

DM 03-176

INVESTIGATION OF UTILITY BILLING PRACTICES

Order Following Pre-Hearing Conference

O R D E R N O. 24,222

October 24, 2003

APPEARANCES: Devine, Millimet & Branch, P.A. by Frederick J. Coolbroth, Esq. for Bretton Woods Telephone Company, Dixville Telephone Company, Dunbarton Telephone Company, Granite State Telephone Company, Hollis Telephone Company, Kearsarge Telephone Company, Merrimack County Telephone Company, New Hampshire Telephone Association, Northland Telephone Company and Wilton Telephone Company; Kenneth C. Picton, Esq. for Connecticut Valley Electric Company; Laura S. Olton, Esq. and Gallagher, Callahan & Gartrell, P.A. by Seth L. Shortlidge, Esq. for Granite State Electric Company; Patricia French, Esq. for Northern Utilities, Inc.; Gerald M. Eaton, Esq. for Public Service Company of New Hampshire; LeBoeuf, Lamb, Greene & MacRae, L.L.P. by Maebh Purcell, Esq. for the Unutil Companies; Victor D. Del Vecchio, Esq. for Verizon New Hampshire; Patricia Crowe, Esq. for KeySpan Energy Delivery; Office of Consumer Advocate by F. Anne Ross, Esq. on behalf of residential ratepayers; and Donald M. Kreis, Esq. of the Staff of the New Hampshire Public Utilities Commission.

I. PROCEDURAL HISTORY

The New Hampshire Public Utilities Commission (Commission) opened this docket pursuant to RSA 365:5, 365:19, 374:4 and 378:7 to investigate the extent to which New Hampshire utilities have entered into contractual relationships with outside vendors for the purpose of authorizing those vendors to process payments by utility customers and transmit those payments to the utility while charging utility customers a fee

for this service. The proceeding began with the entry of an Order of Notice on September 15, 2003.

Invoking the Commission's ratemaking authority as conferred by RSA 378, the Order of Notice characterized such third-party charges as "rates" and advised all New Hampshire utilities that the Commission would investigate whether such rates are just and reasonable. The Commission stated that it would also decide whether such arrangements require the prior approval of the Commission and whether any action should be taken with respect to utilities that entered into such arrangements without prior Commission approval. The Order of Notice (1) instructed each utility that had entered into such arrangements to advise the Commission in writing by September 30, 2003, and (2) scheduled a Pre-Hearing Conference for October 7, 2003.

Various utilities made filings in response to the Commission's request for information about the third-party arrangements. The Office of Consumer Advocate (OCA) entered an appearance on behalf of residential ratepayers on September 17, 2003. KeySpan Energy Delivery and the New Hampshire Telephone Association filed timely motions to intervene, to which there were no objections. Granite State Electric Company (GSEC), Northern Utilities (Northern) and Verizon New Hampshire (Verizon) submitted motions for confidential treatment with

respect to contract documents setting forth the terms of their arrangements with third-party billing services.

The Pre-Hearing Conference took place as scheduled. Without objection, the Commission granted the pending intervention requests and noted that all utilities that had appeared would be treated as parties. Each party gave a preliminary statement of its position. Thereafter, the parties and Commission Staff participated in a technical session to discuss the procedural schedule for the docket and other issues. Staff submitted a written report of the technical session on October 8, 2003.

II. POSITIONS OF THE PARTIES AND STAFF

A. Bretton Woods Telephone Company, Dixville Telephone Company, Dunbarton Telephone Company, Granite State Telephone Company, Hollis Telephone Company, Kearsarge Telephone Company, Merrimack County Telephone Company, New Hampshire Telephone Association, Northland Telephone Company and Wilton Telephone Company

These parties, appearing jointly, indicated that none of their arrangements with third-party payment processors involved the assessment of any charges to utility customers.

B. Connecticut Valley Electric Company

Connecticut Valley Electric Company (CVEC) indicated that it has entered into a contractual arrangement with Speedpay, Inc. that allows customers to make payments via phone or online, using a credit card, debit card or a bank account

number. According to CVEC, it is CVEC's understanding that Speedpay only accepts transactions of \$500 or less and charges a "convenience fee" of \$4.95 per transaction. CVEC's position is that the service provided by Speedpay is not a service rendered by a utility pursuant to RSA 374:2 and thus not subject to regulation by the Commission.

C. Granite State Electric Company

GSEC indicated that it currently has an agreement with Integrated Payment Systems, Inc. (IPS) to receive checks, money orders or cash on behalf of GSEC at certain IPS-authorized locations in the utility's service territory. According to GSEC, IPS presently imposes no charge to GSEC's customers for providing this service. However, GSEC indicated that it is presently negotiating a new agreement with IPS that would involve charging customers \$1.00 per payment. GSEC took the position that such a charge need not be incorporated into the GSEC tariff but noted that if the Commission determines otherwise it would file an appropriate tariff revision.

D. Northern Utilities, Inc.

Northern indicated that it has entered into third-party arrangements with IPS, for processing payments received at supermarkets, and EDS, with respect to payments made on line and via telephone. In both instances, customers incur fees but Northern receives no revenue, the utility avers. According to

Northern, these arrangements received an informal approval from Staff in 2002. Northern contends that review of such fees, when charged by third parties, is beyond the Commission's jurisdiction.

E. Public Service Company of New Hampshire

Public Service Company of New Hampshire (PSNH) indicated that it has two arrangements with third-party payment processors. One arrangement is with American Payment Systems relating to electronic payments and involves no fee charged to customers, although PSNH reported that a \$1.00 fee is being considered. The second arrangement is with BMC U.S., Inc. and involves customers paying a fee of \$4.50 to use BMC's BillMatrix system to pay a PSNH bill by credit card. PSNH proposed that the Commission treat the case in a "legislative" as opposed to an adjudicatory matter.

F. The Unitil Companies

Unitil indicated that it has contracts with three payment agents but that none currently charge any fees to Unitil customers. Unitil further reported that from January 2002 to January 2003 one of the providers, IPS, charged customers a fee of \$1.00 per transaction but no longer does so. According to Unitil, it sought and received informal Commission Staff approval for such a fee.

G. Verizon New Hampshire

Verizon indicated that it has contracts with two third-party payment processors: CashPoint Network Services, Inc. and PhoneCharge, Inc. According to Verizon, CashPoint provides customers with a walk-in payment option and charges no fees to customers. Verizon further reports that PhoneCharge permits customers to pay Verizon bills by telephone and charges customers \$1.50 per transaction.

Relying on RSA 374:2, *Appeal of Zimmerman*, 141 N.H. 605 (1997), *Appeal of Omni Communications, Inc.*, 122 860 (1982), and *In re Jack O'Lantern, Inc.*, 118 N.H. 445 (1978), Verizon argued that the Commission is without jurisdiction to review fees charged by third-party vendors to utility customers.

H. Office of Consumer Advocate

OCA indicated that it agreed with those utilities arguing that the Commission is without jurisdiction to regulate third-party payment processors. However, OCA took the position that the Commission is free to require utilities to accept payment by credit card or via other alternatives to the traditional check mailed to the utility. OCA pointed out that such reforms would have an effect on the companies' cost of collecting debts, and also took the position that customers require adequate notice of whatever payment-related fees they may incur in connection with paying any utility bill.

I. Staff

Staff disagreed with the position that the Commission lacked jurisdiction to review payment-related fees assessed to utility customers via third-party payment processors.

III. SCOPE OF DOCKET AND PROCEDURAL SCHEDULE

As noted, *supra*, a technical session took place immediately following the Pre-Hearing Conference. According to Staff's report, participating in the technical session were representatives of Bretton Woods Telephone Company, Dixville Telephone Company, Dunbarton Telephone Company, GSEC, Granite State Telephone, Hollis Telephone Company, Kearsarge Telephone Company, KeySpan Energy Delivery, Merrimack Telephone Company, the New Hampshire Telephone Association, Northern Utilities, Northland Telephone Company, OCA, PSNH, Union Telephone Company, Verizon, Unitil, Wilton Telephone Company and Staff (collectively, the "participants").

Staff's October 8, 2003 written report indicates that the participants recommend that the Commission shift the focus of the docket significantly. They recommended that the Commission eschew consideration of whether transaction fees assessed against utility customers by third-party payment processors are within the Commission's jurisdiction. Instead, the participants recommend that the Commission use this docket to determine whether some or all utilities should be required to

offer alternative payment options and, if so, how the applicable costs should be allocated.

We concur with and adopt this recommendation, subject to the understanding that we reserve the right in a future docket to consider whether such third-party fees are properly included in utility tariffs that require Commission approval. We agree that this question should be deferred at this time. Obviously, if we were to require a utility to directly offer payment-related services it now makes available via a third-party, we would have authority to require a different cost allocation scheme than the one employed by the third party. See RSA 378:7 (providing that the Commission "shall determine the just and reasonable rates, fares and charges" imposed by utilities).

In furtherance of their proposal, the participants recommended that we order an initial round of data requests and responses, followed by a technical session at which the parties could discuss what further action to recommend to the Commission. We find this suggestion to be reasonable and, accordingly, we adopt the following procedural schedule:

Staff Data Requests	October 29, 2003
Responses to Staff Data Requests	November 12, 2003
Technical Session	November 19, 2003

We note that the participants expressed optimism that at the technical session an agreement could emerge with respect to the substantive issues in the docket. We share this optimism.

In its report of the technical session, Staff noted that none of the water companies appeared at the Pre-Hearing Conference and asked the Commission to determine what effect such non-appearance should have. In our Order of Notice, we did not instruct all utilities to appear at the Pre-Hearing Conference but limited that obligation only to those utilities that have entered into third-party payment arrangements involving customer fees. Accordingly, we will treat non-appearance by any duly noticed utility as a representation that it has not entered into any such arrangement. However, we note that because the scope of this docket is general in nature, we will provide notice of this proceeding to all utilities regulated by this Commission and will afford them an opportunity to participate.

IV. CONFIDENTIALITY MOTIONS

Finally, we take up the three pending motions for confidential treatment of contract documents involving third-party payment processors. The New Hampshire Right-to-Know Law provides each citizen with the right to inspect all public records in the possession of the Commission. See RSA 91-A:4, I.

RSA 378:43, however, provides an exception to this right that applies only to telephone utilities. Specifically, a document submitted by a telephone utility is not a public record within the meaning of the Right-to-Know law if the telephone utility represents to the Commission that

the information or records are not general public knowledge or published elsewhere; that measures have been taken by the telephone utility to prevent dissemination of the information or records in the ordinary course of business; and that the information or records:

(a) Pertain to the provision of competitive services; or

(b) Set forth trade secrets that required significant effort and cost to produce, or other confidential, research, development, financial, or commercial information, including customer, geographic, market, vendor, or product-specific data, such as pricing, usage, costing, forecasting, revenue, earnings, or technology information not reflected in tariffs of general application.

The Verizon motion contains such a representation, averring that the contracts it provided pertain to the provision of competitive services, set forth trade secrets or other confidential information and are not general knowledge of published elsewhere. In these circumstances, the Commission may only deny Verizon's motion after notice and opportunity for hearing. See RSA 378:43, III.

With respect to the other pending confidentiality motion, the Right-to-Know law contains an exception, invoked here, for "confidential, commercial or financial information." RSA 91-A:5, IV. In *Union Leader Corp. v. New Hampshire Housing Finance Authority*, 142 N.H. 540 (1997), the New Hampshire Supreme Court provided a framework for analyzing requests to employ this exception to shield from public disclosure documents that would otherwise be deemed public records. There must be a determination of whether the information is confidential, commercial or financial information "and whether disclosure would constitute an invasion of privacy." *Id.* at 552 (emphasis in original, citations omitted). "An expansive construction of these terms must be avoided," lest the exemption "swallow the rule." *Id.* at 552-53 (citations omitted). "Furthermore, the asserted private confidential, commercial, or financial interest must be balanced against the public's interest in disclosure, . . . since these categorical exemptions mean not that the information is *per se* exempt, but rather that it is sufficiently private that it must be balanced against the public's interest in disclosure." *Id.* at 553 (citations omitted).

Our applicable rule is designed to facilitate the employment of this balancing test. We require a motion for confidentiality to contain (1) the specific documents or portions thereof for which confidential treatment is sought, (2)

reference to statutory or common law authority favoring confidentiality, (3) "[f]acts describing the benefits of non-disclosure to the public, including evidence of harm that would result from disclosure to be weighed against the benefits of disclosure to the public," and certain evidence. Puc 204.06(b). The evidence must go to the issue of whether the information "would likely create a competitive disadvantage for the petitioner." *Id.* at (c).

We find that all three movants have made the requisite showing, notwithstanding the fact that other utilities submitted similar contracts without requesting confidential treatment. The dispositive factor is the reality that utilities may find it necessary to negotiate similar arrangements in the future. Such negotiations would be hampered from the utilities' perspective if there were public disclosure of the terms they were previously willing to accept. Moreover, attenuating the public's interest in disclosure is the fact that we are shifting our inquiry from the third-party arrangements to the question of whether utilities should offer alternative options directly. In these circumstances, the interest of Northern and GSEC in confidentiality clearly outweighs the public's interest in disclosure. Similarly, we discern no reason to conduct further proceedings with respect to Verizon's representations under RSA

378:43 that the documents it submitted under seal should receive confidential treatment.

Based upon the foregoing, it is hereby

ORDERED, that the procedural schedule outlined above, and related recommendations concerning the scope of this proceeding, are APPROVED; and it is

FURTHER ORDERED, that pursuant to N.H. Admin. Rules Puc 203.01, the Commission's Executive Director and Secretary shall notify all persons desiring to be heard at this hearing by publishing a copy of this Order of Notice no later than October 30, 2003, in a newspaper with statewide circulation, publication to be documented by affidavit filed with the Commission on or before November 5, 2003; and it is

FURTHER ORDERED, that pursuant to N.H. Admin. Rules Puc 203.02, any party seeking to intervene in the proceeding shall submit to the Commission an original and eight copies of a Petition to Intervene with copies sent to the Office of the Consumer Advocate on or before November 7, 2003, such Petition stating the facts demonstrating how its rights, duties, privileges, immunities or other substantial interests may be affected by the proceeding, as required by N.H. Admin. Rule Puc 203.02 and RSA 541-A:32, I(b); and it is

FURTHER ORDERED, that the motions for confidential treatment submitted Granite State Electric Company, Northern Utilities and Verizon New Hampshire are GRANTED; and it is

FURTHER ORDERED, that the determination as to confidential treatment of documents is subject to the ongoing authority of the Commission, on its own motion or on the motion of Staff or any member of the public, to reconsider such determination in light of RSA 91-A, should circumstances so warrant.

By order of the Public Utilities Commission of New Hampshire this twenty-fourth day of October, 2003.

Thomas B. Getz
Chairman

Susan S. Geiger
Commissioner

Graham J. Morrison
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary