

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 11-014

NORTHEAST UTILITIES, INC.

Northeast Utilities, Inc.-NSTAR Merger Review

Order Addressing Commission Jurisdiction

ORDER NO. 25,211

April 5, 2011

I. PROCEDURAL HISTORY

On October 18, 2010, Northeast Utilities, Inc. (NU), the parent company of Public Service Company of New Hampshire (PSNH), announced a proposed merger with NSTAR, a Massachusetts-domiciled gas and electric utility company. NSTAR has no plant, operations, customers or public-utility subsidiaries in New Hampshire. NU and NSTAR entered into an Agreement and Plan of Merger (Merger Agreement) on October 16, 2010 (amended on November 1, 2010 and December 16, 2010), which provides for the acquisition of NSTAR by NU, subject to obtaining the necessary approvals of shareholders and those regulatory authorities having jurisdiction over the planned merger. This order addresses the Commission's jurisdiction over the proposed transaction.

The Merger Agreement contemplates the purchase of NSTAR by NU through a share-exchange transaction, in which each holder of NSTAR common shares will be entitled to a pro rata distribution of newly-issued NU shares on the basis of an exchange ratio between NSTAR and NU shares, specifically, 1.312 NU common shares per each NSTAR common share

exchanged. After the share exchange, it is expected that the former shareholders of NSTAR will control approximately 1.312 million shares of NU, which would represent 43.7% of NU's shares. Immediately following the share-exchange transaction, through a series of interim corporate merger transactions, NSTAR's current subsidiary companies, including NSTAR Electric Company and NSTAR Gas Company, would be held under NSTAR LLC, a holding company wholly-owned by NU. NSTAR Electric Company and NSTAR Gas Company, which are utilities under the jurisdiction of the Commonwealth of Massachusetts, would continue to be regulated by that state. The Merger Agreement specifies that following the merger, the NU Board of Trustees would be composed of seven designees of the pre-merger NU, and seven designees of the pre-merger NSTAR. The Merger Agreement also specifies that the current chief executive of NSTAR, Mr. Thomas J. May, would become the chief executive of NU 18 months after consummation of the proposed merger.

In recognition of the potential impact that the proposed merger of NU and NSTAR could have on the citizens and ratepayers of this State, in which PSNH is the largest electric utility, the Commission, by secretarial letter, opened this docket on January 18, 2011 ". . . to gather information regarding any impacts that the proposed merger might have on PSNH and its customers, and to hear arguments concerning the Commission's jurisdiction under New Hampshire law to exercise prior approval authority over the merger." To that end, a public informational session was scheduled for February 7, 2011, at which NU and NSTAR representatives were instructed to ". . . present detailed information regarding the proposed merger's expected impact on PSNH and its affiliates, with special attention paid to any expected effects on PSNH's rates, terms, services, or operations and any changes in the provision of

services currently provided by NU's service-company affiliates to PSNH." On February 1, 2011, NU and PSNH jointly filed a letter providing information regarding the expected impacts of the merger, together with NU-PSNH's arguments regarding the Commission's jurisdictional authority for review and approval of the proposed merger under New Hampshire law.

At the informational session NU and NSTAR representatives provided the Commission, Staff, and attendees with a presentation outlining the proposed merger. At that time the Commission directed NU and NSTAR to submit to Staff copies of all filings provided by NU and NSTAR to other regulatory authorities, together with any updates or amendments related to the merger proposal, on an ongoing basis. The Commission also invited interested persons to submit written comments regarding the NU-NSTAR transaction.

On March 1, 2011, NU and PSNH provided a response to the comments submitted by the Office of the Consumer Advocate (OCA) and the New England Power Generators Association, Inc. (NEPGA), both submitted on February 25, 2011. The NU-PSNH response included an affidavit from David R. McHale, Executive Vice President and Chief Financial Officer of NU and PSNH (McHale Affidavit), reiterating Mr. McHale's oral representations regarding the NU-NSTAR proposed merger provided at the February 7 informational session. The Commission also received written comments from the International Brotherhood of Electrical Workers, Local #1837 on March 2, 2011. All written comments, as well as the transcript of the Commission's informational session, are available at: www.puc.nh.gov/Regulatory/Docketbk/2011/11-014.html.

II. REPRESENTATIONS OF NU-PSNH

In their letter of February 1, 2011, orally at the February 7 informational session, and in their March 1, 2011 written response to OCA's and NEPGA's comments, NU and PSNH presented arguments seeking to establish that: (1) the Commission has no approval jurisdiction over the NU-NSTAR merger proposal; and (2) in any case the proposed merger of NU and NSTAR would have no adverse impact on PSNH or its customers, and would result in no immediate changes in NU's management of PSNH.

NU and PSNH represented that, under their interpretation of New Hampshire law and Commission precedent, the Commission would not have approval jurisdiction over the proposed merger between NU and NSTAR. NU and PSNH argue that the Commission's approval jurisdiction arises only in situations where a public utility or holding company would acquire a controlling interest in a public utility or holding company incorporated in or doing business in New Hampshire. NU-PSNH 2/1/11 Letter at 3. Conversely, NU and NSTAR argue that the Commission's jurisdiction is not triggered if the proposed transaction involves a utility with no New Hampshire corporate or operational presence being acquired by the parent holding company of a New Hampshire public utility.

To bolster their interpretation of the NU-NSTAR proposed merger's jurisdictional implications for the Commission, NU and PSNH provided detailed analysis seeking to establish that NU would act as a *bona fide* acquirer of the NSTAR holding company structure, located entirely outside of New Hampshire. Specifically, NU and PSNH represented that: NU's corporate existence would remain intact after the merger with NSTAR; NU shares would continue to be traded, both before and after completion of the merger; and PSNH's position as a

wholly-owned independent subsidiary of NU would remain unchanged after the proposed merger. NU-PSNH 2/1/11 Letter at 1-6. In summary, NU and PSNH argue that no approval jurisdiction rests with the Commission given the facts at hand, with NU acquiring a utility holding company, NSTAR, that has no New Hampshire corporate or operational presence. NU-PSNH 2/1/11 Letter at 3-4.

In seeking to demonstrate that the proposed merger would have no adverse impact on PSNH or its customers, NU and PSNH described NU's and PSNH's operations following the merger. NU and PSNH represented that the proposed NU-NSTAR merger would not: change PSNH's corporate structure; result in a merger or consolidation for PSNH; cause a change in control of PSNH or NU; nor affect PSNH's outstanding debt, its dividend policy, or capital structure. *See* McHale Affidavit at 1.

In relation to the proposed merger's impact on PSNH customers, NU and PSNH stated that PSNH's rates will be unaffected by the proposed merger, and will remain at current levels unless and until a change in rates is authorized by the Commission. *See* NU-PSNH Letter dated February 1, 2011, at 6. To the extent that the proposed merger would result in efficiencies, cost savings, or potential new business practices for PSNH, these issues would be addressed by the Commission in future rate cases and related proceedings. NU-PSNH 2/1/11 Letter at 6. NU and PSNH also stated that the Commission would retain its full jurisdiction with respect to PSNH's provision of electric service, the condition of its plant and equipment, and its manner of operations, and that PSNH would also continue to be subject to all compliance obligations under applicable New Hampshire statutes, rules, and Commission Orders. NU-PSNH 2/1/11 Letter at

6. NU and PSNH also noted that no acquisition premium would be paid for NU's merger with NSTAR that could result in increased rates for PSNH customers. NU-PSNH 2/1/11 Letter at 6.

III. PUBLIC COMMENTS

During the pendency of this docket, a number of oral and written comments were submitted regarding potential impacts of the NU-NSTAR proposed merger on PSNH customers, and the Commission's jurisdictional powers.

A. Office of the Consumer Advocate

OCA provided the Commission with oral and written comments regarding the potential impacts of the proposed NU-NSTAR merger on PSNH and PSNH customers, and the OCA's opinion regarding the scope of the Commission's approval jurisdiction over the transaction. At the February 7, 2011 informational session, OCA expressed concern that, without a formal Commission approval process, the Company's representations that PSNH rates and operations would not be adversely impacted by the merger would have limited enforceability. *See* Transcript of February 7, 2011 Informational Session (Tr.) at 62-65. In OCA's comment letter dated February 25, 2011, OCA presented arguments in support of its position that the Commission does possess approval jurisdiction over the proposed NU-NSTAR merger.

OCA, referencing the approximate 44 percent post-consummation ownership of NU shares by former NSTAR shareholders, argued that, "through its stockholders," NSTAR would indirectly acquire more than 10 percent of NU, giving rise to Commission jurisdiction under New Hampshire law. OCA also argued that the proposed composition of the post-consummation NU Board of Trustees, which would have seven NU nominees and seven NSTAR nominees, together with the proposed nomination of NSTAR's Mr. May as the post-consummation chief

executive of NU, indicated that the proposed merger had the functional effect of an “acquisition” of NU by NSTAR, “through its stockholders,” providing additional support for the exercise of approval jurisdiction by the Commission over the proposed merger.

B. New Hampshire Legal Assistance

At the February 7, 2011 informational session, New Hampshire Legal Assistance (NHLA) stated that it was concerned about potential impacts that the proposed merger could have on PSNH’s low-income-assistance and community-development programs, specifically, PSNH’s Electric Assistance, Low-Income Energy Efficiency, and Neighbor Helping Neighbor programs. *See* Tr. at 58-60. NHLA lauded PSNH’s commitment to these programs, and expressed its expectation of PSNH’s on-going support for these efforts after consummation of the proposed NU-NSTAR merger. Tr. at 59-60. NHLA requested that PSNH provide a written or oral representation that its community-development efforts would not be adversely impacted by consummation of the proposed merger. Tr. at 59. PSNH orally affirmed that no adverse effect on PSNH’s community-development efforts was expected to arise from consummation of the proposed merger. Tr. at 60-62.

C. New England Power Generators Association, Inc.

By letter dated February 25, 2011, NEPGA, a regional trade association representing non-utility electric power generators in the New England states, expressed its generalized concerns regarding the proposed NU-NSTAR merger. NEPGA noted NU’s potential market power in the New England electricity market after consummation of its merger with NSTAR, which, in NEPGA’s view, could harm its members’ competitive position. *See* NEPGA Letter dated February 25, 2011 at 2-3. NEPGA also opined that NU and NSTAR’s post-merger plans

to develop additional generation capacity could negatively impact NEPGA members' market participation, and lead to additional costs for PSNH ratepayers. On the basis of these concerns, NEPGA urged the Commission to exercise an unspecified approval jurisdiction over the proposed merger. NEPGA Letter at 4-6.

D. International Brotherhood of Electrical Workers Local #1837

By letter dated March 2, 2011, the International Brotherhood of Electrical Workers, Local #1837, Dover, New Hampshire, expressed concerns that the proposed NU-NSTAR merger would impact staffing levels at PSNH, as well as the terms and conditions of employment for its members.

IV. POSITION OF COMMISSION STAFF

Staff has reviewed the materials provided by NU and PSNH in this docket, and anticipates that NU's and PSNH's representations regarding ongoing informational submissions to the Commission and Staff regarding future impacts of the merger on PSNH and its customers will be adhered to. Staff plans to communicate regularly with NU and PSNH regarding needed informational filings, before and after consummation of the proposed merger, and expects NU and PSNH to be responsive to Staff's requests.

V. COMMISSION ANALYSIS

Having reviewed NU and PSNH's submissions, Staff's recommendations and the comments tendered, we conclude that the threshold issue is whether the Commission has jurisdiction for review and approval of the proposed NU-NSTAR transaction under New Hampshire law. 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). We cannot simply “take jurisdiction” over a matter if there is no statutory grant of authority to do so. We have identified four potential sources of authority to consider in determining whether the proposed transaction between NU and NSTAR is subject to the Commission’s jurisdiction: RSA 374:30; and RSA 374:33; RSA 369-B:3, IV(b)(4) and RSA 369:8.¹ Having examined each statutory provision, we conclude that the Commission lacks jurisdiction for review and approval of the proposed NU-NSTAR merger. The reasons are discussed below.

A. RSA 374:30

RSA 374:30 establishes the Commission’s authority to make findings and issue orders prior to the consummation of certain transactions entered into by New Hampshire public utilities. Specifically, RSA 374:30 states: “Any public utility may transfer or lease its franchise, works or system, exercised or located in this state, or contract for the operation of its works and system located in this state, when the commission shall find that it will be for the public good and shall make an order assenting thereto, but not otherwise.” RSA 374:30.

Applying the plain meaning of this statute, we conclude that it does not apply to the proposed NU-NSTAR merger. NU’s wholly-owned New Hampshire public utility subsidiary, PSNH, would remain in control over its franchise, works, and system after the proposed merger,

¹ RSA 374:3 grants the Commission general supervisory authority over all public utilities under the Commission’s jurisdiction; while this statute authorizes Commission broad reach in seeking information, it does not confer jurisdiction over transactions the Commission may wish to adjudicate but for which there is no statute that expressly addresses the transaction.

without any transfer or lease of same being made to either NSTAR, NSTAR's subsidiaries, or a third party. Indeed, PSNH's corporate relationship with NU would not change in any significant way as a consequence of the proposed merger, as represented by PSNH and NU. Because there is no transfer or lease of the franchise, works or system of a New Hampshire utility, RSA 374:30 does not apply.

B. RSA 374:33

RSA 374:33 confers jurisdiction over any transaction under which a public utility or public utility holding company, as defined by the statute, acquires more than 10 percent of a public utility or public utility holding company incorporated in or doing business in New Hampshire. In this case, NU, which is a public utility holding company as defined, seeks to acquire more than 10 percent of NSTAR. Though NSTAR is a public utility, it is not one that is incorporated in or doing business in New Hampshire. Therefore, we conclude that RSA 374:33 does not apply to the proposed merger of NU and NSTAR.

C. RSA 369-B:3, IV(b)(4)

RSA 369-B:3, IV(b)(4) was enacted by the New Hampshire Legislature in 2000, in the context of PSNH's request for the Commission's authorization to issue rate reduction bonds at that time. The Legislature required the Commission to impose, in the language of its authorization orders for the issuance of such bonds, a series of specific conditions on PSNH. RSA 369-B:3, IV(b); *see also* Commission Order No. 23,549 (September 8, 2000). One such condition, related to mergers and acquisitions involving NU and PSNH, may be found at RSA 369-B:3, IV(b)(4)(A)-(B). This condition requires that, "[i]n the event that PSNH or its parent company is acquired or otherwise sold or merged: . . . [s]uch merger, acquisition, or sale shall be

subject to the jurisdiction of the commission under RSA 369, RSA 374, RSA 378 or other relevant provisions of law, and the merger, acquisition, or sale shall be approved only if it is shown to be in the public interest . . . [and] should PSNH or its parent company be acquired or otherwise sold or merged, such merger, acquisition or sale shall be subject to the jurisdiction of the commission under the standard set forth in the original proposed settlement. . . .” The Commission, by Order No. 23,550 (September 8, 2000) in Docket No. DE 99-099, approved PSNH’s issuance of rate reduction bonds and, as required by the Legislature, integrated the language of RSA 369-B:3, IV(b)(4)(A)-(B) as conditions of the Order.

In interpreting the language of this statutory provision, in the context of the proposed NU-NSTAR merger, we note that, as a threshold matter, the provision, within both the preamble and subpart (B) of RSA 369-B:3, IV(b)(4), sets forth the following formulations for the statute’s applicability: “In the event that PSNH or its parent company is acquired *or otherwise* sold or merged” (*emphasis added*); RSA 369-B:3, IV(b)(4)(B) states in part: “. . . should PSNH or its parent company be acquired *or otherwise* sold or merged . . .” (*emphasis added*). Presently, the parent company of PSNH is NU; the statute clearly applies to transactions in which PSNH itself, or its parent NU, is to be acquired by another entity. Likewise, the statute clearly applies to transactions in which PSNH or NU, or both, would be sold to another entity.

With regards to *mergers*, however, the adverbial phrase “*or otherwise*,” *in pari materia* with the word “acquired,” serves as a limitation on the range of corporate transactions to which the statutory grant of jurisdiction to the Commission would apply. “Or otherwise,” following the word “acquired,” thereby functionally limits the jurisdiction of the Commission under RSA 369-B:3 to such mergers that are the equivalent of an acquisition of NU or PSNH by a third party.

Furthermore, RSA 369-B:3, IV(b)(4)(B) provides that “such merger, acquisition or sale shall be subject to the jurisdiction of the commission under the standard set forth in the original proposed settlement.” “Original proposed settlement” is a defined term at RSA 369-B:2, VIII and refers to the “Public Service Company of New Hampshire Restructuring Settlement Agreement” filed with the Commission on August 2, 1999 in DE 09-099. The relevant jurisdictional standard in the original proposed settlement is found at page 68 in section XIV under paragraph C, “Sale of PSNH or NU,” which states, in relevant part: “If NU itself is acquired or otherwise sold or merged . . . it agrees that notwithstanding any contrary provision of law, the merger, acquisition or sale shall be subject to the jurisdiction of the PUC under RSA Chapters 369, 374, 378 or other relevant provisions, and that the merger, acquisition or sale shall be approved only if it be shown to be in the public interest. *A merger of NU that is subject to this section shall not include acquisitions by NU of other entities.*” (*Emphasis added.*) The first quoted sentence of this section is restated, almost verbatim, by RSA 369-B:3, IV(b)(4)(A). The last sentence, as part of the jurisdictional standard referenced under RSA 369-B:3, IV(b)(4)(B), clarifies that a merger of NU subject to PUC jurisdiction under this section “shall not include acquisitions by NU of other entities.”

The factual context of the proposed NU-NSTAR merger does not support a finding that the proposed merger, if consummated, would be the equivalent of NU and PSNH being acquired by NSTAR. Rather, NU would acquire NSTAR with a new issuance of NU shares as consideration. Also, while NSTAR’s (the parent holding company’s) corporate existence would cease as a consequence of the proposed merger, NU would continue to serve as the parent holding company of PSNH, and would also serve as the parent holding company of NSTAR’s

current Massachusetts utility subsidiaries going forward. Moreover, NU's, and PSNH's, current corporate assets would not be alienated to NSTAR in any way; rather, individual shareholders of NSTAR would receive newly issued NU shares in exchange for their current NSTAR shareholdings, at a fixed ratio, with currently-issued NU shares still outstanding. We therefore conclude that the statutory provisions of RSA 369-B:3 do not form a basis for our review of the proposed NU-NSTAR merger.

D. RSA 369:8

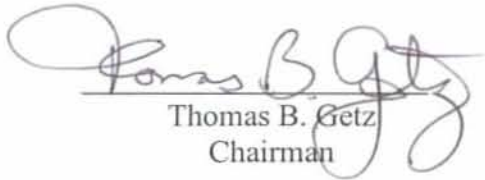
Finally, we turn to RSA 369:8, II. Sections II (a) and (b) establish fast track procedures under which public utilities may provide detailed representations to the Commission, with 60 days' prior notice, regarding the impact of certain corporate actions, including in section II(b)(1), "any corporate merger or acquisition involving parent companies of a public utility whose rates, terms, and conditions of service are regulated by the commission" The jurisdictional basis for Commission review under these provisions, however, is only in cases in which there is a separate statute requiring Commission approval; that is, RSA 369:8 is not an independent grant of authority. RSA 369:8, II(a) states, "[t]o the extent that the approval of the commission is required by any other statute for any corporate restructuring, financing, change in long-term and short-term indebtedness, or issuance of stock involving parent companies of a public utility regulated by the commission" (*emphasis added*). RSA 369:8, II(b)(1) states, "[t]o the extent that the approval of the commission is required by any other statute for any corporate merger or acquisition involving parent companies of a public utility" (*emphasis added*). Because we find no other statute requiring Commission approval of the transaction presented in the instant docket, the provisions of RSA 369:8, II are not triggered.

While the Commission does not have the statutory authority to approve or reject the proposed transaction, it does retain jurisdiction over PSNH going forward. PSNH is the state's largest electric utility, serving approximately 500,000 homes and businesses in all corners of the State. The Commission's continuing jurisdiction over PSNH's operations, rates, affiliate contracts, and plant are not affected by the proposed merger. Furthermore, we agree with Staff that PSNH must continue to provide detailed information, including responses to questions that arise as Staff evaluates the information, as part of the Commission's ongoing supervisory responsibility over PSNH and its parent, NU. *See, e.g.,* RSA 365:5-7, RSA 366, RSA 374:3-4. We expect that NU and PSNH will respond to Staff's data requests in this docket in a timely and responsive manner, with copies of all information that is not the subject of a motion for confidential treatment posted on the Commission's website for interested parties to review. We will continue to exercise our general supervisory powers over PSNH to ensure that its rates and terms of service are not adversely impacted.

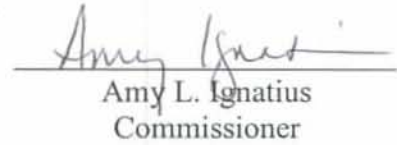
Based upon the foregoing, it is hereby

ORDERED, that the Commission does not have jurisdiction for approval of the proposed merger between NU and NSTAR.

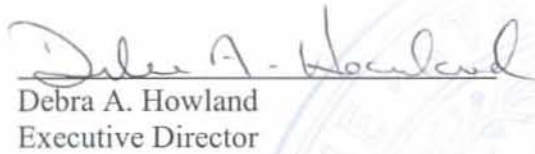
By order of the Public Utilities Commission of New Hampshire this fifth day of April,
2011.


Thomas B. Getz
Chairman


Clifton C. Below
Commissioner


Amy L. Ignatius
Commissioner

Attested by:


Debra A. Howland
Executive Director



ROBERT BERSAK
PUBLIC SVC OF NEW HAMPSHIRE
780 N COMMERCIAL ST
PO BOX 330
MANCHESTER NH 03105-0330

04/05/11 Order No. 25,211 issued and forwarded to all parties. Copies given to PUC Staff.

GREGORY B BUTLER
NORTHEAST UTILITIES SERVICE COM
PO BOX 270
HARTFORD CT 06141-0270

DORENE HARTFORD
CONSERVATION LAW FOUNDATION
27 NORTH MAIN ST
CONCORD NH 03301

MEREDITH A HATFIELD
OFFICE OF CONSUMER ADVOCATE
21 SOUTH FRUIT ST STE 18
CONCORD NH 03301
MANCHESTER NH 03105

RORIE HOLLENBERG
OFFICE OF CONSUMER ADVOCATE
21 SOUTH FRUIT ST STE 18
CONCORD NH 03301-2429

RICHARD A KANOFF
MURTHA CULLINA LLP
99 HIGH ST
BOSTON MA 02110

ALAN LINDER
NH LEGAL ASSISTANCE
117 N STATE ST
CONCORD NH 03301-4407

THOMAS F RYAN
IBEW NH
74 SOUTH MAIN ST STE 3
ROCHESTER NH 03867

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WITH THE EXCEPTION OF DISCOVERY, FILE 7 COPIES (INCLUDING COVER LETTER) TO:

DEBRA A HOWLAND
EXEC DIRECTOR & SECRETARY
NHPUC
21 SOUTH FRUIT STREET, SUITE 10
CONCORD NH 03301-2429