

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 09-158

PUBLIC SERVICE OF NEW HAMPSHIRE

Tariff Filing to Modify Demand Response Options

Order Approving Motion for Permission to Withdraw Petition

ORDER NO. 25,059

December 31, 2009

APPEARANCES: Gerald M. Eaton, Esq., for Public Service Company of New Hampshire; Alexandra E. Blackmore, Esq., for Granite State Electric Company d/b/a National Grid; Office of Consumer Advocate by Meredith A. Hatfield, Esq., on behalf of residential ratepayers; and Lynn Fabrizio, Esq., on behalf of the Staff of the New Hampshire Public Utilities Commission.

I. PROCEDURAL HISTORY

On August 27, 2009, Public Service Company of New Hampshire (PSNH) filed with the New Hampshire Public Utilities Commission (Commission) a request for approval of tariff revisions proposing to continue its PeakSmartPlus demand response option through changes in certain program design elements and relevant tariff provisions governing the company's Voluntary Interruptible Program Rate (Rate VIP). PSNH's filing included a technical statement in support of its petition and requested expedited approval of the proposed changes. PSNH now seeks to withdraw the petition, after discovery and hearing before the Commission.

PSNH proposed to revise Rate VIP to continue PeakSmartPlus beyond its expiration date of May 31, 2010. The PeakSmartPlus program is currently offered as an ISO-New England (ISO-NE) Demand Program Option through PSNH's tariff for electric delivery service. In its filing, PSNH proposed revising the existing program to include more direct administration by

PSNH and funding through Forward Capacity Market (FCM) revenues received from ISO-NE for CORE Energy Efficiency Programs. The PeakSmartPlus program currently is funded through FCM Transition Period payments, which run from December 1, 2006, through May 31, 2010. Beginning June 1, 2010, demand response assets must have obtained a capacity supply obligation through a Forward Capacity Auction (FCA) in order to continue receiving payments. PSNH has not previously participated in FCAs with its PeakSmartPlus program. In the instant petition, PSNH sought Commission approval to offer a modified PeakSmartPlus program beyond the May 31, 2010 cut-off date. PSNH intended to continue the current program, based on ISO-NE's 30 Minute Real-Time Demand Response program, with modifications.

The Commission issued an Order of Notice on September 15, 2009, scheduling a prehearing conference and technical session for October 2, 2009. On September 14, 2009, the Office of Consumer Advocate (OCA) notified the Commission of its participation in this docket on behalf of residential ratepayers pursuant to RSA 363:28. On September 29, 2009, Granite State Electric Company d/b/a National Grid ("National Grid") filed a petition to intervene, which the Commission granted.

On September 21, 2009, PSNH filed a motion for protective order regarding customer specific information contained in its response to Staff Data Request 1-6. On October 19, 2009, National Grid filed a motion for confidential treatment regarding customer-specific information contained in its response to Staff Data Request 1-4.

The prehearing conference was held as scheduled on October 2, 2009, followed by a technical session. On October 2, 2009, Staff filed a letter proposing a procedural schedule. The proposed procedural schedule, including a hearing date of November 24, 2009, was approved by secretarial letter dated October 7, 2009. A second technical session was held on November 16,

2009. Staff filed a report on that session on November 17, 2009, noting areas of consensus among the parties and Staff.

On December 29, 2009, PSNH filed a motion for permission to withdraw its petition consistent with a verbal request made at the close of the hearing on November 24, 2009.

Transcript at 58. There were no objections to the request.

II. POSITIONS OF THE PARTIES AND STAFF

A. PSNH

Gilbert Gelineau, Marketing Support Manager of PSNH responsible for oversight of energy efficiency programs and demand response, testified on behalf of PSNH. Mr. Gelineau stated that the PeakSmartPlus program, initiated in April 2008, is based on ISO-NE's 30 Minute Demand Response Program. Currently, PSNH has 24 customers enrolled in the program totaling in excess of 10 megawatts - approximately 3 megawatts associated with demand response and about 7 megawatts associated with emergency generation.

Mr. Gelineau indicated that PSNH operates the program under rules established by ISO-NE, pursuant to which participants are paid in accordance with a fixed payment schedule funded through the Forward Capacity Market (FCM) until the program transitions toward Forward Capacity Auction (FCA) based payments. The transition period will end on May 31, 2010. Participants in ISO-NE demand response programs can obtain funding after that date through FCAs, of which three had been held by the time PSNH filed its petition in this case leaving PSNH without an established source of funding beyond the transition period. Commitments made through FCAs are made three years in advance of implementation.

PSNH first introduced its PeakSmartPlus program after the deadlines for participation in the first two auctions and chose not to participate in the third auction, which occurred during this

proceeding. As a result, that source of funding for the period June 1, 2010 through May 31, 2013 is not available. Mr. Gelineau testified that this funding gap prompted PSNH to seek alternative funding sources to continue the PeakSmartPlus program and file the instant petition. PSNH's proposal includes the following elements:

- Fund the program with FCM revenues paid to PSNH in exchange for the capacity reductions resulting from CORE programs. In the event of a shortfall, PSNH proposes to fund the deficit through the System Benefits Charge.
- Provide PSNH the flexibility to initiate load reductions when PSNH anticipates ISO-NE will reach a system peak.
- Pay program participants 75% of the Adjusted Clearing Price of ISO-NE's FCAs.
- Limit the liability for PeakSmartPlus payments by placing a ceiling of 20 megawatts (MW) on the number of MWs that may participate, subject to periodic review.

In technical sessions, the participants reached consensus on the following:

- CORE funds are not an appropriate source of support for the PeakSmartPlus program, in light of existing demand response options in energy markets and the limited financial resources available for the CORE programs.
- PSNH has explored alternative sources of funding, including through the existing Energy Service (ES) rate and transmission cost adjustment mechanism (TCAM). These options were discussed by the parties at the November 16 technical session; neither is supported by the parties or Staff.
- Competitive demand response options exist for the industrial and commercial customers currently enrolled in PSNH's PeakSmartPlus program.
- PSNH will assist existing PeakSmartPlus customers in their transition to demand response market options. PSNH has agreed to release any existing enrolled customers from the program if requested, to allow customers to participate in another program.
- PSNH's rate VIP, a price-response and peak reduction program, will remain available to customers. PSNH will review the program to adjust as appropriate in light of recent and continuing energy market developments.
- PSNH will continue to explore demand response options as energy markets continue to evolve and will provide information on those options to customers.

Mr. Gelineau testified that PSNH had considered several alternatives for funding the PeakSmart program, all of which were discussed during technical sessions. Two options considered included funding through the Energy Service Rate or use of the Transition Cost Adjustment Mechanism (TCAM). Mr. Gelineau noted his concern that using funds from the Energy Service rate would result in funding of the program by the customers least likely to participate in the program. Current participants are larger customers able to offer up to 100 kilowatts or more in demand response; those customers would not necessarily be Energy Service customers. Regarding the TCAM mechanism, Mr. Gelineau noted that although TCAM has the advantage of being a self-reconciling mechanism, it is designed to reconcile transmission costs that have nothing to do with demand response.

Mr. Gelineau suggested that rather than modify PSNH's PeakSmartPlus program, PSNH should transition customers who are currently participating in the PeakSmart program to third-party suppliers who offer similar programs. Mr. Gelineau stated that all the PSNH customers currently participating in PSNH's program have the necessary equipment in place, experience with the rules of the program, and are well-positioned to take advantage of offerings from third party suppliers. Mr. Gelineau asserted that PSNH remains willing to explore potential interruptible programs. At the end of the hearing, PSNH attorney Gerald Eaton offered to withdraw PSNH's petition, stating that the company is committed to helping customers transition off the current PeakSmartPlus program to market-based alternatives.

B. National Grid

Douglas Smith, Manager of Distributed Resources for National Grid, testified as part of a panel with Mr. Gelineau. Mr. Smith oversees National Grid's efforts in the areas of demand response and market development activities related to increasing price responsive demand within

its service territory. According to Mr. Smith, National Grid has been acting as an enrolling participant in ISO-NE Real-Time Price Response and Demand Response programs for over five years.

Mr. Smith testified that he agrees that competitive demand response options exist for industrial and commercial customers currently enrolled in programs such as PSNH's PeakSmartPlus Program. He indicated that, for reasons similar to those stated by Mr. Gelineau, National Grid has decided there are other areas where it can add more value, such as assisting customers with developing demand response action plans and integrating those plans with providing capacity to the market. Mr. Smith asserted that National Grid supports the use of CORE funding for demand response enabling technologies, but does not support the use of System Benefits Charge (SBC) or CORE-type funding for demand response incentive payments, which are intended to compensate for operation and maintenance costs involved in interrupting load. According to Mr. Smith, more appropriate uses of CORE funds would be to build permanent capabilities, such as load automation, and to provide technical assistance to customers. National Grid uses that funding, in addition to traditional energy efficiency project analysis, to provide demand response auditing services that aid customers in developing DR action plans and understanding what their actions might be worth in the capacity market. National Grid concluded by supporting the consensus reached by the parties in this proceeding.

C. OCA

The OCA supported the consensus reached in the November 17, 2009 technical session and urged the Commission to approve the withdrawal of PSNH's proposal. The OCA agreed with PSNH that ensuring that demand response opportunities are taken by customers is an important goal.

D. Staff

Staff supported PSNH ending the PeakSmartPlus program at the end of the FCM transition period, noting that ending the program now does not preclude the company from participation in FCM auctions and market-based demand response programs in the future. Given the options available to customers seeking to participate in the FCM programs, Staff joined the consensus that the best decision for PSNH at this time is to end its PeakSmart program and assist its customers in migrating to other market-based demand response options. Staff urged PSNH to continue to explore other options for demand response programs that could benefit the system and its customers. Staff stated that while PSNH's VIP Price Response Program is useful and should be maintained, there could be other options, including targeted peak reductions of overloaded distribution circuits, that may be appropriate for PSNH to consider in the future.

III. MOTIONS FOR PROTECTIVE TREATMENT

A. PSNH Motion for Protective Order

On September 21, 2009, PSNH filed a motion pursuant to RSA 91-A:5, IV and N.H. Code Admin. Rules Puc §203.08 for confidential treatment of customer-specific information regarding participation in the PeakSmartPlus program contained in its response to Staff Data Request 1-6. PSNH stated that the information contains financial incentives paid for the purpose of encouraging continued participation in the program and other customer-specific data. PSNH further asserted that the requested information has never been released to the public and that public disclosure of the information would likely constitute an invasion of privacy within the meaning of RSA 91-A:5, IV. In addition, PSNH stated that it was bound by N.H. Code Admin. Rules Puc §2004.08 not to disclose customer-specific information, arguing that the limited

benefits of disclosing customer-specific information were outweighed by the invasion of customer privacy if such information were publicly disclosed.

B. National Grid Motion for Confidential Treatment

On October 16, 2009, National Grid filed a motion pursuant to N.H. Code of Administrative Rules Puc 203.08 for confidential treatment of its response to Staff Data Request 1-4, which included customer names, class and total kW claimed by National Grid's customers participating in ISO-NE demand response programs administered by National Grid during the Forward Capacity Market transition period. National Grid submitted that the names, class and total kW claimed by National Grid's customers constitute confidential information in which the customers have a legitimate privacy interest. In addition, National Grid argued that revealing the information could provide competitors with information they might not otherwise have access to, giving them unfair competitive business advantages and that its customers would not otherwise reveal the information. National Grid further asserted that the public's interest in disclosure of the information does not outweigh the legitimate privacy interests of the customers because the information does not facilitate a better understanding of how government funds are being spent, rather it relates to customers' private demand response commitments.

IV. COMMISSION ANALYSIS

A. PSNH Proposed Tariff Revisions

Initially in this docket, PSNH proposed changes to its existing Voluntary Interruptible Program (Rate VIP) that would enable it to continue offering the real time demand response option it currently offers through ISO-NE's forward capacity market demand response (DR) program. The proposed tariff revisions would have permitted PSNH to continue the real time DR offering with funding derived from CORE program funds, rather than from ISO-NE

transition period payments. However, Staff and parties concluded, through the course of discovery and two technical sessions, that viable market options exist for PSNH's commercial and industrial customers to continue DR participation without the need to tap into CORE funds. As a result of these discussions, PSNH agreed to continue offering Rate VIP, a price response program, to its customers. PSNH also agreed that it would assist existing DR customers to make the transfer to competitive providers of forward capacity market DR programs.

We have reviewed the record, including testimony provided at hearing, and agree with the consensus reached by the parties and Staff, which results in PSNH's PeakSmartPlus program expiring at the end of ISO-NE's forward capacity transition period, as originally contemplated, and its larger customers moving to market alternatives, consistent with established policy and principles that encourage the promotion of demand response options by electric distribution companies. In Order No. 24,263 (January 9, 2004), the Commission approved a settlement agreement that established an obligation on the part of electric providers to offer demand response options to their customers. That obligation reflects the State's energy policy and principles set forth in RSA 378:37-41 concerning least cost energy planning, as well as the electric industry restructuring principles set forth in RSA 374-F:3.

PSNH implemented Rate VIP through its electric service tariff in accordance with Order No. 23,505 (June 6, 2000), with certain modifications through subsequent orders. In April 2008, it began to offer its customers what turned out to be a more lucrative DR option administered for a defined period of time by ISO-NE and offered by PSNH through its PeakSmartPlus option under Rate VIP. Apparently most, if not all customers that had participated in Rate VIP transferred to PeakSmartPlus. The DR option administered and funded through ISO-NE will expire on May 31, 2010, requiring PSNH and its customers to consider other options.

We agree with the parties and Staff that funding real-time DR participation of commercial and industrial customers through CORE funding provided by all ratepayers, residential and business alike, is not appropriate. PSNH testified that, in addition to considering funding PeakSmartPlus through CORE funding, it had considered funding the program through the Energy Service charge and Transmission Cost Adjustment Mechanism (TCAM) fee systems. Parties and Staff agreed that neither of those options would be appropriate. As the Commission found in Order No. 23,574 (November 1, 2000), which established guidelines for post-competition energy efficiency programs, a transition from utility-sponsored to market-based demand-side management programs is an important policy objective set forth in RSA 374-F and, in this case, is appropriate to pursue.

As noted through testimony, PSNH chose not to participate in the forward capacity auctions (FCAs) that would have enabled it to continue funding PeakSmartPlus through participation in the forward capacity market (FCM). Although PSNH could reconsider its participation in future FCAs, parties testified that there are viable market-based options for DR participants through third-party aggregators. PSNH concluded that participation directly in the FCM on behalf of DR customers would not be an appropriate risk to place on its ratepayers, a conclusion National Grid had also reached, particularly in light of the market options available to customers through competitive aggregators.

We agree with PSNH that the market risks involved with participating in the FCM on behalf of its customers is not warranted where competitive suppliers of similar DR options exist in the market. We therefore approve PSNH's motion to withdraw its petition and we encourage PSNH to continue exploring DR options. Toward that end, PSNH should continue to offer its Rate VIP option, a price response program which meets the policy objectives of RSAs 374-F and

378, as well as the Commission's established policy to encourage demand side management initiatives. We expect PSNH to report on participation in Rate VIP as well as its consideration of alternative DR options through its annual Integrated Least Cost Plan filings. Noting that 13 of PSNH's 24 PeakSmartPlus customers had already transitioned to competitive energy suppliers as of October 31, we further expect PSNH to assist its remaining PeakSmartPlus customers in their transition to alternative DR options, including market options.

B. Rulings on Motions for Protective Treatment

In support of their motions, PSNH and National Grid relied upon an exemption to disclosure requirement in the state's Right-to-Know Law, RSA 91-A, which provides that every citizen has the right to inspect all governmental records in the possession of public agencies, except as prohibited by statute or exempted in RSA 91-A:5. PSNH also cited N.H. Code Admin. Rules Puc §2004.08, which protects certain customer information from disclosure by electric power suppliers and distribution companies. No objections were filed to either request. In the absence of a statutory prohibition on disclosure, or an exemption from disclosure, the Commission must disclose the documents in its possession. RSA 91-A:5, IV, upon which PSNH and National Grid base their arguments, states, in relevant part, that records of "confidential, commercial, or financial information" are exempted from disclosure.

The New Hampshire Supreme Court has interpreted the exemption for confidential, commercial, or financial information to require an "analysis of both whether the information sought is confidential, commercial, or financial information, *and* whether disclosure would constitute an invasion of privacy." *Union Leader Corp. v. N.H. Housing Fin. Auth.*, 142 N.H. 540, 552 (1997) (quotations omitted). "Furthermore, the asserted private confidential, commercial, or financial interest must be balanced against the public's interest in disclosure,

since these categorical exemptions mean not that the information is *per se* exempt, but rather that it is sufficiently private that it must be balanced against the public's interest in disclosure." *Id.* at 553 (citation omitted). The burden of proving that the information is confidential and private rests with the party seeking non-disclosure. *See Goode v. N.H. Legislative Budget Assistant*, 148 N.H. 551, 555 (2002).

In determining whether commercial or financial information should be deemed confidential and private, we consider the three-step analysis applied by the New Hampshire Supreme Court in *Lambert v. Belknap County Convention*, 157 N.H. 375, 382 (2008). First, the analysis requires an evaluation of whether there is a privacy interest at stake that would be invaded by the disclosure; when commercial or financial information is involved, this step includes a determination of whether an interest in the confidentiality of the information is at stake. If no such interest is at stake, the Right-to-Know law requires disclosure. *Id.* at 382-83. Second, when a privacy interest is at stake, the public's interest in disclosure is assessed. *Id.* at 383. Disclosure should inform the public of the conduct and activities of its government; if the information does not serve that purpose, disclosure is not warranted. *Id.* Finally, when there is a public interest in disclosure, that interest is balanced against any privacy interests in non-disclosure. *Id.*

The Commission's rule on requests for confidential treatment, N.H. Code Admin. Rules Puc 203.08, similarly addresses this balancing test by requiring petitioners to: (1) provide the material for which confidential treatment is sought or a detailed description of the types of information for which confidentiality is sought; (2) reference specific statutory or common law authority favoring confidentiality; and (3) provide a detailed statement of the harm that would result from disclosure to be weighed against the benefits of disclosure to the public. N.H. Code

Admin. Rules Puc 203.08(b); *see also Unital Corp. and Northern Utilities, Inc.*, Order No. 25,014 (September 22, 2009) at 3.

In applying the relevant balancing of privacy interests and the public's interest in disclosure, the New Hampshire Supreme Court has held that names and addresses of residential customers are entitled to confidential treatment under RSA 91-A:5, IV. *See Lamy v. New Hampshire Public Utilities Commission*, 152 N.H. 106, 113 (2005). The Court, however, did not extend protection to the names and addresses of business customers in that particular case. In *Lamy*, the Court made clear that the names and addresses of commercial and industrial customers, in isolation, do not comprise information in which the customers have a significant privacy interest. *Id.* at 109-110. It left unresolved the question of whether this information, when associated with additional data, such as the financial incentives received and load commitment for participation in ISO-NE demand response programs, would be entitled to confidential treatment.

PSNH cites Puc 2004.08 to support its motion. Puc 2004.08(a) states that competitive electric power suppliers, aggregators and electric distribution companies shall not disclose confidential customer information without written authorization from the customer. Puc 2004.08(b) further states that confidential customer information "shall include but not be limited to: (1) Customer name, address and telephone number; (2) Customer usage data; and (3) Customer payment information."

PSNH notes that Puc 2004.08 codifies Commission policy and a long-standing practice of PSNH to protect customer-specific data from public disclosure, and that disclosure would discourage participation in demand response programs such as PeakSmartPlus. PSNH further argues that disclosure could create a competitive disadvantage for the ISO-NE approved

communication services provider, whose monthly charges are part of the data response, and would reveal that energy is a significant portion of participating customer operating expenditures. National Grid similarly argues that even the fact of participation in a specific voluntary program is considered by customers to be private and confidential and that the Commission has previously recognized the relevant privacy interest that a business has in data that would reveal the amount of electricity consumed by the enterprise insofar as this information would be useful to direct competitors as disclosure would reveal key business costs, as well as information about business operations and methods of production. *See* Order No. 24,612 at 5-6 (April 6, 2006). National Grid also argues that disclosure of the information provided would discourage participation in utility-administered demand response programs as customers would be understandably reluctant to participate in a program if they can't be assured that otherwise confidential details about their business operations will not be publicly disclosed as result of their participation.

We have reviewed the information for which the utilities seek protective treatment. We find that the information constitutes commercial and financial information within the meaning of RSA 91-A:5, IV. The next question is whether the public's interest in disclosure outweighs the privacy interest at stake. The financial incentives provided to customers as a result of participation in these programs have come from ISO-NE and not from any New Hampshire jurisdictional ratemaking or funding sources. Disclosure of the detailed customer specific information under these circumstances, involving an ISO-NE incentive program that PSNH is discontinuing, would not provide the public with information about the conduct or activities of the Commission or other parts of New Hampshire state or local government. We therefore find that the public's interest in review of the financial and commercially sensitive information at

issue does not outweigh the benefit derived from maintaining the confidentiality of such information insofar as the information constitutes customer-specific information not currently disclosed by either the utilities or the customers, is not provided for purposes of ratemaking, and provides no material information about the conduct or activities of New Hampshire government. Thus, we will grant protective treatment to the customer specific information provided in PSNH's response to Staff Data Request 1-6 and National Grid's response to Staff Data Request 1-4.

Consistent with our practice, the protective treatment provisions of this Order are subject to the on-going authority of the Commission, on its own motion or the motion of Staff, or any member of the public to reconsider this protective order in light of RSA 91-A, should circumstances warrant.

Based upon the foregoing, it is hereby

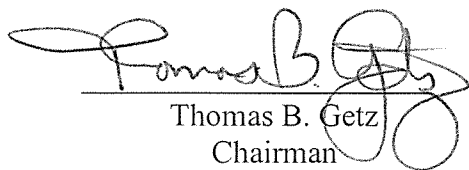
ORDERED, that PSNH's motion for permission to withdraw its petition and the proposed tariff revisions is APPROVED; and it is

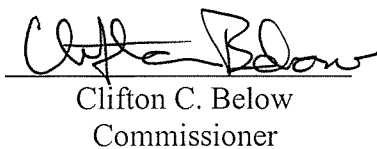
FURTHER ORDERED, that PSNH assist its customers in the transition from PeakSmartPlus; and it is

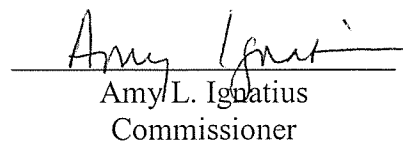
FURTHER ORDERED, that PSNH file compliance pages of its tariff within 30 days from the issuance of this order; and it is

FURTHER ORDERED, that PSNH continue offering Rate VIP and report on program participation through future Integrated Least Cost Plan filings.

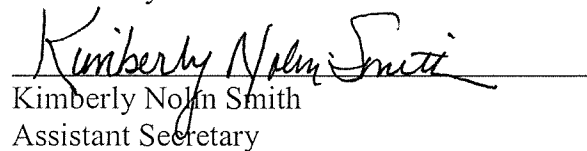
By order of the Public Utilities Commission of New Hampshire this thirty-first day of
December, 2009.


Thomas B. Getz
Chairman


Clifton C. Below
Commissioner


Amy L. Ignatius
Commissioner

Attested by:


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12/31/09 Order No. 25,059 issued and forwarded to all parties. Copies given to PUC Staff.

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