because their timely intervention petition states facts demonstrating that their rights, duties, privileges, immunities or other substantial interests may be affected by the proceeding, and that the interests of justice and orderly and prompt conduct of the proceedings would not be impaired by allowing intervention. *See* RSA 541-A:32, I(b) and (c).

NEPGA is the trade association representing competitive electric generation companies in New England. NEPGA's member companies have been involved with the design and development of competitive wholesale electricity markets and sell their energy and capacity into the New England wholesale power markets administered by

ISO-New England. NEPGA's members are impacted by PSNH's continued ownership of generation assets and its guaranteed cost recovery of and on its investments in those assets. The Commission has granted NEPGA intervention in other Commission proceedings and has determined that such intervention was "consistent with applicable standards for intervention." Public Service Company of New Hampshire, Customer Migration, DE 10-160, Secretarial Letter (July 26, 2010).

RESA is a non-profit organization and trade association that represents the interests of its members in regulatory proceedings in the Mid-Atlantic, Great Lakes, New York and New England regions. RESA members are active participants in the retail competitive markets for electricity, including the New Hampshire retail electric market. Several RESA member companies are authorized by the Commission to serve residential, commercial and industrial customers in New Hampshire and are presently providing electricity service to customers in the State. As such, RESA and its members have a substantial and specific interest in a fully competitive generation market. As competitive retail suppliers in New Hampshire, RESA's members are and would be directly impacted by PSNH's continued ownership of generation assets. The Commission has allowed RESA to intervene in other dockets that have raised issues related to the competitive market. *See, e.g.*, Docket Nos. DE 12-097 (investigation into purchase of receivables and other retail market enhancements) and DE 12-295 (regarding certain of PSNH's charges to competitive electricity suppliers).

Assuming, *arguendo*, that NEPGA and RESA do not qualify for intervention under the mandatory standard set forth in RSA 541-A:32, I, they should be allowed to

intervene under the discretionary standard because their intervention is in the interests of justice and would not impair the orderly conduct of the proceedings. RSA 541-A:32,II. NEPGA's and RESA's knowledge and experience with the issues to be discussed in this docket will likely to be of value to the Commission and other parties in this proceeding. Their participation, therefore is in the interests of justice. In addition, their joint intervention and cooperative participation this docket will not impair the orderly conduct of this proceeding and, in fact, will help to conserve resources.

PSNH's OBJECTION TO NEPGA'S AND RESA'S INTERVENTION

PSNH objects to NEPGA's and RESA's petition for intervention arguing, among other things, that:

1) "[T]he singular interest at stake in this proceeding is 'the economic interests of PSNH's retail customers...'” Response and Objections, p. 2, ¶ 1. NEPGA and RESA's interests upon which they base their claims for intervention are “generalized interests” in, *inter alia*, “‘a competitive generation market’ [and] demonstrate no rights, duties, immunities or substantial interests that would be affected by a docket reviewing the economic interests of PSNH's retain customers...” Response and Objections, p. 7, ¶ 12.

2) “[T]o have standing a party must have specific personal legal or equitable rights at stake.”--Response and Objections, p. 3, ¶ 4.

3) Granting NEPGA and RESA intervenor status “would likely impair the orderly conduct of this proceeding.” Response and Objections, p. 7, ¶ 14.

For the reasons discussed below, all of PSNH's arguments must fail, and NEPGA and RESA's intervention petition should be granted.

II. ARGUMENT

1) **PSNH Misapprehends the Statutorily-Prescribed Sequence and Scope of This Docket**

PSNH incorrectly asserts that the “singular interest at stake in this proceeding is ‘the economic interests of PSNH’s retail customers.’” Response and Objections, p. 2. Based upon that mistaken premise, PSNH argues that because this proceeding “is governed by the narrower ‘economic interest’ standard, parties asserting standing based upon grounds not encompassed by this standard have not demonstrated an adequate foundation for their intervention request.” *Id.* PSNH’s argument must fail as it ignores the plain and unambiguous wording and structure of RSA 369-B:3-a, I. which states, in pertinent part, as follows:

...the commission shall commence and expedite a proceeding to determine whether all or some of PSNH’s generation assets should be divested...Notwithstanding RSA 374:30, the commission may order PSNH to divest all or some of 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.

It is abundantly clear from the first sentence of the foregoing statute (which PSNH ignores), that the Commission’s first task in this docket is to determine whether all or some of PSNH’s generation assets should be divested. This inquiry involves broad public policy issues including, as noted in the Order of Notice, whether disposition of PSNH’s generation assets is consistent with the restructuring principles articulated in RSA 374-F:3 and RSA 369-B:3-a. The issue of whether divestiture is appropriate is not, as PSNH argues, limited to the narrow issue of whether divestiture is in PSNH’s retail customer’s economic interests. That narrow determination is simply a prerequisite for

the Commission's ability to order divestiture; it is not dispositive of the broader question of whether divestiture "should" occur. The structure of RSA 369-B:3-a, I. indicates that the Commission must first determine whether PSNH's generation assets should be divested. If that question is answered in the affirmative, the Commission must then determine whether divestiture is in PSNH's customers economic interests before the Commission may order divestiture.

As organizations with members who are actively involved in the competitive generation and electric supply markets, NEPGA and RESA have substantial interests in promoting robustly competitive markets. They therefore have a direct interest in the overarching question of whether PSNH's generation assets should be divested and subject to the same competitive market forces that other non-utility owned generators must face. Accordingly, they qualify for intervention in this docket.

In the alternative, the Commission should exercise its discretionary authority under RSA 541-A:32, II and follow the Commission's past practice of allowing interested persons and organizations to intervene in major dockets involving important public policy principles such as the instant docket. *See, e.g.* Docket DE 99-099, PSNH Proposed Restructuring Settlement, Order No. 23,443 (April 19, 2000). It is entirely appropriate and lawful for the Commission to permit intervention by third parties such as NEPGA, RESA and others who have knowledge of and experience with the issues implicated in this docket. *See Ruel v. New Hampshire Real Estate Appraiser Board*, 163 N.H. 636, 642 (2011) (an administrative agency "'is free to permit third parties to participate in proceedings before it, for such assistance as those parties may offer...") The interests of justice would be served by such intervention as it will assist the

Commission in fully developing a record upon which to make an informed decision about divestiture and related questions.

2) PSNH Mistakenly Equates “Standing” to Participate in Court Proceedings With the Intervention Standard Applicable to Administrative Proceedings.

PSNH asserts that the intervention standard under RSA 541-A:32 is equivalent to the “standing” standard applicable in judicial proceedings. Response and Objections, p. 3, ¶4. PSNH also argues that NEPGA and RESA must demonstrate “legal harm” akin to the type required to confer standing to appeal zoning board decisions. Response and Objections, p. 9, ¶ 16. Both arguments must fail as they ignore the distinction between the intervention standard applicable to administrative proceedings and the legal “standing” requirements for court proceedings. *See Ruel v. New Hampshire Real Estate Appraiser Board*, 163 N.H. 636, 642 (2011). The New Hampshire Supreme Court has recognized that “the principles underlying the agency’s intervention practices are entirely different from the principles that apply [to seeking review of agency decisions.]” *Id.* (citations omitted). Although, as PSNH indicates, competitive interests may not constitute harm sufficient to confer standing in judicial proceedings, those interests are nonetheless sufficient for purposes of qualifying for intervention in Commission proceedings. For example, in the proceeding to determine whether PSNH should be allowed to modify its Schiller Station (DE 03-166), four wood-fired plants were granted intervention by the Commission on the basis “that their rights or interests may be adversely affected by the Schiller Project due to ...competition the project would create for the same low grade wood supplies that the Wood Plants purchase...” *Appeal of Pinetree Power*, 152 N.H. 92, 94 (2005). Thus, notwithstanding PSNH’s arguments to

the contrary, interests in competitive generation and supply markets rise to the level of those which meet the intervention standard outlined in RSA 541-A:32, I and II.

PSNH also avers that competitors including NEPGA and RESA “should not be granted legal standing in this proceeding to avoid the ‘natural risk[s] in our free enterprise economy.’” Response and Objections, p. 9, ¶ 16. This argument is confusing and nonsensical as it ignores that the reason underlying NEPGA’s and RESA’s intervention requests is their interest in promoting free enterprise and competition in electric generation and supply markets, not the avoidance of it. In advocating for continued ownership of generation assets with regulated, cost of service rates, it is PSNH, not NEPGA or RESA, that is avoiding free enterprise and competition. For the reasons set forth above, the Commission must reject PSNH’s standing arguments.

3) NEPGA’s and RESA’s Intervention Will Not Impair the Orderly Conduct of This Proceeding.

There is no evidence to support the claim that intervention by NEPGA and RESA would impair the orderly and prompt conduct of this proceeding. Positions taken by parties in past dockets do not constitute a sufficient basis for preventing them or others from participating in a different proceeding. NEPGA and RESA have much information to offer in this docket and will participate together, which will promote orderliness. Questions concerning discovery and how to handle confidential or competitively sensitive information should be addressed at the appropriate time and in the factual and procedural context in which they arise. They should not be prejudged by PSNH or others at the outset of this proceeding, nor should speculation by PSNH on these matters at this juncture serve as a legitimate basis for preventing NEPGA and RESA from participating in this docket. To the extent that the Commission shares any of PSNH’s concerns, it may

employ the mechanisms outlined RSA 541-A: 32, III to address them, instead of barring NEPGA and RESA from participating.

WHEREFORE, NEPGA and RESA respectfully request that the Commission grant them full intervenor status in the proceeding and grant such other relief as the Commission deems just and equitable.

Dated: October 9, 2014

Respectfully submitted,

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and

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By their Attorneys

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Certificate of Service

I hereby certify that a copy of the foregoing Response has on this 9th day of October, 2014 been sent by electronic mail to persons named on the Service List for this docket.

By: 

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