

DE 01-246

**CONCORD ELECTRIC COMPANY AND
EXETER & HAMPTON ELECTRIC COMPANY**

**Retail Fuel and Purchased Power Adjustments and Short-Term
Power Purchase Rates for Qualifying Facilities**

**Order Granting Unitil Companies' Request for Clarification and
Denying Their Motion for Rehearing**

O R D E R N O. 23,947

April 8, 2002

I. PROCEDURAL HISTORY AND BACKGROUND

Following a hearing on January 23, 2002, the New Hampshire Public Utilities Commission (Commission) issued Order No. 23,910 (the Order) on January 31, 2002. The Order approved certain retail fuel adjustment charges (FAC), purchased power adjustment charges (PPAC) and short term power purchase rates of Concord Electric Company (CEC) and Exeter and Hampton Electric Company (E&H).

The Commission found the charges and rates requested by CEC and E&H to be consistent with the public interest and approved them subject, however, to the deferral of costs incurred by Unitil Power Company (UPC) in connection with the restructuring proposal docketed as DE 01-247. (UPC, CEC and E&H are affiliated companies collectively referred to as the Unitil Companies.) In DE 01-247, the Unitil Companies have proposed a settlement in order to implement the provisions of

RSA 374-F and resolve all issues outstanding with respect to Unitil from the electric restructuring proceeding in DR 96-150 and resulting federal court litigation.

In the Order, the Commission stated that deferral was consistent with its recent orders in Connecticut Valley Electric Company's FAC/PPAC and Temporary Billing Surcharge filings. See Connecticut Valley Electric Company, Order Nos. 23,885 and 23,887 (December 31, 2001). Since CEC and E&H had included UPC's estimated restructuring-related costs for 2002, approximately \$950,000, in their calculation of their FAC and PPAC rates, they were directed to recalculate rates to reflect the elimination of such costs. The Commission required CEC and E&H to request recovery of restructuring expenses as part of the Unitil Companies' restructuring proposal and noted that these expenses "will be subject to a prudence review."

On February 28, 2002, the Unitil Companies filed a petition for clarification and rehearing of the Order. The petition does not question the Commission's authority to "change the structure" by which CEC and E&H should recover UPC's restructuring costs, i.e., the Commission's authority to order deferral of such costs. Rather, the petition suggests that the language in the Order quoted above may require clarification "because such a prudence review would be under

the FERC's,¹ not the Commission's, jurisdiction." The Unitil Companies request rehearing of the order unless the Commission clarifies that its reference to a future prudence review was "merely dicta" or is a reference to the FERC review of UPC's annual filing of estimated and actual costs and revenues.

Under the Unitil System Agreement dated October 1, 1986 (the System Agreement), UPC provides firm, all-requirements wholesale electric power supply service to CEC and E&H. The rates charged by UPC for such service are based on certain formulas designed to allow UPC to recover its costs from CEC and E&H. Pursuant to the System Agreement, UPC's charges are normally revised for prospective six-month rate periods, January-June and July-December.

On or before May 1 of each year, UPC is required to file with FERC a statement of all sales and billing transactions under the System Agreement for the preceding calendar year, including UPC's actual costs by FERC account. The System Agreement provides that FERC may institute an investigation into the "justness and reasonableness" of the costs incurred and the rates billed for the prior calendar year. If FERC does not do so, then the sales and billing transactions for the preceding year are deemed to be approved

¹ The Federal Energy Regulatory Commission, the agency responsible for administering the Federal Power Act, 16 U.S.C. 791a et seq.

by FERC.

Service under the System Agreement continues until terminated by any party on seven years' written notice or until the FERC approves a superseding amendment mutually agreeable to the parties.

In DE 01-247, the Unitil Companies have proposed that the System Agreement be terminated and replaced by an Amended Unitil System Agreement (Amended System Agreement) as of the date of implementation of restructuring. See generally pre-filed testimony of Karen M. Asbury, Volume III, at pages 270-272, and attached Schedule KMA-6, at pages 300-330.

Under the proposed Amended System Agreement, UPC would no longer be responsible to provide CEC and E&H and their successor, Unitil Energy Systems, Inc. (UES), with wholesale power.² However, all outstanding balances owed under the System Agreement would be included as part of contract release payments to be made under the Amended System Agreement. In addition, administrative service charges, which would include "all third party and regulatory charges" incurred by UPC, would flow through the Amended System Agreement to be paid by CEC, E&H or UES. Among other things, CEC, E&H or UES would be specifically responsible for the

² Customers of CEC and E&H would purchase power through transition or default service obtained for them by CEC and E&H or directly through the market.

management and administration of, and all costs associated with, the buyout of UPC's power supply portfolio. The Amended System Agreement preserves the FERC review of sales and billing transactions now provided for in the System Agreement.

The Amended System Agreement would continue until the last of the contract release payments has been delivered to UPC or until all liabilities of the Unitil Companies and UES arising under the System Agreement, the restructuring settlement and the Unitil restructuring have been extinguished, whichever is later.

From the pre-filed testimony, it appears, although the Commission does not have the benefit of further development of the record in DE 01-247, that the Unitil Companies are proposing a scheme for regulatory review of UPC's charges under the Amended System Agreement similar to what now exists under the System Agreement. If so, the FERC filing due on or before May 1, 2003 would presumably include UPC's 2002 actual restructuring costs at issue in the present docket.

II. POSITIONS OF THE PARTIES

A. Unitil Companies

The Unitil Companies request the Commission either

to clarify the Order by deleting from page thirteen the clause, "and note that these expenses will be subject to a prudence review", or grant the motion for rehearing.

They state that clarification of the Commission's intent is important because CEC and E&H run the risk that in a future proceeding the Commission could seek to deny recovery of UPC's restructuring costs in retail rates. They assert that any prudence review would be under FERC, not Commission, jurisdiction.

In support of its alternative request for a rehearing, the Unitil Companies argue that a prudence review by the Commission that could result in the Commission denying recovery by CEC and E&H of UPC's actual restructuring-related costs violates the principle of preemption and the "filed rate doctrine" and is therefore unlawful and unreasonable under *Nantahala Power & Light Company v. Thornburg*, 476 U.S. 953 (1986).

They further argue that if the Commission in a subsequent prudence review were to deny recovery of restructuring-related costs billed by UPC under its FERC approved tariff, the effect would be to "trap" FERC approved wholesale costs in violation of the Federal Power Act and the Supremacy Clause of the United States Constitution. In

support, they cite *Mississippi Power v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988) and *Appeal of Northern Utilities, Inc.*, 136 N.H. 449 (1992).

Finally, they argue that *Appeal of Sinclair Products, Inc.*, 126 N.H. 822 (1985) does not authorize the Commission to conduct a belated prudence review of CEC's and E&H's participation in the System Agreement because the Commission has found that CEC and E&H acted reasonably in entering into the System Agreement.³

B. Other Parties

The Office of Consumer Advocate and the Commission Staff did not take any position on the Unitil Companies' petition.

III. COMMISSION ANALYSIS

When we noted in the Order that "[UPC's restructuring] expenses will be subject to a prudence review", we did not specify that the prudence review would be conducted by the Commission. We wish to clarify here that our remark was not a determination of the Commission's jurisdiction or authority to deny recovery by CEC and E&H in retail rates of UPC's restructuring costs where such costs flow through the System Agreement and are approved by FERC.

³ See *Unitil Service Corporation*, 72 NH PUC 467 (1987).

Based upon the foregoing, it is hereby

ORDERED, that the Unitil Companies' request for a clarification of Order No. 23,910 (January 31, 2002) is granted so that the last sentence on page 13 before the ordering paragraphs will read, "We direct the Companies to request recovery of such costs as part of Unitil's restructuring proposal, and note that these expenses may be subject to a prudence review by the appropriate regulatory agency."; and it is

FURTHER ORDERED, that in light of the above, the Unitil Companies' request for rehearing is denied.

By order of the Public Utilities Commission of New Hampshire this eighth day of April, 2002.

Thomas B. Getz
Chairman

Susan S. Geiger
Commissioner

Nancy Brockway
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary