

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 10-160

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Investigation into the Effects of Customer Migration

Order Following Hearing

ORDER NO. 25,256

July 26, 2011

APPEARANCES: Gerald M. Eaton, Esq., on behalf of Public Service Company of New Hampshire; Murtha Cullina LLP by Robert J. Munnelly, Esq., and Debbie C. Albrecht, Esq., on behalf of the Retail Energy Supply Association; Joseph E. Donovan, Esq., on behalf of Constellation Energy Commodities Group, Inc. and Constellation NewEnergy; Orr & Reno P.A. by Douglas L. Patch, Esq., on behalf of TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast Inc.; N. Jonathan Peress, Esq., on behalf of Conservation Law Foundation; James T. Rodier, Esq., on behalf of Freedom Energy Logistics and Halifax-American Energy Company; Orr and Reno P.A. by Maureen D. Smith, Esq., on behalf of New England Power Generators Association; the Office of Consumer Advocate by Meredith A. Hatfield, Esq., on behalf of residential ratepayers; and Suzanne G. Amidon, Esq., on behalf of Commission Staff.

I. PROCEDURAL HISTORY

On May 4, 2010, Public Service Company of New Hampshire (PSNH or Company) filed a petition in Docket No. DE 09-180 (the proceeding establishing PSNH's 2010 default energy service (ES) rate) requesting an adjustment to its ES rates effective with service rendered on and after July 1, 2010. In DE 09-180, PSNH demonstrated that as ES customers migrate to third party competitive supply during a time when the marginal cost to serve is lower than the average cost to serve, the ES rates increase for those residential, commercial, and industrial customers who continue to take ES from PSNH.¹ In its May 4, 2010 filing, PSNH proposed to address this

¹ The average cost to provide energy service to default service customers is the sum of the costs of all generation services to serve that load (PSNH owned generation plus the net cost of any supplemental power purchases that PSNH contracts for to serve default load) divided by the total load (usually expressed as cents per kilowatt-hour or

circumstance by removing a portion of fixed costs from ES rates and recovering that portion through a non-bypassable charge, like the distribution charge, which is paid by all customers, including those customers who had migrated to competitive suppliers. Because customers would not be able to opt out of such a charge (except by self generating), the PSNH proposal is referred to as a “non-bypassable” charge. In the May 28, 2010 Order of Notice in Docket No. DE 09-180, the Commission stated that it would open a separate proceeding to consider the issue of how customer migration affects ES rates for PSNH’s remaining ES customers.²

On June 11, 2010, the Commission issued an Order of Notice to investigate the issues related to PSNH’s customer migration along with PSNH’s practices procuring power for the portion of its load not served by the generation it owns. Among the issues noticed were: whether PSNH’s proposal for a non-bypassable mechanism to collect a portion of its energy service costs from all customers is permissible under New Hampshire law and is a reasonable way to address the cost impacts of customer migration on remaining ES customers; other methods to address those cost impacts including but not limited to the targeted use of technology-based initiatives and/or targeted rate mechanisms; the interplay of PSNH’s current supplemental power purchase practices with customer migration; whether alternative procurement strategies should be implemented; and the appropriate scope of the proceeding.

The Office of Consumer Advocate (OCA) filed a letter on June 17, 2010, indicating its participation in the docket pursuant to RSA 363:28. On June 23, 2010, the following parties filed petitions to intervene: Constellation Energy Commodities Group, Inc. and Constellation NewEnergy (together, Constellation); TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast Inc. (together, TransCanada); Conservation Law Foundation (CLF); Freedom

dollars per megawatt-hour). The marginal cost is the incremental cost to purchase additional generation services for load on the margin from the regional wholesale market, that is, the last block of energy (kilowatt-hours) procured.

² For additional history, *see* Order No. 25,061 (December 31, 2009) in Docket No. DE 09-180 at pages 32-33.

Energy Logistics and Halifax-American Energy Company (Freedom Energy/Halifax); Clean Power Development (CPD); and the Retail Energy Supply Association (RESA). On June 28, 2010, the New England Power Generators Association (NEPGA) filed a petition to intervene.

At the June 28, 2010 prehearing conference, the Commission granted all pending petitions to intervene, with the exception of the late-filed petition of NEPGA, which the Commission granted on July 26, 2010. Following the prehearing conference, the parties and Staff held a technical session. Staff filed a report of the technical session and a proposed procedural schedule on July 2, 2010.

In its report, Staff said that, following the direction of the Commission at the prehearing conference, the parties had discussed whether the potential use of technology-based initiatives, including the use of time-of-use pricing, was considered central or tangential to the proceeding and whether there was any experience to be garnered from other states' experience in addressing the effects of customer migration. Staff reported that the parties concluded that technology-based initiatives might minimally address the cost impact of customer migration, and that the use of such initiatives to address customer migration was a tangential issue. Staff also stated that the parties agreed that New Hampshire's restructuring laws are different from other states in that PSNH retains generation, so other states' experience in restructuring would not be particularly relevant in this proceeding. Finally, Staff reported that the parties had agreed on a procedural schedule that included two opportunities for testimony: the first concerning migration and the second concerning the interplay between power procurement strategies and migration. By secretarial letter dated July 26, 2010, the Commission approved the procedural schedule and granted NEPGA's intervention.

On July 30, 2010, the OCA filed the testimony of Kenneth E. Traum and PSNH filed the testimony of Robert A. Baumann on customer migration. The following parties filed testimony on the interplay between power procurement and migration: TransCanada (testimony of Michael E. Hachey) on September 15, 2010; Constellation and RESA, jointly (testimony of Daniel W. Allegretti) on September 16, 2010; and NEPGA (testimony of Sandi M. Hennequin) on September 17, 2010. PSNH filed a motion for an extension of time to file rebuttal testimony on October 20, 2010, which was granted by secretarial letter on October 26, 2010. Pursuant to the revised schedule, PSNH filed the rebuttal testimony of Mr. Baumann and Stephen R. Hall on October 29, 2010. The Commission conducted a hearing on the merits on November 30 and December 1, 2010.

On January 21, 2011, the Commission issued a secretarial letter describing the legal issues implicated by the proceeding and requiring written closing statements and legal briefs to be filed by February 9, 2011. The OCA filed an assented-to motion for an extension of time, which the Commission granted on February 4, 2011, and established February 29, 2011 as the new deadline for briefs. CLF, Staff, the OCA, TransCanada, NEPGA, and PSNH filed briefs on February 25, 2011; RESA and Constellation jointly filed on February 28, 2011.

II. POSITIONS OF THE PARTIES AND STAFF

A. Public Service Company of New Hampshire

In its brief, PSNH asserted that the solution to the so-called “migration” issue lies in the structure of its rates and the method of cost recovery rather than in creating barriers to market entry or exit. According to PSNH, the Commission has authority to implement ratemaking methodologies to address the cost shifting that has resulted from migration of ES customers to competitive suppliers. PSNH Closing Statement and Legal Brief at 2. PSNH opined that, absent

a specific statute restricting the Commission's authority, the Commission can fashion a ratemaking response to cost shifting resulting from migration if it finds that such cost-shifting is unfair under RSA 374-F:3, VI. *Id.* at 3-4.

PSNH asserted that RSA 369-B:3, IV(b)(1)(A) constitutes a legislative barrier to requiring PSNH to bid its generation assets into the market and to purchase all of its power needs pursuant to an RFP process because it requires PSNH to supply all default service from its generation assets and, if necessary, through supplemental power purchases. PSNH argued that this PSNH-specific statute supersedes the more general requirement in the restructuring statute, RSA 374-F:3, V(c), that states that default service should be procured through the competitive market. *Id.* at 4-5. According to PSNH, the statutory requirement to supply default service first from PSNH's plants is a clear barrier to requiring PSNH to bid all of its generating assets into the daily market and purchase all of its energy requirements through an RFP. *Id.* at 4-5. PSNH said that the Commission had previously rejected this proposal, citing Docket No. DE 03-175, Order No. 24,252 (December 19, 2003) 88 NH PUC 638 at 644-645. *Id.* at 5.

According to PSNH, the parties seeking to change how PSNH procures its default energy supply should bear the burden of proof, pursuant to N.H. Code Admin. Rule Puc 203.25, in making the case for such a change. PSNH said that the competitive suppliers who advocate for changes in energy supply design should submit a fully detailed proposal for the bid process as directed by the Commission in Docket No. DE 07-096, *Public Service Co. of New Hampshire*. See Order No. 24,814 (December 28, 2007) 92 NH PUC 496. *Id.*

While PSNH conceded that there is no legal barrier to PSNH providing supplemental power through an RFP process, the Company said such a process would be more costly than PSNH's current practice for acquiring supplemental power supply. PSNH pointed out that it can

acquire supplemental power in a manner approved by the Commission pursuant to RSA 369-B:3, IV(b)(1)(A). PSNH opined that it would be very expensive for PSNH customers to acquire power through an RFP process. According to the Company, bidders will have to take into account when and how PSNH's generating assets will operate to serve load, which greatly increases the risk that would be borne by a winning competitive supplier and reduces PSNH's ability to respond to changing conditions, all at the expense of ratepayers. In addition, PSNH pointed out that while the price of supplemental power may be fixed through the RFP process, the volume would not be fixed, so the RFP approach would do little to help manage over- and under-recoveries. *Id.* at 8. PSNH said that nothing in the record about the RFP process demonstrated that it would bring value to PSNH's default service customers over the value associated with PSNH's own management of supplemental power procurement. *Id.* at 9.

PSNH agreed that the fixed costs it has proposed for inclusion in a non-bypassable charge do not meet the definition of stranded costs found at RSA 374-F:2, IV. Referring to testimony of Mr. Baumann, the Company stated that the costs PSNH identified consist of fixed costs of the generation system, which are incurred regardless of the energy service load. Mr. Baumann listed the costs as depreciation, property taxes, and the debt service component of the capital structure that supports the generation system, for a total of approximately \$40 million on an annual basis. *Id.* PSNH said the costs it proposes to collect from all customers are common to all generating sources and that PSNH will still collect its variable costs, including fuel, through its default service rate. *Id.* at 10.

PSNH claimed that while a stay-out provision may not be prohibited by statute, the use of such a provision would not cure the problem of cost shifting resulting from migration. According to PSNH, a stay out provision would bar a customer from returning to default service

for a predetermined period of time, for example one year. *Id.* at 10-11. If reentry to default service was permitted before the one-year period had expired, then in exchange for a one-time fee to be paid or a rate higher than the default service charge, an entry or reentry fee would be in play.

While not barred by statute, PSNH opined that a stay-out provision appears to be anti-consumer and adds a chilling effect on customer choice. The Company said that customers would have another risk to consider when contemplating a switch to a competitive supplier. Further, PSNH said that it would be difficult to impose a new condition on customers who have already migrated to the competitive market because such a condition would, in effect, be imposed retroactively on their choice of supplier. *Id.* at 11.

Regarding rate design, PSNH said that it has always charged an average price over all kilowatt-hours, but RSA 369-B:3, IV(b)(1)(A) does not require that the rate be based on average costs alone as long as PSNH recovers all of its actual costs. When marginal energy costs are less than average default ES costs, PSNH opined that if a rate that exceeds PSNH's marginal cost of default service, but is less than the average cost, were offered to customers who have migrated to competitive supply and some of those customers return to default service, all customers on default service would benefit by the amount of the premium over the marginal cost paid by returning customers. *Id.* at 11-12. PSNH said that such a rate could be implemented easily and that precedent exists for offering a rate of this design. *Id.* at 12.

PSNH stated that it does not believe that there is merit to offering a rate reflecting the real-time market price. According to PSNH, customers can procure a real-time market price from the market today, or they can become self supplying members of the ISO-NE. PSNH

further opined that a real-time rate design will not address the problem of unfair cost shifting among customer classes. *Id.* at 13.

PSNH said that the purchase of receivables (POR) option proposed by Constellation³ is not good policy because it shifts risks away from the competitive market and onto PSNH's customers and further exacerbates the migration issue. PSNH claimed that its collection practices are heavily regulated while those of competitive suppliers are not. Further, PSNH stated that it has the duty not to discriminate and to serve all applicants for service within its service territory. On the other hand, competitive energy suppliers are free to limit their agreements to the most credit worthy customers, who meet stringent credit requirements and can terminate service with written notice to customers. *Id.* at 13-14. PSNH said that if a POR is approved, the risk of competitive supply uncollectible accounts will shift to PSNH and ultimately to its ES customers or to all customers. The Company warned that Constellation, in supporting the POR, wants all customers to shoulder the cost of the risk of uncollectible accounts, while objecting to PSNH's proposal to spread the fixed cost of generation to all customers. According to PSNH, this demonstrates that suppliers are interested in shifting their risk to PSNH's customers, "while increasing the 'migration' problem, the related instability and cost shifting caused by migration." *Id.* at 14.

Regarding divestiture, PSNH said that RSA 369-B:3-a allows it to approach the Commission to request permission to divest generation assets but does not confer upon the Commission the power to require PSNH to divest its generation assets. *Id.* at 15. The Company said that if the Legislature intended to require the Company to divest its plants upon a Commission finding, it would have used the word "shall" instead of "may." PSNH pointed out that its generation plants previously produced power at a cost well below the market. *Id.* at 16.

³ A description of the POR can be found, *infra*, at 10-11.

PSNH said there is no evidence that the plants are permanently uneconomic to justify a declaration they are stranded costs and concluded that PSNH is not required to mitigate stranded costs through retirement or divestiture. *Id.* at 17.

PSNH said that the Commission has authority to order continued unit operation studies for PSNH's generating plants and that the results of such studies may inform the Commission regarding whether any additional retirement or divestiture inquiry is necessary, referring to the economic interest test under RSA 369-B:3-a. According to PSNH, the Commission would also need a detailed forecast of fuel and power supply costs to determine what costs would be incurred for default service in the event that a PSNH generating plant is no longer available. *Id.* at 17. The Company said the Commission would additionally need to consider multiple scenarios and risks that could result from divestiture. PSNH stated that a divestiture proceeding would require a sufficiently detailed record and a preponderance of the evidence that an RFP process will produce greater benefits to PSNH's default service customers over the long term, and that it would be a difficult and complicated process. *Id.* at 18.

PSNH argued that none of the competitive suppliers' proposals should be accepted because there is an inadequate record to support any of them. *Id.* at 21. PSNH said the record supported a finding that there is an unfair shifting of costs among classes due to customer migration and the Commission can authorize PSNH to collect some of the fixed costs from all customers. *Id.* at 22-23. PSNH concluded that the Commission can also approve a rate based on PSNH's actual, reasonable, and prudent marginal costs of default service supply, plus an adder, to be offered to customers returning to default service. *Id.* at 23.

B. Constellation/Retail Energy Supply Association

Constellation/RESA filed the testimony of Daniel W. Allegretti. Mr. Allegretti opined that a Full Requirements Service (FRS) procurement structure would best meet the needs of PSNH and its ES customers. Mr. Allegretti explained that, under a FRS structure, PSNH would sell all of its generated power and other power in its portfolios, such as power procured through purchase power agreements with independent power producers, into the wholesale market, and issue an RFP for all of its load requirements. According to Mr. Allegretti, an FRS structure would avoid: (1) the excess supply costs that have caused upward pressure on the ES rate; (2) cost shifting from ES customers to switched customers; and (3) the imposition of costs on customers for supply that they neither want nor need. Exh.16, Constellation/RESA testimony, at 4-5. He noted that another positive feature of the FRS structure is that the FRS provider assumes 100 percent of the risk should the all-in price be too high and customers decide to switch to a competitive retail provider. In such a scenario, Mr. Allegretti noted that customers would be protected against the cost of over- or under-hedging that results from changes in market prices over time. *Id.* at 13-14.

Mr. Allegretti said that a January 2010 study comparing FRS and portfolio management approaches to procuring generation to meet default service needs by the NorthBridge Group on behalf of National Grid in Rhode Island provides significant analytical support for the use of the FRS Structure to meet National Grid's default service requirements. *Id.* at 16-17. He also asserted that moving to a FRS model for PSNH would be consistent with the principles of the New Hampshire electric industry restructuring statute, RSA 374-F:3, II. He testified that even if PSNH does not fully divest or retire some of its generation, the FRS structure would be the best approach for PSNH to procure supply. *Id.* at 20.

Mr. Allegretti also recommended the use of three tools to promote the development of retail markets for the residential and small commercial customer segments – a POR program, customer referral, and electronic data interface. According to Mr. Allegretti, under a POR program the utility bills and collects payments on behalf of the competitive supplier and the supplier receives payments from the utility for the commodity portion of the bill minus a discount to compensate the utility for credit risk or receivables collected by the utility and, in some instances, minus utility administrative costs, when the bill is rendered. The utility continues to handle disconnection and reconnection of all customers. Mr. Allegretti said that as a transition tool to an end state where the supplier will provide the consolidated billing service, POR attracts suppliers to a service territory that offers this service, as demonstrated by the growth in residential and small commercial markets in Connecticut, New York and New Jersey. *Id.* at 23-24.

According to Mr. Allegretti, a customer referral program is a service offered by a utility to a customer who contacts the utility for service initiation, high bill inquiry or other type of question. The customer is asked by a utility representative if it is interested in participating in this type of program. If the customer agrees, the customer then selects a specific supplier from a pool or agrees to be assigned at random to one of the participating suppliers, and the customer receives a discount off the commodity portion of its bill for two months. *Id.* at 24.

Mr. Allegretti explained electronic data interface as a system whereby a dedicated web-based interface site is maintained by the utility that allows electronic access to key customer usage and account data by competitive suppliers. *Id.* at 24-25.

In its closing, Constellation/RESA recommended that the Commission: (1) deny the imposition of a proposed non-bypassable charge for recovery of PSNH's excess supply costs,

asserting that there is no law that supports the creation of such a charge; (2) initiate a docket to implement divestiture or retirement of PSNH generation assets or require PSNH to demonstrate why divestiture or retirement is not in the economic interest of its customers; (3) direct PSNH to adopt the use of a competitive solicitation process for the procurement of FRS for its ES customers; (4) decline to adopt interim measures such as stay-out provisions or separate rates for returning ES customers; and (5) immediately open a new proceeding to investigate steps to improve access to competitive alternatives such as a POR program employed in other states, including Connecticut and Massachusetts. Constellation/RESA Closing Brief at 3-13.

Constellation/RESA stated that PSNH lacks legal authority to impose a non-bypassable charge for portions of its generation costs. Constellation/RESA first argued that the costs PSNH proposed to recover through the non-bypassable charge are not stranded costs as defined by RSA 374-F:2. Further, Constellation/RESA argued that RSA 374-F:3, V(c) requires that the costs of administering default service be paid by customers of default service and not through stranded costs. *Id.* at 5. Constellation/RESA said that they might consider supporting a reasonable stranded cost recovery as part of an approved retirement or divestiture plan, but oppose the imposition of such a charge while PSNH retains its own generation assets and supplies above-market generation.

Constellation/RESA pointed out that PSNH has an obligation to take all reasonable measures to mitigate stranded costs, including undertaking a reasonable amount of retirement, sale or write-off of uneconomic surplus, citing RSA 374-F:3, XII(c)(4), and argued that the proposed non-bypassable charge may only be imposed in conjunction with an approved divestiture plan. *Id.* at 5-6. Finally, Constellation/RESA insisted that the proposed non-

bypassable charge amounts to an exit fee, the use of which is expressly discouraged by RSA 369-B:4, VI and VII. *Id.* at 6.

Constellation/RESA said that migration will continue to place upward pressure on ES prices so long as the prices remain tied to PSNH's generation portfolio costs. *Id.* at 6-7.

According to Constellation/RESA, allowing PSNH's proposed non-bypassable charge would re-impose those costs on customers who choose lower-cost competitive supply and thus hamper competition. It would also remove any incentive for PSNH to reform or change its process for acquiring and managing the generation assets in its ES portfolio. *Id.* at 8-9.

Constellation/RESA claimed that PSNH's arguments about fairness to the remaining ES customers do not stand up to scrutiny. *Id.* at 9. Constellation/RESA stated that while PSNH points to alleged unfairness in making ES customers pay all the costs associated with PSNH's above-market generation portfolio, it is also fundamentally unfair to customers who have chosen to take competitive supply to require them to pay costs associated with generation that they have expressly elected not to use. Constellation/RESA opined that, if the Commission approved the non-bypassable charge, PSNH would impose the charge indefinitely, absent divestiture. *Id.* at 10. According to Constellation/RESA, PSNH failed to prove that the above-market costs associated with providing power through its own generation assets is a short term anomaly and that the record showed that PSNH planned expenditures to upgrade pollution control equipment at the Merrimack Station facility, which would increase its generation costs. *Id.* at 11-12.

Constellation/RESA recommended that the Commission address PSNH's high ES rate through divestiture and/or retirement of PSNH's generation assets and require PSNH to use a FRS structure to purchase all its power requirements, noting that other utilities in New England, including PSNH's affiliates have successfully used the FRS structure to acquire their power

needs. *Id.* at 13-14. Constellation/RESA claimed that PSNH's current practice of procuring power from its own generation and supplementing that power as necessary with market purchases results in above-market costs for customers. *Id.* at 14-15. According to Constellation/RESA, requiring PSNH to acquire power through an FRS approach would be consistent with the restructuring principles of RSA 374-F:3 and places market risk and portfolio management risks on wholesale suppliers instead of PSNH ES customers. *Id.* at 16-27.

Constellation/RESA opined that the interim measures suggested to date could harm the competitive market, limit customer choice, and be of doubtful utility. *Id.* at 27.

Constellation/RESA argued that stay-out provisions, including the use of a separate ES rate for customers who migrate to competitive supply and then return to PSNH, limit customer choice, contravene the principles of the electric utility restructuring statute, RSA 374-F:1, II and III, and unreasonably disadvantage competitive supply customers contrary to RSA 378:10. Finally, Constellation/RESA said that the stay-out provisions are of questionable usefulness in avoiding the adverse impacts of customer migration. *Id.* at 28-29.

Constellation/RESA specifically recommended that the Commission implement action to improve competitive offerings for the residential and small commercial classes. Specifically, they recommended the institution of a POR program, a customer referral program, an electronic interface to allow suppliers access to key customer usage and account data information, and separate default service for customers with hourly metering. Constellation/RESA said these measures are in place in Connecticut and Massachusetts and apply to PSNH affiliates operating in those states. *Id.* at 31-35.

C. TransCanada

TransCanada disagreed with PSNH's argument that one of the benefits of holding generation assets is that it provides backup supply for customers who want to return to PSNH ES from competitive supply. TransCanada argues that it is no longer in the economic interest of PSNH ratepayers for the company to own generation. TransCanada Closing Brief at 2.

According to PSNH, the non-bypassable charge is a means to "dollarize" the benefit associated with the back-up supply. TransCanada questioned whether there was any value to that benefit, given that for some time the PSNH ES has been above market prices. *Id.* at 3.

TransCanada opined that there are several issues of fairness to be considered and the discussion should go beyond what is "fair" to the customers who remain on PSNH ES. For example, TransCanada asked whether it was fair that a customer who has migrated should pay for the fixed cost of generation twice – once for their supply and once for PSNH through its proposed non-bypassable charge. TransCanada also questioned whether it was fair that PSNH ratepayers had overpaid for ES service. *Id.* at 3-4. In addition, TransCanada predicted that if the Commission approved a non-bypassable charge, PSNH would ask that additional generation and supply costs, and the costs of the upgrade at Merrimack Station, be added to the charge, thus increasing both its size and impact. *Id.* at 4.

TransCanada said that, from a legal perspective, allowing PSNH to collect the proposed non-bypassable charge would be contrary to New Hampshire law, citing RSA 374-F:3, V(c) (costs of default service should be borne by customers of default service) and RSA 374-F:3, V(e) (minimization of customer risk and the development of competitive markets). *Id.* at 4-5. As noted by TransCanada, RSA 374-F:3, XII (d) states that exit fees are not a preferred method for recovery of stranded costs, the costs PSNH proposed to recover in a non-bypassable rate are not

“stranded” as those costs are defined and the costs do not fall within any category of costs that may be charged to all customers. *Id.* at 5.

TransCanada said that the statute created a mechanism – divestiture – to be used when it is uneconomic for PSNH to continue to own generation and use it to provide default service, RSA 369-B:3-a. According to TransCanada, PSNH is trying to avoid divestiture and denying the economic reality that the value of its generation assets has eroded. TransCanada asserted that this approach was never contemplated by the Legislature and that the Commission should not allow PSNH to impose such a charge on all customers. *Id.* at 6, 9-11. TransCanada claimed that the Commission has power pursuant to RSA 369-B:3-a to order PSNH to divest its generation assets but that if the Commission were to decide that it did not have the authority to order divestiture, it could find continued ownership of generating assets to be imprudent and not allow PSNH to recover the costs of owning and operating the generating assets going forward. TransCanada said that divestiture should be addressed in a separate proceeding. *Id.* at 11-12.

TransCanada recommended that PSNH be required to obtain the power it needs to serve default service customers through a transparent and competitive RFP process. According to TransCanada, allowing PSNH to continue with the managed portfolio model that it currently uses will perpetuate a practice that has cost PSNH ratepayers hundreds of millions of dollars and put PSNH out of step with other load serving entities around New England. TransCanada claimed that under an RFP process, the risk is on the supplier and not the ratepayers. *Id.* at 7. TransCanada stated that, as a minimum, PSNH should issue an RFP for the power needed to supplement its generation units. *Id.* at 8. Further, TransCanada asserted that purchasing power through an RFP would be more economical than under the current managed portfolio model used by PSNH. *Id.* at 9.

TransCanada criticized a stay-out provision because customers who migrate to competitive supply are unlikely to return and said it preferred the imposition of a separate default service rate for customers who leave the default rate and want to preserve the option to come back. According to TransCanada, taking these customers out of the mix will allow for better planning for the power PSNH needs to serve the smaller customers who, for the time being, are not likely to have the opportunity to shop for power. *Id.* at 12.

Finally, TransCanada commented favorably on a POR program. TransCanada said that the Commission should explore the use of a POR program, customer referral and electronic interface as suggested by Constellation to spur the development of a market for small customers in New Hampshire. *Id.* at 13.

D. Conservation Law Foundation

CLF argued that the Commission lacks the statutory authority to impose the non-bypassable charge proposed by PSNH. CLF Closing Brief at 2 (citations omitted). Further, CLF claimed that the proposed non-bypassable charge would contravene a specific legislative directive, RSA 369-B:3, IV(b)(1)(A), mandating that PSNH's ES rate include the cost of providing default service. *Id.* at 3-4. According to CLF, the statute clearly mandates that PSNH must include the cost of the power produced from its generating assets in the Company's ES rate, and PSNH should not be permitted to remove such fixed costs and include them in a non-bypassable charge. CLF asserted that the Commission's more general authority under RSA 374-F does not provide a basis to contravene the specific directive of RSA 369-B:3, IV(b)(1)(A). *Id.* at 5-7 (citations omitted).

E. New England Power Generators Association

NEPGA filed the testimony of Sandi Hennequin, which included two recommendations. First, NEPGA said that the Commission should not create a non-bypassable mechanism for recovery of any ES costs for PSNH. Second, NEPGA recommended that the Commission suspend further consideration of two related dockets – Docket No. DE 10-195, *Public Service Company of New Hampshire, Petition for Approval of a Purchase Power Agreement with Laidlaw Berlin BioPower LLC* and Docket No. DE 09-067, *Clean Power Development, LLC Complaint against PSNH* – until the conclusion of the instant proceeding to allow for proper consideration of common competitive issues in one docket. Exh. 12, Testimony of Sandi Hennequin, at 4 and 7.⁴

In its closing brief, NEPGA argued that PSNH's proposed non-bypassable charge is not permitted under RSA 369-B:3, IV(b)(1)(A) or the restructuring policy principles in RSA 374-F. NEPGA Closing Statement and Legal Brief at 2. NEPGA said that RSA 369-B:3, IV(b)(1)(A) requires PSNH to recover its costs to provide power through the ES rate. According to NEPGA, PSNH cannot shift such costs to customers who only take transmission and distribution (T&D) service. *Id.* at 3. NEPGA argued that a non-bypassable charge as proposed by PSNH is also not allowed under the electric industry restructuring law, RSA 374-F. NEPGA pointed out that the purpose of RSA 374-F was to offer customer choice and lower retail electric service through the competitive markets. *Id.* at 3-4. NEPGA said that PSNH's proposed non-bypassable charge on T&D customers would send confusing price signals to electricity buyers and undermine public confidence in the electric utility industry. *Id.* at 4.

⁴ The Commission has already acted on these dockets. *See* Orders No. 25,213 (April 18, 2011) and No. 25,239 (June 23, 2011) regarding the Laidlaw Berlin BioPower purchase power agreement and secretarial letter dated May 19, 2011 in which the Commission closed the Clean Power Development docket upon the withdrawal of its complaint against PSNH.

NEPGA further argued that the proposed non-bypassable charge would “rebundle” generation and distribution services, effectively eliminating fair market competition for generation services. *Id.* at 5. NEPGA also claimed that a non-bypassable charge would violate the restructuring principles of universal service, RSA 374-F:3, V(c); benefits for all customers, RSA 374-F:3, VI; full and fair competition, RSA 374-F:3, VII; near term rate relief, RSA 374-F:3, XI; and administrative processes, RSA 374-F:3, XIV. *Id.* at 5-7.

NEPGA opined that requiring PSNH to use an RFP process to procure its power needs is consistent with the electric industry restructuring principles contained in RSA 374-F and that no legal impediments exist to requiring PSNH to use an RFP process to obtain its supplemental power requirements. *Id.* at 8-12. Similarly, NEPGA did not interpret RSA 369-B:3, IV(b)(1)(A) as barring PSNH from bidding all of its generation into the daily market and using an RFP for all of its default service requirements. *Id.* at 12-13.

According to NEPGA, divestiture by PSNH of its generating assets is the preferred statutory route to restructuring. NEPGA pointed out that RSA 369-B specified that divestiture was a goal of restructuring policy that “will facilitate the competitive market in generation services,” RSA 369-B:1, I. *Id.* at 13. NEPGA opined that RSA 369-B:3, IV(b)(1)(A) did not change the goal of divestiture but simply required PSNH to use power produced from its own generation to provide ES to its customers so long as it owned generation. NEPGA stated that 369-B:3, IV(b)(1)(A) established a standard for the Commission to use to determine whether and when the generation assets should be divested and reiterated that divestiture is still the preferred method for achieving restructuring. *Id.* at 13-14.

NEPGA recommended that the Commission require PSNH to divest its generation assets because the record demonstrated that the assets are not economic, *Id.* at 16-17, and asserted that

the Commission has plenary authority to require PSNH to divest its generation assets. *Id.* at 20. NEPGA further insisted that 369-B:3, IV(b)(1)(A) gave the Commission specific authority to allow for divestiture. According to NEPGA, the provision in 369-B:3, IV(b)(1)(A) which states “notwithstanding RSA 374:30” is critical because RSA 374:30 gives the utility discretion to decide whether divestiture is appropriate, whereas the remaining language in 369-B:3, IV(b)(1)(A) charges the Commission with making a particular finding at the point in time when divestiture becomes economically advantageous to retail customers. *Id.* at 19-22. NEPGA opined that the permissive nature of the language in 369-B:3, IV(b)(1)(A) was intended to refer to the relevant timing of divestiture. *Id.* at 23.

NEPGA said that the Commission had three options regarding divestiture: (1) find in this docket that divestiture is in the economic interest of retail customers and order divestiture; (2) in a new docket or an expanded docket now open, such as PSNH’s Least Cost Plan (Docket No. DE 10-261), make the requisite RSA 369-B:3-a finding and order PSNH to divest its generation assets; or (3) commence a three-step process with the first step being an investigation into the economic costs associated with divestiture versus power purchase on the market, followed by the RSA 369-B:3-a determination and, if divestiture is found to be in the economic interest of retail customers, put PSNH on notice that no rate increases would be approved until the completion of divestiture. Or, argued NEPGA, the Commission could simply deny any new rate increases until divestiture is completed. *Id.* at 25-27.

F. Office of Consumer Advocate

In testimony filed July 30, 2010, the OCA observed that PSNH calculated the increased costs to ES for 2010 resulting from migration to be \$28 million which, as a result of PSNH's ES structure, are shifted to customers taking ES from PSNH. According to the OCA, large customers who migrate currently have the opportunity to return to PSNH's ES on a monthly basis at a time of their choosing at the same rate paid by all other customers who remain on default service. The OCA opined that the ability of large customers to game the system by taking the lower rate, whether from the market or from PSNH when its rates are below market, is one of the weaknesses of PSNH's current default service structure. The OCA said this scheme and the concomitant changing migration makes it difficult for PSNH to plan power purchases, and thus disadvantages smaller customers who cannot choose to migrate. The OCA testified that cost shifting is contrary to New Hampshire's electric industry restructuring law, RSA 374-F:3, VI. Exh. 13, Prefiled Testimony of Kenneth E. Traum, at 5-6.

The OCA suggested four proposals on how PSNH's ES structure could be changed so as to be more equitable for small customers and consistent with the electric industry restructuring law. The OCA proposals were as follows: (1) PSNH should divest itself of its owned generation and contractual commitments for energy and bid its ES requirements into the market; (2) develop rates that allocate or assign all of the costs from PSNH's units and contractual commitments to two general classes of customers; (3) quantify the costs that PSNH incurs in order to manage its portfolio in a way that allows migrating customers to return on a month-to-month basis and recover them through a mechanism similar to the current Stranded Cost Recovery Charge; and (4) institute a stay-out provision to prohibit customers who choose to take service from a competitive supplier from returning to ES for a specified period of time. *Id.* at 8-9. The OCA

said it was not prepared to recommend any time-based rate design options, but was interested in exploring them as the docket proceeded. *Id.* at 10.

In its closing, the OCA emphasized that PSNH's duty to provide electric service at just and reasonable rates must be read with the requirement that it use its generation plants to provide default service and with the electric industry restructuring laws. According to the OCA, the cost-shifting that results from PSNH's management of its customers' default service needs is discriminatory and unfair, and PSNH should take steps to mitigate these effects. OCA Closing Brief at 3. The OCA said that PSNH is mistaken in its interpretation of RSA 369-B:3, IV(b)(1)(A) as requiring the Company to fully use its generating plants regardless of how much they cost ratepayers to provide default service. For example, the OCA said that PSNH does not fully utilize Newington Station because the cost of its power is so much more than the market. The OCA pointed out that, if PSNH is correct in its interpretation of 369-B:3, IV(b)(1)(A), it would be compelled to run Newington Station at maximum capacity. *Id.* at 4. According to the OCA, PSNH is more concerned with managing over- and under-recoveries than in considering whether it would be prudent to retire or divest some of its generation units. *Id.* at 6.

The OCA argued that RSA 369-B:3-a authorizes the Commission to require divestiture. The OCA said that the fact that the language states that PSNH "may" divest its generation does not mean that PSNH decides when to divest or retire its generating plants. According to the OCA, given the current status of energy markets, environmental regulations, the age of PSNH's generation fleet and its reliance on expensive fossil fuels, it is time to analyze whether retirement or divestiture of generation is in the economic interest of its default service customers. The OCA recommended that the Commission open a separate docket to examine the issues

related to divestiture and retirement and added that the Commission should also consider more immediate steps to end the unfair cost shifting that is currently occurring. *Id.* at 7-8.

The OCA asserted that the Commission cannot approve a new stranded cost to require all customers to pay PSNH for the over-market costs of their plants. According to the OCA, the non-bypassable charge proposed by PSNH does not qualify as a stranded cost under existing law and is contrary to the restructuring law provision, RSA 374-F:3, XII(b), which requires utilities to take reasonable measures to mitigate stranded costs. The OCA concluded that PSNH needs statutory authority to create a new stranded cost. *Id.* at 8-9.

The OCA opined that there are no legal barriers to implementing the following short-term steps to mitigate the unfair cost shifting caused by customer migration. First, PSNH could be required to bid the output of the plants into the market and use RFPs to meet the energy service needs of its customers. Second, customers who migrate to a competitive supplier and wish to return to default service could be subject to a stay-out provision to help PSNH better manage its needs for supplemental power purchases. Third, customers returning from competitive supply to default service could be subject to a separate default service charge. Lastly, the Commission could implement a POR program to promote competition for small customers. *Id.* at 9-10. The OCA also suggested that the Commission require PSNH to immediately propose steps to increase customer access to competitive suppliers including but not limited to those activities currently in place in Connecticut and Massachusetts where other PSNH affiliates do business, referencing Exhibit 6.

Finally, the OCA requested that the Commission take administrative notice of the following dockets: DE 09-180 (PSNH's 2010 Default Energy Service), DE 10-121 (PSNH's 2009 Energy Service and Stranded Cost Recovery Charge Reconciliation), and DE 10-257

(PSNH 2011 Default Energy Service) for additional information about the causes and impacts of the cost shifting that is taking place. *Id.* at 10-11.

G. Staff

In its closing brief, Staff emphasized that the effects of customer migration are real and that near-term as well as long-term solutions should be considered to help alleviate the rate pressure on the smaller set of PSNH ES customers that remains as larger customers migrate to competitive supply options. Staff suggested that such measures could include a stay-out provision, separate ES pricing for customers returning from competitive supply to PSNH ES, reallocation of PSNH's ES costs to the various classes of customers, or the issuance of RFPs for at least a portion of PSNH's supplemental power purchases. According to Staff, the institution of near-term measures does not obviate longer-term issues with respect to customer migration and that divestiture and the potential movement to an FRS model would require additional investigation. Staff recommended that, should the Commission decide to further examine those measures, it open a separate docket to fully explore the economic consequences of the potential divestiture of PSNH's generation assets as well as the full range of implications should PSNH adopt an FRS model. If the Commission opts to pursue the investigation of long-term solutions, Staff recommended that, in the interim, the Commission also implement near-term measures to mitigate what has been referred to as the cost shifting occurring as a result of customer migration. Staff Closing Brief at 2.

Staff opined that RSA 369-B:3, IV(b)(1)(A) is not a barrier to PSNH using an RFP process to purchase at least some of its energy service power requirements. Staff noted that PSNH typically sells surplus power into the market on a daily basis and may make spot purchases for supplemental power needs as required. According to Staff, RSA 369-B:3,

IV(b)(1)(A) allows PSNH to make supplemental power purchases “in a manner approved by the Commission” and does not bar the Commission from requiring PSNH to procure some portion of its supplemental power requirements through an RFP process. Staff recommended that the Commission consider requiring PSNH to use an RFP process to solicit its supplemental power requirements. *Id.* at 3. Staff said that it was less clear whether the Commission could require PSNH to adopt an FRS approach, but that an FRS approach could be considered in connection with divestiture if the Commission decided to further reexamine those issues.

Staff stated its opposition to the implementation of a non-bypassable charge, a position previously advanced by the testimony of Steven E. Mullen in Docket No. DE 09-180. In that proceeding, Staff pointed out that the non-bypassable charge proposed by PSNH was not a stranded cost within the meaning of RSA 374-F:2, IV. *Id.* at 4.

In addition, Staff disagreed with PSNH’s position that the Commission had statutory authority to impose a non-bypassable charge as proposed by PSNH. According to Staff, the limits of Commission authority to impose such a charge is consistent with the restructuring principles of RSA 374-F including: (1) customer choice and minimization of customer confusion, RSA 374-F:3, II; (2) market competition, RSA 374-F:1 and RSA 374-F:3, VII; (3) avoidance of cost-shifting among customers, RSA 374-F:3, IV; and (4) mitigation of stranded costs, RSA 374-F:3, XII. Staff opined that the imposition of a non-bypassable charge as proposed by PSNH would dampen the attractiveness of low rates offered by competitive suppliers and deter PSNH customers from electing competitive supply. *Id.* at 5. Staff said that the imposition of a non-bypassable charge would be unfair and could be considered anti-competitive in the power supply market. *Id.* at 6.

According to Staff, a stay-out provision, a proposal that could be implemented in the near term, is not prohibited by New Hampshire law. Staff said that, given that PSNH provides power from its own generation assets and supplemental power purchases, a stay-out provision could allow PSNH to recover incremental supply costs from those customers for which it had not planned to provide energy service during the stay-out period without further burdening the remaining customers. Staff suggested that any question of “undue or unreasonable preference or advantage” that is prohibited by RSA 378:10 could be avoided through a clear statement in PSNH’s tariff of the terms and conditions of the stay-out provision, putting customers on notice of the costs they would incur upon returning to PSNH’s energy service during the stay-out period. Finally, Staff stated that it was not aware of any legal barriers to PSNH providing separate default service pricing based on real-time market prices for the largest customers who have hourly interval metering and who choose a competitive supplier. *Id.* at 7.

III. COMMISSION ANALYSIS

We opened this docket to consider the effect of customer migration on ES rates for those customers, primarily residential and small commercial customers, who remain on PSNH’s default ES as other customers, primarily large commercial and industrial customers, migrate to competitive suppliers. There appears to be no dispute among the parties that many large commercial and industrial customers migrated to competitive supply when the market price for energy fell below the ES rate offered by PSNH. The result is that a shrinking pool of ES customers – comprising primarily residential and small commercial customers who do not have competitive supply options readily available to them – are paying for the fixed costs of ownership and operation of PSNH’s generation units. According to PSNH, the ES rates for these

remaining customers are 5-8% higher than they would otherwise be if all customers were paying for PSNH's fixed costs to provide default energy service.

The Parties and Staff responded to our request for both near term and long term mechanisms to address this problem, as well as comment on the non-bypassable charge proposed by PSNH and the statutory provisions that govern. We address the recommendations in turn.

A. Non-Bypassable Charge

We first address PSNH's proposal to create a non-bypassable charge to recover a portion of the fixed costs associated with its owned generation from all PSNH customers, including distribution customers who take electricity from a third party competitive supplier. PSNH asserts that customer migration shifts costs associated with PSNH's owned generation to the remaining ES customers. PSNH said that if the Commission agrees that there is cost-shifting contrary to RSA 374-F:3, VI, which states that costs "should not be shifted unfairly among customers," the Commission must adopt the non-bypassable charge or other mechanism to protect ES customers. Other parties disagreed with PSNH's assertion that customers who had elected competitive supply were not paying their "fair share" of energy service costs. The competitive energy suppliers – Constellation/RESA, TransCanada, and NEPGA – argued that PSNH's continued ownership of generation assets, and what they consider to be uneconomic fixed costs of those assets, are the cause of the increased costs to customers remaining on PSNH's default ES rate. The competitive energy suppliers argued that principles of fairness would be better served by denying the request for a non-bypassable charge.

There is no dispute that as a result of customer migration, PSNH's fixed costs associated with generation are recovered over a shrinking customer base, *i.e.*, those customers who have not migrated to competitive supply. We do not consider this, however, to be unfair "cost-shifting" in

the sense that rates have been designed to benefit one customer class to the detriment of another. Rather, this is a natural consequence of the transition to competitive markets. The dilemma is one of competing equities, which results from the long transition to fully competitive markets resulting from PSNH's retention of its fossil and hydro assets. This is compounded by the disparate state of competitive alternatives which are readily available to industrial and large commercial customers while few alternatives are available to residential and small commercial customers. The cure, however, is not to impose a non-bypassable charge on those customers who have migrated from PSNH's default ES supply to pay a portion of PSNH's fixed generation costs. Such a charge, in our view, *would* constitute unfair cost-shifting to customers that have taken advantage of competitive supply. Furthermore, imposition of such a non-bypassable charge would only serve to treat a symptom of the transition to competitive markets and would be contrary to the purposes of RSA 374-F, as discussed below.

In Docket No. DE 09-180, PSNH first proposed a non-bypassable charge in response to the effects of migration on the rates of customers remaining on PSNH's services. Though it initially characterized the proposed non-bypassable charge as a stranded cost, in the instant proceeding PSNH has said that the non-bypassable charge would not be used to recover a stranded cost within the meaning of the restructuring statute. Rather, in its view, the Commission has plenary authority to make rate changes, including the proposed non-bypassable charge, consistent with the goals of the restructuring statute, RSA 374-F.

We agree that the non-bypassable charge proposed by PSNH does not meet the definition of stranded cost delineated in RSA 374-F:2, IV.⁵ Shifting costs that are clearly and directly related to generation used to provide default service from the default ES rate to the distribution

⁵ RSA 374-F:2, IV defines stranded costs, limiting them to "costs of: (a) existing commitments or obligations incurred prior to the effective date of this chapter; (b) renegotiated commitments approved by the commission; and (c) new mandated commitments approved by the commission"

rate or a new charge imposed upon all customers would also be contrary to RSA 369-B:3, IV(b)(1)(A), which provides that “[t]he price of such default service shall be PSNH's actual, prudent, and reasonable costs of providing such power.” Further, the creation of a non-bypassable charge for these purposes is contrary to principles of the restructuring statute, the most important of which is to reduce costs for all consumers of electricity by harnessing the power of competitive markets, RSA 374-F:1. In addition, imposition of such a charge is contrary to the principles of customer choice and minimization of customer confusion, RSA 374-F:3, II, and full and fair competition, RSA 374-F:3, VII.

We are persuaded that the implementation of a non-bypassable charge as proposed would discourage customers from seeking power from competitive suppliers because the savings they might otherwise enjoy would be offset by the continued obligation to pay for a portion of generation-related costs through the proposed non-bypassable charge. Finally, the implementation of a non-bypassable charge for the purpose of allowing PSNH to recover costs associated with generation from all customers, including those who take competitive electric service, would, in effect, re-bundle certain generation costs with distribution costs, contrary to RSA 374-F:3, III, which states that “rates should be unbundled to provide customers clear price information on the cost components of generation services, transmission, distribution, and other ancillary charges.” For the foregoing reasons, we reject PSNH’s proposal to impose a non-bypassable charge on all its distribution customers for any portion of its generation-related fixed costs.

B. Stay-out Provision

Staff and the OCA support the use of a stay-out provision as a near term measure to address PSNH’s need to plan for customers who go to competitive suppliers when PSNH’s

prices are high yet want to be free to return to PSNH when the ES rate is lower than the market rate for electricity. Such movement to and from default service creates uncertainty for PSNH as it plans to procure its customers' default service energy needs, resulting in the risk of additional costs for PSNH's ES customers. One solution brought forward in the proceeding is a stay-out provision that would prohibit a customer who migrates to competitive supply from returning to ES, either in perpetuity or for a period of time. PSNH said that a "stay-out" provision may not be prohibited but, in its view, it did not cure the problem of cost shifting arising from migration.

Constellation/RESA argued that a "stay-out" provision would have an adverse effect on competition. TransCanada argued that a stay-out mechanism could be construed as an entry or exit fee, neither of which are preferred recovery mechanisms pursuant to RSA 374-F:3, XII(d). This section of the statute, which states that "[e]ntry and exit fees are not preferred recovery mechanisms," is under the restructuring policy principle entitled "Recovery of Stranded Costs, and in context clearly refers to entry and exit fees as not being preferred mechanisms for recovery of stranded costs. Because we are not dealing here with "stranded costs" as defined by statute, this restructuring principle is not directly relevant to our analysis.

We conclude that a stay-out provision is legally permissible, if crafted to comply with restructuring policy principles. For example, such a provision would need to recognize that PSNH maintains an obligation to provide universal service, and thus it would be contrary to RSA 374-F:3, V(c), the "Universal Service" restructuring policy principle, for us to adopt a policy that categorically prevented a customer from returning to default service if power from a competitive supplier were no longer available. Nevertheless, we do not believe it is sound public policy at this time to craft a stay-out provision that would prohibit customers who are currently taking competitive supply from returning to some form of default service. Resources are better spent

focusing on short and long term pricing options that reflect the costs of, and provide appropriate price signals to, customers who move from default service to competitive supply and back in order to discourage misuse of default service.

C. Rate Design: Alternative Default Service Pricing for Load Returning After Taking Competitive Supply

The Legislature authorized the Commission to implement measures “to discourage misuse, or long-term use, of default service” if such measures are determined to be in the public interest, RSA 374-F:3, V(c). Though there is conflicting evidence as to whether customers who have left default ES for competitive supply will return if ES prices are lower than the market, the potential is certainly there under the current pricing structure – to the detriment of residential and smaller commercial customers who have little choice but to remain on ES even as market prices fluctuate above and below ES rates. This ability of customers to move in and out of PSNH’s default ES creates uncertainty in volume, costs, and associated risks for PSNH in planning energy procurement for its default energy service load. For example, in a rising wholesale price environment where market rates are above PSNH’s ES rates, PSNH may have to procure additional energy supply at a price higher than its average cost to meet the additional load of returning customers who had previously migrated to competitive supply but who return to default service to take advantage of the lower price. PSNH’s purchase of additional supply would raise the average cost and rate to serve all default ES customers in the process. To help defray the costs of this risk, it is reasonable that PSNH be allowed to charge customers who return to its default service an alternative default service rate reflecting the marginal cost to serve that load. The proper design of a separate rate or rates will discourage the misuse or long-term use of default service and allow PSNH to recover the actual costs of providing that service consistent with RSA 369-B:3, IV(b)(1)(A).

To be consistent with the policy principles of RSA 374-F, such rates must be cost-based and non-discriminatory and should not have an adverse effect on competition. In designing such a rate or rates, PSNH will also have to consider which customers would pay the alternative rate or rates and for what period of time customers would have to remain on such alternative default service rates before the customer would be eligible for PSNH's regular default energy service, if ever. PSNH may consider having one or more such alternative default service rates, and may consider having a separate tariff and default service rate for its largest classes of customers generally. There are two circumstances that should be addressed: (1) when the default ES rate is less than market rates; and (2) when the default ES rate is greater than market rates. Both circumstances have been experienced over the past decade and should be provided for in the future.

For example, in the event that market rates rise above the default ES rate, for the largest customers that have interval meters and seek to return to default service from competitive supply, PSNH may want to charge that load a rate based on the actual hourly real time market rate, which would reflect the actual cost to serve such customers, with a minimum of reconciliation needed to true-up over- or under-collections. A day-ahead hourly pricing mechanism could be an option for predictable or assured load. These options might also be considered generally as part of default service rate design for the largest customers with interval metering. For smaller customers who do not yet have interval meters and who seek to return to default service when market prices are higher, PSNH may want to charge some increment over the regular default ES rate to reflect an estimated marginal cost to serve such customers, along with a true-up mechanism.

In order to fully evaluate PSNH's proposal to address the current circumstance, when the default ES rate is greater than the market rate, by offering a rate that exceeds its marginal cost of default service, but is less than the average cost, we direct PSNH to develop and file a specific tariff proposal. This proposal should be crafted so that it can be considered either separately from or in conjunction with a tariff that would address the circumstance when market energy costs are greater than the default ES rate.

The above examples are not intended to dictate the design of alternative pricing provisions; but rather to provide examples of rate structures that might be beneficial. Of course, the full ramifications of any proposal cannot be considered until adjudicated and we have not concluded that these or any rate design proposals would be approved. In order to begin the process of exploring alternative rate options, we direct PSNH to file such proposed tariffs, with supporting testimony, in conjunction with its 2012 default service filing, expected by late September 2011. It could prove useful if PSNH were to work collaboratively with the parties and Staff in the development of appropriate alternative default service pricing mechanisms.

D. PSNH Acquisition of Full Requirement Service Through an RFP Process

Several parties have recommended that we require PSNH to sell all of the power from its owned generation and its contractual commitments into the market and to solicit all power requirements through an RFP. As those parties noted, if PSNH were to retire or divest all of its generation assets, an FRS model would result in market-based rates for its customers and, in fact, the FRS model has worked well for National Grid and Unitil Energy Systems, Inc., distribution companies that do not own generation, when procuring default service energy supply at market-based rates for their respective default service customers. An FRS model for PSNH, however, is

inconsistent with RSA 369-B:3, IV(b)(1)(A), which requires PSNH to supply default service from its generation assets.

We do not find a barrier to requiring PSNH to make use of an RFP process when obtaining the *supplemental* power that cannot be met through its owned generation. While it is legally permissible, based on the record herein, we are not persuaded that requiring PSNH to do so for all supplemental needs would be the least cost method of acquiring such power. The use of an RFP to purchase supplemental power requirements would not mitigate PSNH's immediate need for supplemental power in the event of an unplanned outage of one of its generation units. In addition, as the rate of customers migrating off of PSNH's default ES increases, its "open" position requiring supplemental energy purchases shrinks and, depending on the amount of migration, could drop to zero or even go negative – meaning PSNH could end up with enough surplus generation that it might, on net, be selling such excess into the wholesale market.⁶ Monthly variations in the size of PSNH's default service open position and the fact that the open position may be relatively small or could go negative, raise the question as to whether requiring PSNH to use an RFP process for its supplemental energy purchases would be useful or beneficial, compared with managing its open position primarily through short term purchases, particularly the day-ahead and real-time wholesale markets, which have been clearing at relatively low marginal costs, and typically lower than hedged pricing products for variable and uncertain loads. Accordingly, we cannot conclude at this time that such a requirement is in the public interest.

E. Purchase of Receivables and Ancillary Proposals

⁶ In such a surplus situation PSNH would presumably only operate its own generation to produce power for the wholesale market if that market is clearing above PSNH's marginal operating costs, such that the wholesale market would be making a contribution to PSNH's fixed generation costs and mitigating the amount of such costs paid by PSNH's default ES customers.

Constellation/RESA provided testimony recommending that the Commission adopt a POR requirement and customer referral and electronic interface programs. The competitive suppliers and the OCA expressed agreement that POR with customer referral and electronic interface would help open the market for competitive energy suppliers in New Hampshire, particularly among the small commercial and residential customers. PSNH argued against the proposal, asserting that it would require PSNH to accept a large share of the risk associated with serving customers who have migrated. PSNH, however, did not present legal impediments against the institution of a POR program.

As we understand it, a POR program requires a utility to purchase the receivables of competitive suppliers at a discounted rate, to cover bad debt risk and administrative expenses associated with the receivables, as approved by the Commission. This mechanism puts the power of collection with the entity that can “pull the meter” on a customer who is in arrears. One of the asserted benefits of a POR program is that it attracts competitive suppliers to a service territory and promotes competitive supply opportunities for small commercial and residential customers. Customer referral and electronic access to certain customer information by competitive suppliers can also contribute to customer choice.

There does not appear to be a legal barrier to the adoption of these tools, but we would need to explore how a POR and the ancillary proposals of customer referral and electronic interface programs could be implemented in New Hampshire to promote competitive supply options for small commercial and residential customers in PSNH’s and other utility service areas without unduly burdening PSNH or other distribution companies or their default service customers. We also believe it is worth exploring whether these concepts could be adopted in the natural gas industry as well. Therefore, we find that these measures are a suitable subject for a

separate generic docket to allow their full evaluation and possible implementation in New Hampshire.

F. Divestiture or Retirement of PSNH Generation Assets

RSA 369-B:3-a, reads in relevant part as follows:

The sale of PSNH fossil and hydro generation assets shall not take place before April 30, 2006. Notwithstanding RSA 374:30, subsequent to April 30, 2006, PSNH may divest 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.

The competitive suppliers argue that this provision grants the Commission authority to require PSNH to divest or retire its generation assets and that the Commission should move to do so. PSNH argues that RSA 369-B:3-a allows PSNH to file with the Commission to request to divest generation assets but does not confer upon the Commission the power to require PSNH to divest its generation assets.

This Commission is a creation of the New Hampshire Legislature and, as such, is endowed with only the powers and authority which are expressly granted or fairly implied by statute. *Appeal of Public Service Co. of New Hampshire*, 122 N.H. 1062, 1066 (1982) (*citing* *Petition of Boston & Maine R.R.*, 82 N.H. 116, 116 (1925)); *see also* *Re Public Service Company of New Hampshire*, 88 NH PUC 239 (2003); *Re Public Service Company of New Hampshire*, 87 NH PUC 295 (2002).

The phrase “PSNH *may* divest its generation assets” in RSA 369-B:3-a suggests that the Commission may not have authority to *require* divestiture, but only the authority to *approve* divestiture if proposed by PSNH. PSNH claims that the language of the statute itself, without recourse to legislative history, makes clear that the Company retains the discretion to offer generation assets for divestiture or retirement for the Commission’s consideration but cannot be forced to do so. Other parties, relying in part on legislative history, argue that the Commission

has been granted authority to order PSNH to divest or retire its generation assets. We do not seek to resolve the statutory debate today. We do note, however, that On July 19, 2011, Representative James Garrity, Chairman of the House Science, Technology and Environment Committee, filed a letter expressing his opposition to PSNH's proposed non-bypassable charge and seeking input on statutory shortcomings that could be addressed by the Legislature. Legislative clarification of the Commission's authority and PSNH's rights relative to divestiture of PSNH's fossil and hydro assets pursuant to RSA 369-B:3-a could obviate protracted litigation arising from adjudication of these issues.

Independent of RSA 369-B:3-a, the Commission has authority to require PSNH to evaluate the economics of its generation units and to take appropriate action. In PSNH's 2010 energy service docket (Docket No. DE 09-180), the Commission required PSNH to conduct a continued unit operation study for Newington Station to submit with its 2010 least cost integrated resource plan. Order No. 25,061 (December 31, 2010). PSNH filed the study in Docket No. DE 10-261 and we will consider the question of the continued operation of Newington Station in that docket. Further, in any relevant proceeding and at any time, if we determine that it is imprudent for PSNH under the circumstances to continue operation of any of its generation units, we can deny recovery of the associated costs through rates pursuant to RSA 369-B:3, IV(b)(1)(A).

G. Miscellaneous

The OCA requested that we take administrative notice of Docket Nos. DE 09-180 (PSNH's 2010 Default Energy Service), DE 10-121 (PSNH's 2009 Energy Service and Stranded Cost Recovery Charge Reconciliation) and DE 10-257 (PSNH's 2011 Default Energy Service) for more information on what it believes is cost-shifting occurring as a result of migration. We

will take administrative notice of all three dockets as each was referenced by several parties and contributed to the opening of the instant docket.

Finally, we note our disagreement with NEPGA's suggestion that Docket Nos. DE 10-195 and DE 09-067 should have been suspended, pending the outcome of this proceeding. This suggestion is moot because the Commission has already acted on these dockets. See footnote 4 at page 18 above. The Commission acted in those proceedings because the issues were sufficiently separate from the issues in this proceeding that suspension was not warranted.

H. Conclusion

It has been over ten years since PSNH was restructured pursuant to RSA 374-F and more than eight years since the Legislature determined that PSNH should not sell its fossil and hydro generation assets unless it is in the economic interest of PSNH's retail customers. By interrupting the transition to competitive markets for the generation of electricity in 2003, PSNH customers benefitted to the extent that the embedded cost of energy from PSNH's assets at the time was below the market cost of energy. Over time, however, that cost advantage has been eliminated by a combination of forces. Furthermore, as the price advantage has dissipated more and more customers, primarily large commercial and industrial customers, have migrated from PSNH's default service to lower cost competitive supply. As a result of that migration, PSNH's energy costs are being recovered from a shrinking customer base, primarily residential and small commercial customers, who incur a greater share of fixed costs as fewer of them are available to pay PSNH's actual, prudent, and reasonable costs of providing such power.

To alleviate the cost impact on its remaining energy service customers, PSNH proposes that a non-bypassable charge be levied against all distribution customers, regardless of the source of energy supply, to recover some of PSNH's fixed generation costs. Other parties proposed that

customers who migrate face a stay-out provision or that a separate energy service rate be designed for customers who return to PSNH from competitive supply. Still others argue that PSNH should procure energy service in a different way or implement programs that make it more likely that competitive suppliers provide options for residential and small commercial customers. Finally, some parties press for the sale of PSNH's fossil and hydro assets.

The customer migration effect that PSNH seeks to remedy through a non-bypassable charge is symptomatic of the transition instigated by restructuring and is exacerbated by the protracted duration of the transition. Furthermore, customers who have few competitive choices available to them are currently being disproportionately affected by the delay. Treating the symptom as PSNH recommends, however, would have a negative impact on customers who were in a position to exercise customer choice, which was a fundamental tenet of restructuring. A non-bypassable charge is unwise in these circumstances because it does not address the underlying cause of the condition affecting PSNH's remaining energy service customers and it reflects instead an implicit view that PSNH's ownership of generation assets is an end-state and not a transition, as was originally intended.

Stay out provisions, default service rate design changes, RFPs for procurement of energy service and purchase of receivables programs similarly do not address the underlying cause motivating this proceeding, but each has been addressed on its own merits relative to restructuring principles and potential palliative benefits to customers. The one proposal that does address the underlying cause is divestiture of PSNH's hydro and fossil assets. However, this approach is attended by significant legal uncertainty in light of the language the Legislature used to interrupt the sale of PSNH's fossil and hydro assets, and could conceivably entail a lengthy

adjudicated proceeding leading to a result that the Commission could not enforce. It is precisely this prospect that makes a legislative resolution of the issue preferable to a litigated one.

Based upon the foregoing, it is hereby

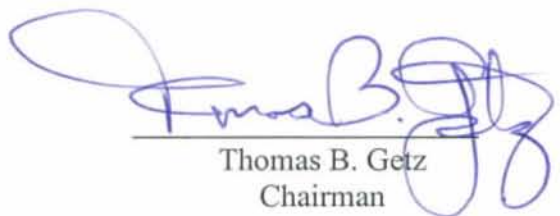
ORDERED, that PSNH's proposal for a non-bypassable charge to recover a portion of the fixed costs associated with its owned generation from all PSNH customers is **DENIED**; and it is


FURTHER ORDERED, that a stay-out provision that would deny customers who currently take competitive supply from returning to some form of default service for a given period of time is **REJECTED**; and it is


FURTHER ORDERED, that PSNH shall file, as part of its 2012 default energy service filing, alternative proposed rates and tariffs for customers who return to PSNH default energy service from competitive supply, along with supporting testimony; and it is

FURTHER ORDERED, that proposals for purchases of receivables, customer referral, and electronic interface programs to support customer choice in energy supply should be further investigated through a generic docket for potential applicability for all residential electric utility customers and for smaller commercial electric and gas utility customers who currently have few, if any, competitive options for energy supply.


By order of the Public Utilities Commission of New Hampshire this twenty-sixth day of
July, 2011.


Thomas B. Getz
Chairman


Chifton C. Below
Commissioner


Amy L. Ignatius
Commissioner

Attested by:


Debra A. Howland
Executive Director



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FILING INSTRUCTIONS:

- a) Pursuant to N.H. Admin Rule Puc 203.02 (a), with the exception of Discovery, file 7 copies, as well as an electronic copy, of all documents including cover letter with:
- DEBRA A HOWLAND
EXEC DIRECTOR & SECRETARY
NHPUC
21 S. FRUIT ST, SUITE 10
CONCORD NH 03301-2429
- b) Serve an electronic copy with each person identified on the Commission's service list and with the Office of Consumer Advocate.
- c) Serve a written copy on each person on the service list not able to receive electronic mail.

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