

STATE OF NEW HAMPSHIRE

PUBLIC UTILITIES COMMISSION

October 17, 2011 - 2:29 p.m.  
Concord, New Hampshire

NHPUC NOV09'11 AM 8:13

RE: DE 11-216  
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE:  
Petition for Alternative Default Energy  
Service Rate. (Prehearing conference)

PRESENT: F. Anne Ross, Esq.  
(Presiding as Hearings Examiner)

APPEARANCES: Reptg. Public Service Co. of New Hampshire:  
Gerald M. Eaton, Esq.  
Sarah B. Knowlton, Esq.

Reptg. Freedom Energy Logistics and  
Halifax American Energy Company:  
James T. Rodier, Esq.

Reptg. Conservation Law Foundation:  
Jonathan Peress, Esq.

Reptg. Residential Ratepayers:  
Meredith Hatfield, Esq., Consumer Advocate  
Stephen Eckberg  
Office of Consumer Advocate

Reptg. PUC Staff:  
Suzanne G. Amidon, Esq.  
Thomas Frantz, Director/Electric Division  
Steven Mullen, Asst. Dir./Electric Division

Court Reporter: Steven E. Patnaude, LCR No. 52

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\* \* \*

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JAMOND

**P R O C E E D I N G**

1  
2 MS. ROSS: Good afternoon. I'd like to  
3 open the prehearing conference in Docket DE 11-216. On  
4 September 23rd, 2011, Public Service Company of New  
5 Hampshire filed a petition for approval of an Alternative  
6 Default Energy Service rate, ADE. In support of its  
7 petition, PSNH filed the testimony of Stephen R. Hall,  
8 with attachments, consisting of illustrative tariff pages.  
9 In its petition, PSNH recommended that the rate be  
10 effective on January 1st, 2012.

11 According to the petition, Rate ADE will  
12 be based on PSNH's actual costs, consistent with RSA  
13 369-B:3, IV(1)(A). The rate will be based on forward  
14 market prices (PSNH's marginal cost) for power necessary  
15 to serve additional customers returning to PSNH's default  
16 energy supply plus an adder based on the non-operating  
17 costs of newly installed -- of the newly installed wet  
18 flue gas fluidized desulfurization system.

19 PSNH stated that the Rate ADE will be  
20 applicable to customers who take delivery service from  
21 PSNH under Primary General Service Rate GV, Large General  
22 Service Rate LG, or Backup Service Rate B, the rate  
23 classes for PSNH's largest customers, who return to PSNH  
24 energy service after taking service from one or more

1 competitive suppliers for at least 12 consecutive months.

2 PSNH designed the rate such that, once a  
3 customer terminates service from a competitive supplier  
4 following at least 12 consecutive months of taking  
5 competitive supply, that customer must take energy service  
6 from PSNH during any of the next 24 months under Rate ADE.  
7 Because the default energy service, Rate DE, will not be  
8 available to customers during the twenty-four month  
9 period, PSNH also proposes to change the availability  
10 section of Rate DE to clarify that it is not available to  
11 customers who are required to take service under Rate ADE.

12 PSNH explains that it is -- explained  
13 that it is not proposing a price for Rate ADE at this  
14 time, as the scrubber was not yet providing service to  
15 customers. PSNH stated that it intends to update its  
16 proposal just prior to the hearing to be held in the  
17 docket when it has more information regarding the  
18 in-service date and costs of the scrubber. At that time,  
19 PSNH said that it will be able to determine a proposed  
20 rate level and effective date for Rate ADE.

21 With that, I would like to first take  
22 appearances, and also to hear your position on  
23 intervention requests. And, at this time, I have one on  
24 behalf of Freedom Logistics and Halifax American Energy.

1 And, do I have -- CLF's intervening in this as well?

2 MR. PERESS: I'm Jonathan Peress, on  
3 behalf of Conservation Law Foundation. At this point, we  
4 have not filed an intervention.

5 MS. ROSS: Okay, then. Thank you. It's  
6 not in the file, so I'm glad to know you haven't filed it  
7 then.

8 All right. So, with that, if we could  
9 take appearances, and, again, if you could indicate your  
10 position on the request for intervention.

11 MR. EATON: For Public Service Company  
12 of New Hampshire, my name is Gerald M. Eaton. And, with  
13 me today is Sarah B. Knowlton, who is Senior Counsel for  
14 Public Service Company of New Hampshire. And, she will  
15 give our position on the intervention of Freedom Logistics  
16 and Halifax American New Energy.

17 MS. ROSS: Thank you.

18 MS. KNOWLTON: Good afternoon, Madam  
19 Hearing Officer. The Company has submitted an objection  
20 to the pending Petition to Intervene. And, what I want to  
21 emphasize in my argument is that whether a person or an  
22 entity is permitted to participate in a matter here at the  
23 Commission is not a light matter. We have a statute in  
24 New Hampshire that creates the legal standard for

1 participation, and that standard must be met. RSA  
2 541-A:32 provides that persons or entities should only be  
3 granted intervention status if their "petition states  
4 facts demonstrating that the petitioner's rights, duties,  
5 privileges, immunities, or other substantial interests may  
6 be affected by the proceeding." What the Supreme Court  
7 has told us is that "a petitioner has to demonstrate an  
8 injury in fact." It's not enough just to submit a  
9 pleading that recites back the words of that standard.  
10 The Commission has to actually look at the pleading and  
11 determine whether the standard has been met by facts that  
12 have been stated. And, I would assert that, if the  
13 Commission applies that rigor to the Petition to Intervene  
14 that's been submitted by FEL and HAEC, that it does not  
15 meet that standard.

16 All that's alleged in the petition is  
17 that FEL is a licensed aggregator and that HAEC is a  
18 registered competitive electric power supplier, and the  
19 conclusory statement that "the [Company's] proposal in  
20 this [docket] will have an adverse impact on competitive  
21 electricity markets." The Supreme Court has told us  
22 repeatedly that "a status as a competitor is not -- does  
23 not rise to the level of intervention status under RSA  
24 541-A:32, II." So, on that basis alone, I believe that

1 this intervention petition should be rejected by the  
2 Commission.

3 In addition, this intervention petition  
4 also refers back to the Commission's migration docket, in  
5 which the two parties participated, DE 10-160. But the  
6 petitioners cannot use that as an -- as a basis to  
7 bootstrap participation into this docket. If they were  
8 unhappy with the order that came out in that docket, they  
9 could have appealed it, which they chose not to do. But  
10 that in and of itself does not create standing for  
11 purposes of this docket. Thank you.

12 MS. ROSS: Thank you. Who would be our  
13 next party?

14 MR. RODIER: It's Jim Rodier, for FEL  
15 and HAEC.

16 MS. ROSS: Do you wish to add anything  
17 in support of your request for intervention?

18 MR. RODIER: Well, I'd like to reply to  
19 their objection, which, you know, I received very late in  
20 the day Friday. So, there's no question that it's very  
21 prejudicial to my ability to intervene here.

22 Having said that, let me say a few  
23 things. That I feel that the objection is frivolous and  
24 vexatious. And, let me tell you why. And, I'll take the

1 second point first. That somehow, because I did not  
2 motion for rehearing in 10-160, that that's a final and  
3 unappealable order with respect to this Rate ADE. Let me  
4 read you a passage from Page 33 of the Commission's  
5 decision: "Of course, the full ramifications of any  
6 proposal cannot be considered until adjudicated and we  
7 have not concluded that these or any rate design proposals  
8 would be approved." I read that to say "It's still on the  
9 table. We're going to consider whether or not this is a  
10 good idea."

11 Now, evidently, counsel for PSNH,  
12 reading the same language, feels that this proceeding is  
13 basically a done deal. PSNH is going to put in -- make a  
14 proposal, and the bean counters will say what the rate is  
15 going to be, okay, because this has already been decided.  
16 And, we will, as a preordained matter, have a Rate ADE. I  
17 don't think that's the case. And, if it's not the case --  
18 I mean, if it is the case, then I stand to be corrected.

19 But the order speaks for itself. It's  
20 extremely clear. I don't know how that the Company could  
21 contend that that order, on the aspect of Rate ADE, the  
22 order of 10-160, is like estoppel or *res judicata* on what  
23 is supposed to happen in this proceeding.

24 The second point: The "injury in fact".

1 The Company, PSNH, is grossly in error as a matter of law.  
2 *Stonyfield* did not change the standard for intervention.  
3 I think it's well recognized, all *Stonyfield* did is that  
4 was a standard, injury in fact, that would apply to an  
5 appeal or perhaps even a motion for rehearing. It  
6 certainly did not change at all the standard for  
7 intervention.

8 The Company has had opportunities, since  
9 the *Stonyfield* case was decided in 2009, to say that's  
10 their interpretation of the law, and they haven't. Maybe  
11 every three or four years I go through this. Sometimes  
12 it's "you're going to delay the proceeding." This is a  
13 new one on me, after maybe 30 interventions, to hear this  
14 kind of stuff.

15 With respect to -- there's a -- I mean,  
16 to say the Commission should not be allowing the  
17 competitors to intervene in their proceedings is  
18 absolutely astonishing. What would that -- let me just  
19 suggest as a rhetorical point. What do you think a  
20 competitive telecommunications company would think about  
21 that? Or, how about just the electric competitors? I've  
22 been here in the past when the Commission has said "we're  
23 disappointed that we don't have more intervention from the  
24 competitive providers." And, in particular, I took that

1 to heart, so I have tried to intervene, and I've tried to  
2 intervene in all of these proceedings. And, I try to,  
3 primarily through cross-examination, I try to make a  
4 contribution. I certainly try to act in a constructive  
5 manner.

6 With respect to competition, the Company  
7 relies on this *Valley Bank* case. And, let me just read  
8 you what the Site Evaluation Committee has said about  
9 this, because the counsel's prior employer has raised this  
10 very objection before the Site Evaluation Committee. "The  
11 Applicant's" -- the Applicant here, I'm reading from a  
12 decision of the Site Evaluation Committee, the Applicant  
13 here would be Laidlaw: "The Applicant's suggestion that a  
14 purely commercial interest does not create a substantial  
15 interest justifying intervention -- intervention is  
16 without merit. The Applicant relies upon the *Valley Bank*  
17 case. However, the *Valley Bank* case was not a case that  
18 determined the standard for intervention." It goes on to  
19 say -- and, it goes on to just say "it's a standing with  
20 respect to an appeal for an administrative hearing."

21 And, I think one of the canons of  
22 professional conduct is you're supposed to call the  
23 attention of a tribunal to adverse authority; that was not  
24 done in this case.

1 MS. ROSS: And, could you tell me what  
2 SEC order you were reading from, Mr. Rodier?

3 MR. RODIER: I don't --

4 MS. ROSS: Or a date?

5 MR. RODIER: All I could do, in the time  
6 available, is to just cut and paste this excerpt down on a  
7 piece of paper. I can certainly provide that. It was in  
8 the Laidlaw proceeding. Commissioner Ignatius was on the  
9 panel. And, it was a motion, a pending -- it was an order  
10 on pending motions.

11 MS. ROSS: Thank you.

12 MR. RODIER: Now, if that is not enough,  
13 PSNH somehow overlooks the fact that the Commission can  
14 allow anybody to intervene at any time they want if the  
15 Commission finds it in the public interest. That's clear.  
16 That is settled.

17 So, let me just say that, as somebody  
18 who has been involved quite a bit over the years, and has  
19 not impeded the proceedings, has tried to make  
20 contributions, I think it would be in the public interest,  
21 I hope we don't have to get that far, but that is the law.

22 With respect to Rate ADE, on at least  
23 two occasions I have cross-examined -- I have  
24 cross-examined Mr. Hall and Mr. Baumann, maybe three

1 times, on this whole issue of marginal cost versus average  
2 cost, with respect to the issue of migration. And, there  
3 is a lot there. This whole issue is very deceptive, is  
4 very tricky, okay, as I would hopefully point out. And,  
5 what I intend to do, if my intervention is granted, is to  
6 ask the Commission to take administrative notice of my  
7 cross-examination in those prior proceedings.

8 Now, a couple of other points here. You  
9 know, one is that this whole proceeding, the Rate ADE  
10 proposal, if you read it like I have, it's premised upon  
11 the fact that the smaller -- the larger customers have the  
12 ability to migrate, the smaller customers are stuck. They  
13 can't get out from underneath the current rates, you know,  
14 and what's about to happen here. That's not the case.  
15 That is a fallacious prophesy. If Mrs. Malmquist, on  
16 Dubuque Street, in Manchester, can buy her electricity at  
17 seven and a half cents per kilowatt-hour, do you think  
18 she's going to stay with PSNH at 9.6, when the  
19 telemarketers are calling? I don't think so. Everybody  
20 is going to migrate. This rate, if they're going to do  
21 this, everybody should have the benefit of it.

22 This proposal of PSNH is, really, you  
23 know, things are changing so fast that the whole  
24 circumstances behind this idea, if it made a sense a

1 couple years ago, just doesn't make any sense anymore.

2 Now, I do want to, just in conclusion,  
3 say maybe, and, first of all, with respect to the public  
4 interest, I do want to say that FEL and HAEC are the only  
5 New Hampshire-based competitors, the only ones. Always  
6 have taken a strong interest in what goes on at the PUC,  
7 even when it's against their own interests. You know, we  
8 did say that what's going on with the scrubber, we were  
9 involved at the PUC, we went up to the Supreme Court. We  
10 didn't think that this was a good idea, that it was going  
11 to backfire. And, for that, we were -- had vitriol heaped  
12 on us. Well, look what has happened. So, we don't just  
13 look out for narrow, selfish interests. We try to look  
14 out for what's best overall.

15 With respect to "used and useful", we  
16 have a declaration here that "this project is used and  
17 useful." That's a legal standard. Okay? "Used" means  
18 "is it being used?" "Useful" means "is it useful? Is it  
19 worthwhile?" Is it doing something of value?" It's hard  
20 to say that this thing is useful. Cleaning the air?  
21 Maybe. Well, look what it's doing to rates.

22 So, when I read the Commission's order  
23 of notice, I said, "well, look, the way that's stated, it  
24 sounds to me like they just -- all they were interested

1 in, the Commission is interested in is having the bean  
2 counters get together, and audit PSNH's books, and see if  
3 the costs were prudently incurred in meeting the  
4 requirements of the law. I don't think that's what this  
5 prudence in this case is about. It's really about "is it  
6 useful or should it have been retired?"

7 As a matter of fact, the law says, it  
8 mandates the scrubber, if it's going to continue to  
9 operate. It even says that the owner of the project, it  
10 could have been sold, it could have been retired. So, a  
11 couple comments on "used and useful" and "prudency".

12 And, so, obviously, this objection has  
13 got my bile risen up, and I am very sorry if I have been a  
14 little too aggressive in my comments, but that happens to  
15 be the way I feel. So, thank you very much.

16 MS. ROSS: Thank you. OCA.

17 MS. HATFIELD: Thank you. Meredith  
18 Hatfield, for the Office of Consumer Advocate, on behalf  
19 of residential ratepayers. And, with me for the Office is  
20 Stephen Eckberg. And, could I just inquire, Madam  
21 Hearings Officer, I am to give just the position on the  
22 Motion to Intervene, not the overall position?

23 MS. ROSS: That's correct.

24 MS. HATFIELD: Thank you.

1 MS. ROSS: Sorry.

2 MS. HATFIELD: We support the Motion to  
3 Intervene. In the migration docket, the OCA put forth one  
4 idea that the Commission actually rejected, which the  
5 competitive suppliers I think did not support, which was a  
6 sort of a stay-out provision to try to address some of the  
7 impacts of migration. And, it seems to me that, since the  
8 Commission did reject that, and did call for PSNH to make  
9 some sort of a filing to address migration, the question  
10 of whether or not this approach meets the legal standards  
11 and meets the requirements of the migration order is a  
12 question that the Commission would want to have vetted by  
13 competitive suppliers. So, to the extent that they are  
14 excluded from this proceeding, it seems to me that it  
15 certainly leaves out a set of important stakeholders whom  
16 the Commission would want to hear from.

17 I would like an opportunity to actually  
18 respond in writing to this objection, because I agree with  
19 some of Attorney Rodier's comments about the way that some  
20 of the case law and the history has been characterized.  
21 So, I would love to have a chance to do that. And, if  
22 there's a date by which the Commission would like to  
23 receive it, I'd be happy to meet such a deadline.

24 MS. ROSS: I will recommend an

1 opportunity to respond to objections in writing in this  
2 docket, as well as in the prior combined one, --

3 MS. HATFIELD: Thank you.

4 MS. ROSS: -- with regard to  
5 intervention.

6 MS. HATFIELD: Thank you.

7 MS. ROSS: Staff.

8 MS. AMIDON: Thank you.

9 MS. ROSS: I'm sorry. Mr. Peress has  
10 not intervened. So, you --

11 MR. PERESS: I want to make -- just for  
12 the record, I would just like to note that Conservation  
13 Law Foundation is here at this prehearing conference and  
14 is inclined to intervene, and will participate in the  
15 technical conference, obviously, subject to the extent to  
16 which that intervention, late intervention will be granted  
17 by the Commission.

18 MS. ROSS: So, you're indicating you  
19 will be filing -- CLF will be filing a late intervention?

20 MR. PERESS: Subject to approval from my  
21 internal approval process, yes.

22 MS. ROSS: Okay.

23 MR. PERESS: Thank you.

24 MS. ROSS: I'm sorry. Staff.

1 MS. AMIDON: Thank you, Madam Hearings  
2 Examiner. Suzanne Amidon, for Commission Staff. To my  
3 far left is Tom Frantz, Director of the Electric Division,  
4 and to my immediate left is Steve Mullen, the Assistant  
5 Director of the Electric Division.

6 Insofar as the Motions to Intervene, we  
7 take no position on Mr. Rodier's Motion to Intervene.  
8 And, as Mr. Peress has indicated that he may file  
9 intervention, I would say we would have no objection to a  
10 late-filed intervention. Thank you.

11 MS. ROSS: Thank you.

12 MS. KNOWLTON: Madam Hearing Officer, to  
13 the extent that a schedule is set to consider a late  
14 intervention, the Company would want the opportunity to  
15 object to that, depending on what the basis for the  
16 intervention is, and also to respond to any written  
17 comments that are filed with regard to the objection to  
18 the pending Petition to Intervene.

19 MS. ROSS: A reply to the reply?

20 MS. KNOWLTON: Well, I take seriously  
21 the concerns that have been raised about the legal  
22 citations that are contained in the objection, and also  
23 Mr. Rodier's allegation somehow that he was unduly  
24 prejudiced by the date of this filing, because it was not

1 filed late. His comments suggest that. But it was not --  
2 there actually is no date in the order of notice for  
3 filing an objection. But, if you look to the other orders  
4 of notice that were filed in the other two dockets that  
5 were issued at the same time, the date was today. And,  
6 so, I don't understand the basis for that concern. And, I  
7 would want the opportunity to respond, because some of  
8 those allegations that are raised I think are quite  
9 serious.

10 MR. RODIER: Madam Hearing Examiner, may  
11 I comment?

12 MS. ROSS: Let me make a suggestion.  
13 I'm going to recommend to the Commission that they allow  
14 written response -- written objections -- I'm sorry, let  
15 me try this again -- written responses to the written  
16 objections. And, what I would suggest is, rather than  
17 deciding right now to have further responses to what's  
18 been presented orally, if the Commission does allow for  
19 written responses, then I think, at that point, parties  
20 could decide, once they see the written response, whether  
21 they feel it's necessary to respond further.

22 MR. RODIER: But all I wanted to say is  
23 acknowledge that counsel for PSNH just said actually is  
24 correct. The fault is not theirs, it's with scheduling a

1 prehearing conference immediately after the date for  
2 interventions are filed. I mean, what I meant is these  
3 issues are being raised, okay? They raised them, okay?  
4 They're entitled to raise the issues. But I've intervened  
5 a number of times, it's never come up, particularly since  
6 the *Stonyfield* was filed, then all of a sudden, I don't  
7 know when I saw it over the weekend, I said "Holy cow,  
8 what am I going to do now?" I didn't really have time,  
9 because I had commitments this morning, to come here and  
10 reply.

11 So, what they said is correct. Maybe  
12 the Commission should be mindful in the future of, you  
13 know, it does put somebody in a bind, without the proper  
14 amount of time to respond. Thank you.

15 MS. ROSS: Thank you. Okay. With that,  
16 I would like to now hear the parties' initial positions on  
17 issues raised in this docket.

18 MR. EATON: Thank you, Madam Commission  
19 -- Madam Hearing Examiner. My name is Gerald M. Eaton.  
20 We filed this petition for a Alternative Default Energy  
21 Service rate, in response to the Commission's final order  
22 in the migration proceeding. We believe we followed the  
23 Commission's direction in filing that rate as an  
24 alternative. We believe that the components satisfy the

1 requirement that -- two requirements. One, that it  
2 reflects PSNH's costs of providing energy service to a  
3 customer that returns to energy service. And, it also  
4 collects some of the costs of the scrubber, which are  
5 supposed to be collected through energy service. So that  
6 these customers that do return are helping to pay for the  
7 non-operating costs of the scrubber that has been  
8 constructed at Merrimack Station.

9 We look forward to suggestions that  
10 other parties may have with regard to this rate. And,  
11 with that, we will adjourn to the technical conference and  
12 set up a procedural schedule for the proceeding.

13 MS. ROSS: Thank you. Mr. Rodier.

14 MR. RODIER: I think I've had my say on  
15 what the position is.

16 MS. ROSS: Thank you. And, Ms.  
17 Hatfield.

18 MS. HATFIELD: Thank you. The OCA  
19 doesn't have a final position at this time, since we are  
20 at the beginning of the docket. And, we thank PSNH for  
21 coming forward with their Alternative Default Energy  
22 Service rate proposal. But it does raise a lot of  
23 questions and concerns for the OCA. Namely, it really  
24 points out one of the challenges that smaller customers

1 are facing now. And, if they were to see that their rate  
2 was to be in the range of 9.57 cents, and that large  
3 customers, who had recently enjoyed a lower rate, were  
4 able to return to a different rate that is nearly two  
5 cents lower, that certainly, I think, would raise concerns  
6 and is something that we are deeply concerned about.

7 So, we will be investigating that in  
8 this docket. And, we will cooperate with the parties and  
9 Staff in developing a schedule. Thank you.

10 MS. ROSS: Thank you. And, Staff.

11 MS. AMIDON: At this point, with respect  
12 to this docket, Staff is taking no position. We will  
13 conduct discovery and review and make an appropriate  
14 recommendation to the Commission, especially with respect  
15 to whether we use a different procedural schedule for this  
16 proceeding, as opposed to the proceedings in Docket 11-215  
17 and 11-217. Thank you.

18 MS. ROSS: Thank you. Are there any  
19 other matters, procedural or substantive, that need to be  
20 addressed in this prehearing conference?

21 (No verbal response)

22 MS. ROSS: Okay. I'm going to close the  
23 prehearing conference and ask the parties if they can stay  
24 and attend a technical session on the three dockets that

1 we've just held prehearing conferences in. And, then, if  
2 possible, recommend a procedural schedule in each of the  
3 dockets. And, I will try to get my recommendations in  
4 writing quickly so that the Commissioners can determine  
5 what they want in the way of filings on the pending  
6 Motions to Intervene and what their decision is going to  
7 be. Thank you.

8 **(Whereupon the prehearing conference**  
9 **ended at 2:58 p.m., and a technical**  
10 **session was held thereafter.)**