

STATE OF NEW HAMPSHIRE
BEFORE THE
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

DE 11-184

Joint Petition for Approval of
Power Purchase Agreements and Settlement Agreements

CLOSING STATEMENT OF FEL AND HAEC

I. The above-market costs of the Wood PPA's should not be recovered through a non-bypassable delivery charge.

The Commission should not approve the method of cost recovery insisted upon by PSNH for the above-market costs of the PPA's. The substance of it is that the above-market costs of the PPA's would in effect be recovered through a non-bypassable delivery rate rather than through the bypassable default energy service rate.¹ Such a method would seriously call into question the continued vitality of the Commission's recent decision in the Customer Migration proceeding, Docket No. 10-160:

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. ... 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.**

Order No. 25, 256 (July 26, 2011) at 28.

PSNH has stated that imposition of a non-bypassable charge is necessary to alleviate upward pressure on the default energy service rate. However, the looming increase to the default energy service rate for the Merrimack Scrubber which PSNH is currently seeking in Docket No. 11-250 is approximately 10 times the size of the Wood PPA increase. Accordingly, as a practical matter, there is really no need to bend the rules to accommodate PSNH in this proceeding since the cost of the Wood PPA's is going to get lost in the rounding of the increase for the Scrubber.

¹ During cross-examination, PSNH conceded that its proposed recovery method would adversely impact smaller customers.

Nonetheless, if the Commission does approve a *de facto* recovery of above-market costs of the PPA's through a non-bypassable charge, its approval should clearly state that the recovery method is temporary and not permanent, not precedential, and only for the limited purposes and duration described by Witness Frantz.

II. The applicable law in this proceeding is governed by Federal preemption of state law; the NHPUC's only residual authority is to disallow recovery of any imprudently incurred costs.

The Joint Petitioners seeks approval of the Wood PPA's "pursuant to RSA 374:57 and the Public Utility Regulatory Policies Act, 16 U.S.C.A. Section 824a-3." Joint Petition at 1. The Joint Petitioners also assert that "[t]he pricing of these power purchases has been negotiated pursuant to 18 CFR 292.301 (b). Joint Petition at ¶ 7.

A. Applicable Federal Law

The relevance of Federal law is clear:

The Commission's authority under the FPA includes the exclusive jurisdiction to regulate the rates, terms and conditions of sales for resale of electric energy in interstate commerce by public utilities. While Congress has authorized a role for states under PURPA, Congress has not authorized other roles for states to set rates for wholesale sales by public utilities, or indicated that the Commission's actions or inactions can give states this authority... However, a state commission may, pursuant to PURPA, determine avoided cost rates for QF's.

Order on Petitions for Declaratory Order, 132 FERC ¶ 61,047 (July 15, 2010) at 25, 26 (citations omitted.)

According to PSNH,

[e]ach one of these facilities previously held rate orders issued by this Commission pursuant to the Public Utility Regulatory Policies Act (PURPA). Although those rate orders have now expired, each of the facilities still qualifies as a "Qualifying Facility" or "QF" under PURPA and must be continue to be so-qualified throughout the duration of each PPA. Pursuant to PURPA, certain QFs (i.e., those with net generating capacity less than or equal to 20 MW) continue to have the entitlement under federal statute (16 U.S.C.A. Section 824a-3) and FERC regulations (18 CFR Part 292) to require PSNH to purchase electric energy from their facilities.

Lebreccque Pre-filed Testimony at 3.

Section 292.303(a) of the FERC's regulations implementing Section 210 of PURPA requires an electric utility to purchase energy and capacity made available by a QF directly or indirectly interconnected with the electric utility (the Mandatory Purchase Requirement). Section 292.304(d) of the Commission's regulations allows QFs to: (1) provide energy on an as available basis; or (2) provide energy or capacity pursuant to a legally enforceable obligation, i.e., a long-term contract or an order issued by the applicable state regulatory authority imposing a purchase

obligation over a specified term. The rates for as available purchases are based on the purchasing utility's avoided costs calculated at the time of delivery.²

Accordingly, under Section 292.303(a) of the FERC's regulations, PSNH is obligated, inter alia, to purchase from OF's under a long-term contract or rate order issued by the NHPUC.

However, PSNH did correctly testify, notwithstanding its obligation to purchase from OF's under a long-term contract or rate, that it may negotiate a purchase rate which differ from the foregoing obligations set out in Section 292.303(a) of the FERCs regulations:

Under PURPA, the rates paid by an electric utility for the energy from a QF shall, "(i) Be just and reasonable to the electric consumer of the electric utility and in the public interest;" (18 CFR § 292.304 (a)(i)). Moreover, the FERC regulations implementing PURPA expressly allow "any electric utility or any qualifying facility to agree to a rate for any purchase, or terms or conditions relating to any purchase, which differ[s] from the rate or terms or conditions which would otherwise be required by this subpart;..." (18 CFR § 292.301 (b)).

Lebreque Pre-filed Testimony at 4.

² Both PSNH witnesses in this proceeding presented pre-filed testimony pertaining to PSNH's obligations to purchase from QF's under PURPA. In particular, Mr. Hall explained that "PSNH further clarified its obligations under PURPA more recently in Docket No. DE 09-067, Complaint of Clean Power Development." PSNH counsel resisted any further elaboration on PSNH's obligations to purchase, asserting that the matter had been covered in DE 09-067.

In this regard, according to the NHPUC's Order of Notice in Docket No. DE 09-067, PSNH stated its position that there is no requirement in New Hampshire for PSNH to enter into a long-term power purchase agreement:

... PSNH pointed out that there is no requirement in New Hampshire for any market participant, including a utility, to enter into a long-term power purchase agreement with any merchant generator. PSNH said that if a generator is a "qualifying facility" within the meaning of the Public Utility Regulatory Policies Act of 1978 (PURPA) (16 U.S.C. §2601-2645) and the federal rules implementing PURPA (18 CFR 292), PSNH would be required to purchase the output at the short-term avoided cost rate approved by the Commission in PSNH's restructuring docket. See Docket No. 99-099, *PSNH Proposed Restructuring Settlement*, 85 NH PUC 567, Order No. 23,549 (September 8, 2000).

Order of Notice, NHPUC Docket No. DE 09-067 (October 9, 2009) (Emphasis added).

Subsequently, PSNH filed a petition with the Federal Energy Regulatory Commission on January 10, 2010 in Docket No. QM10-4-000 seeking authorization to terminate the mandatory power purchase obligation pursuant to a legally enforceable obligation, specifically, a long-term contract or an order issued by the applicable state regulatory authority imposing a purchase obligation over a specified term.

On February 24, 2010, the NHPUC issued an Order Commencing Adjudicative Proceeding which required, inter alia, "that legal memoranda regarding the nature and extent of PSNH's duty to negotiate with and contract for power from CPD...". Order No. 25,075 at 2. The NHPUC Order further stated that "[w]e are particularly interested in the parties' interpretation of Section 210 of the Public Utilities Regulatory Policies Act of 1978, 16 U.S.C.A. Section 824a-3..." Id.

Accordingly what appears to have transpired in this proceeding is that the Wood QF's chose to negotiate a rate with PSNH rather than pursue their rights to sell under a long-term contract or rate order. FERC must determine that the negotiated rate is "just and reasonable to the electric consumer of the electric utility and in the public interest" pursuant to CFR § 292.304 (a)(i).

B. Applicable State Law

Under state law,

[e]ach electric utility which enters into an agreement with a term of more than one year for the purchase of generating capacity, transmission capacity or energy shall furnish a copy of the agreement to the commission no later than the time at which the agreement is filed with the Federal Energy Regulatory Commission pursuant to the Federal Power Act or, if no such filing is required, at the time such agreement is executed. The commission may disallow, in whole or part, any amounts paid by such utility under any such agreement if it finds that the utility's decision to enter into the transaction was unreasonable and not in the public interest.

RSA 374:57

Accordingly, under state law, the only role for the NHPUC in this proceeding is to determine whether the negotiated rates are reasonable and in the public interest, and therefore prudently incurred. If not, the NHPUC's only recourse is to disallow cost recovery. See also, Appeal of Sinclair Machine Products, Inc. et al., 126 N.H 822 (July 26, 1985).

III. Conclusion

The Wood QF's chose to negotiate a rate with PSNH rather than pursue their rights to sell under a long-term contract or rate order. Pursuant to CFR § 292.304 (a)(i), FERC must find that the resulting negotiated rates are just and reasonable to the electric consumer of the electric utility and in the public interest. Given the obligation of PSNH to enter into a long-term contract, it would appear that the resulting negotiated rates for periods of approximately 2 ½ years are just and reasonable.

Pursuant to state law, for the reasons testified to by Commissioner Bald, the negotiated rates under the PPA's are reasonable and in the public interest, and recovery thereof by PSNH should not be disallowed pursuant to RSA 374:57.

If the NHPUC does approve a *de facto* recovery of above-market costs of the PPA's through a non-bypassable charge, its approval should clearly state that the recovery method is temporary and not permanent, not precedential, and only for the limited purposes and duration described by Witness Frantz.

Respectfully submitted,

FREEDOM LOGISTICS, LLC

HALIFAX-AMERICAN ENERGY COMPANY, LLC

By their Attorney,

/s/ James T. Rodier

Dated: December 5, 2011

Certification of Service

Pursuant to Rules Puc 203.02(2) and Puc 203.11, I have served copy of this petition on each person identified on the commission's service list for this docket.

/s/ James T. Rodier