

**STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION**

Docket No. DE 12-295

Power New England, LLC

Petition for Review of the Reasonableness of Certain Charges of
Public Service Company of New Hampshire for Services to Competitive Suppliers

**PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE'S
MOTION TO DISMISS
PETITION OF PNE ENERGY SUPPLY, LLC**

January 4, 2013

Public Service Company of New Hampshire (“PSNH” or the “Company”) hereby moves the Commission, pursuant to N.H. Admin. Rule Puc 203.07 and Rule Puc 207.01, to dismiss the “Petition for Review of the Reasonableness and Appropriateness of PSNH’s Approved Charges for Selection, Billing, and Payment and Collection Services to Competitive Electricity Suppliers” (“Petition2”) filed by PNE Energy Supply LLC, d/b/a Power New England (“PNE”) dated September 27, 2012. The bases for this Motion are twofold: i. that the Petition seeks the Commission to engage in single-issue ratemaking; and, ii. that the Petition seeks the Commission to issue a declaratory ruling involving future factual situations which are neither definite nor concrete, and which involves a hypothetical situation or otherwise seeks advice as to how the Commission would decide a future case.

In support of this Motion, PSNH states as follows:

1. On April 12, 2012, PNE filed a “Petition of Power New England for Order Requiring Modifications to PSNH’s Terms and Conditions to Ensure that PSNH’s Small Customers Benefit from Retail Electricity Choice,” (“Petition1”), with the Commission seeking “an Order requiring modifications to PSNH’s Services and Schedule of Charges for Energy Service Providers... .” (Petition1 at p. 1). That Petition was docketed as DE 12-093. Petition1 noted that the charges in question were contained in PSNH’s “Electricity Delivery Service Tariff- NHPUC No. 8, Original Pages 31 through 40. PSNH’s ‘Services and Schedule of Charges’ are set out in Section 2, original pages 32 through 36.” (*Id.* at unnumbered p. 2.)

2. Petition1 sought an Order that would have adjusted certain of PSNH’s tariffed rates; in particular, PNE asked that the following portions of Tariff NHPUC No. 8, (“Tariff”), contained in the “Terms and Conditions for Energy Providers” be adjusted to a rate level of zero by eliminating them completely: i. the “Selection Charge” at Section 2(a), (Tariff p. 32); ii. the “Billing and Payment Service Charge” at Section 2(f), (*Id.* at p. 35); and, iii. the “Collection Services Charge” at Section 2(g), (*Id.* at p. 36).

3. PSNH filed a motion to dismiss PNE’s Petition1 on April 20, 2012. The bases for that Motion were that PNE’s Petition1 failed to comply with Rule Puc 203.06(c) and that it asked the Commission to engage in single-issue ratemaking. On August 31, 2012, by Order No. 25,405 the Commission dismissed Petition1.

4. The September 27 Petition² addresses the very same tariff charges and seeks the very same relief that were the subject of the Commission's dismissal Order issued less than four weeks earlier in Docket No. DE 12-093.

5. In the Commission's "Order of Notice" dated November 21, 2012, initiating this proceeding, the Commission presciently noted, "The filing raises, inter alia, issues related to whether it is useful for the Commission to conduct a review of the reasonableness of the approved tariff charges separate from a review of PSNH's revenue requirements in the context of a future distribution rate case and, if so, whether the relief requested by the petition is in the public interest and should be granted." For the reasons set forth herein, the answers to these questions are "no" and "no."

6. PNE asserts that the purpose of Petition² "is to request that the Commission review the reasonableness and appropriateness of PSNH's approved charges for selection, billing, and payment and collection services to competitive electricity suppliers." (Petition², ¶8.) The charges that are the subject of both Petition¹ and Petition² were reviewed and approved by the Commission prior to being included in PSNH's Tariff. In Order No. 23,443, the Commission set forth each of the charges noted in the Petition, and expressly stated, "Since these are new services that will impose additional costs on the Company, they are proper for recovery from suppliers taking the services." 85 NHPUC 154, 273 (2000).

7. Petition² provides no evidence whatsoever that PSNH no longer bears additional costs for the services in question. Instead, the fundamental complaint of PNE is that "there are at least

three charges assessed by PSNH to competitive suppliers, such as PNE, that are completely out-of-line with the comparable charges assessed by other New England utilities.” Contrary to PNE’s pleadings, testimony, and data request responses in Docket No. DE 12-093, and in the related Docket No. DE 12-097, regarding Petition1, PSNH demonstrated that there are other utilities in New Hampshire and elsewhere in New England that do assess charges to competitive suppliers similar to the ones questioned by PNE. *See* PSNH’s Motion to Dismiss, April 20, 2012, in Docket No. DE 12-093, ¶4 (“Pursuant to Rule Puc 203.27, the Commission may take Administrative Notice of Chapter 322 of the Rules of the Maine Public Utilities Commission governing ‘Metering, Billing, Collections, and Enrollment Interactions Among Transmission and Distribution Utilities and Competitive Electricity Providers,’” which requires “A transmission and distribution utility shall charge a competitive electricity provider the utility’s incremental cost of providing basic bill issuance, bill calculation, and collections... .”); PSNH’s Motion to Dismiss, Rescind, Compel, and Strike, August 24, 2012, in Docket No. DE 12-093, ¶24 (“NHEC’s tariff approved by this Commission does include charges levied on competitive suppliers, contrary to the allegations contained in PNE’s Petition, contrary to the testimony of its witness, and contrary to PNE’s responses to PSNH data request numbers 1-5, 1-6, 1-8, and 1-9. Such a lack of candor should not be tolerated.”).

8. In Order No. 23,443 the Commission held that it costs PSNH money to provide the services questioned by PNE. Without evidence that PSNH no longer incurs costs to provide these services, Petition2 is not susceptible to a construction that would permit the relief sought under existing law in New Hampshire, and thus should be dismissed. The relief sought by Petition2 is prohibited by statute. RSA 378:7, “Fixing of Rates by Commission,” requires that

rates be just and reasonable for the service to be performed. Clearly, the billing and collection services in question must have value to PNE, or it could avoid the charges by simply not asking PSNH to provide them. Instead, PNE has again petitioned the Commission demanding that the services it values must be provided for free. Requiring PSNH to provide them for free cannot meet the statutory requirement that services be priced at a just and reasonable level.

9. Once again, in Petition² PNE asks the Commission to engage in single-issue ratemaking, a practice which is clearly disfavored. *In Re Statewide Low-Income Electric Assistance Program*, 87 NHPUC 349 (2002) (“single-issue ratemaking, a practice we have traditionally eschewed”); *Public Service Co. of New Hampshire*, 90 N.H. 542, 561 (2005) (“it would be inappropriate to re-open the record to consider only a single cost element”); *see also In Re Connecticut Valley Elec. Co.*, 86 NHPUC 947 (2001). In the *Connecticut Valley Electric* case, the Commission described the reasons why this is disfavored:

Single-issue rate cases are frowned upon in utility ratemaking because the objective of ratemaking is not to ensure recovery dollar for dollar of every expenditure made by a utility, but rather to ensure that the company has a reasonable opportunity to earn a reasonable overall return on investments dedicated to public utility functions. In order to make this ultimate determination, it is necessary to match ordinary and necessary expenses with income from the same period, and determine whether the net income is sufficient to provide a reasonable return on allowable rate base. Single-issue rate cases do not allow for this determination of overall net income. They focus on the change in a single expense (or revenue) item since the last rate case, ignoring completely what changes may have taken place in the other factors of net income.

86 NHPUC at 952–53.

10. Here, PNE again asks the Commission to focus on three selected tariffed rates associated with the provision of services, and determine whether the charges associated with them are

reasonable and appropriate. What PNE fails to take into account is that those charges were included as part of an overall ratemaking process where the revenues from those services were considered in light of the Company's overall revenue requirement. The Commission cannot now examine a part of those revenues in isolation without upsetting the overall revenue requirement calculus. Doing so "would essentially constitute single-issue ratemaking, a practice we have traditionally eschewed." *In Re Statewide Low-Income Electric Assistance Program*, 87 NHPUC at 369. In response to Petition1, the Commission noted its agreement "that single-issue ratemaking is not a preferred mechanism to adjust rates," but did not need to dismiss that petition on that basis alone. Order No. 25,405.

11. In an attempt to avoid this single-issue ratemaking prohibition, in Petition2 PNE expressly states that it is not seeking a change to PSNH's tariffed rates at this time: "PNE is not seeking a 'rate adjustment' in this proceeding. Any 'rate adjustment' would take place in a subsequent PSNH general rate case." (Petition2, ¶8.) The Commission has acknowledged the limited scope of this proceeding in the Order of Notice issued on November 21, 2012, "PNE said that it is not seeking a rate adjustment in this proceeding and that any rate adjustment that resulted from the Commission's review would take place in a subsequent PSNH general rate case." In essence, in order to avoid the single-issue ratemaking proscription, PNE is seeking a Commission declaration now, based on today's facts and circumstances, to determine how the Commission would decide a future rate case.

12. The Commission has equated such a request for an advance decision on future rates to an application for a declaratory ruling, and rejected the same. *In Re New England Electric System*,

the Commission conditionally approved the proposed merger of National Grid Group plc (“NGG”) with New England Electric System (“NEES”). 84 NH PUC 502 (1999). As part of that approval, Staff and the OCA asked the Commission to deny any present or future recovery of the acquisition premium to be paid by NGG. The Commission denied that Staff and OCA request, stating:

[W]e do not believe it is appropriate to impose a blanket prohibition at this juncture on any recovery of the acquisition premium paid by NGG. The electric industry is undergoing rapid change. In such a climate, we cannot rule out the possibility that circumstances could justify recovery of at least part of an acquisition premium and still be regarded as imposing “no net harm” on ratepayers. However, on the present record, we are unable to determine what precise circumstances, if any, would justify the recovery of the acquisition premium or any part thereof. Such issues are appropriately considered in the context of a rate case. . . . The issue can be viewed as one of ripeness, which “relates to the degree to which the defined issues in a case are based on actual facts ... and are capable of being adjudicated on an adequately developed record.” *Appeal of State Employees’ Assn. of N.H., Inc.*, 142 N.H. 874, 878 (1998) (declining to adjudicate claims based on “general allegations” of actual harm). In the present circumstances, the parties seeking a determination now that NGG could never recover any portion of its acquisition premium are in the same position as litigants who seek a declaratory judgment in court based on “hypothetical facts,” and thus are not entitled to such a determination because the factual bases for their position are not “sufficiently complete, mature, proximate and ripe” to permit us to decide the issue in a manner that would be fair to all parties. *See Delude v. Town of Amherst*, 137 N.H. 361, 363-64 (1993). Thus, we stress that our preliminary determination is without prejudice to the right of NGG and the subsidiaries it is acquiring to request recovery of an acquisition premium in the future, assuming that such a request would address the concerns of the Commission as expressed in this order.

84 NH PUC at 513.

13. In Petition2, PNE “at this juncture,” *id.*, is seeking a decision today regarding recovery of certain costs incurred by PSNH, with that decision not to be implemented until a future rate case. Now, as in *Re New England Electric System*, “The electric industry is undergoing rapid change. In such a climate, we cannot rule out the possibility that circumstances could justify recovery of

at least part of’ the tariffed charges in question. *Id.* Now, as in *Re New England Electric System*, “Such issues are appropriately considered in the context of a rate case.” *Id.* Now, as in *Re New England Electric System*, PNE’s request for a determination now regarding the future recovery of the tariffed charges in question places it “in the same position as litigants who seek a declaratory judgment in court based on ‘hypothetical facts,’ and thus are not entitled to such a determination because the factual bases for their position are not ‘sufficiently complete, mature, proximate and ripe’ to permit us to decide the issue in a manner that would be fair to all parties.” *Id.* Based upon Commission precedent contained in *Re New England Electric System*, Petition2 should be dismissed.

14. Similarly, in *Re Public Service Company of New Hampshire* [Petitioner: 5 Way Realty Trust], the Commission rejected a request for a declaratory ruling stating a petition for declaratory ruling “cannot constitute a request for advice as to future cases.” 88 NH PUC 98, 109 (2003) (citing *Salem Coal. for Caution v. Town of Salem*, 121 N.H. 694, 696 (1981)). Here, in Petition2, PNE is expressly seeking Commission advice regarding a future “rate adjustment” that “would take place in a subsequent PSNH general rate case.” (Petition2, ¶8.) Based upon Commission precedent contained in *Re Public Service Company of New Hampshire* [Petitioner: 5 Way Realty Trust], Petition2 should be dismissed.

15. Even more compelling than Commission precedent, dismissal of Petition2 is mandated by Commission Rules. Rule Puc 207.01 governs “Declaratory Rulings.” Per the *Re New England Electric System* decision, the Commission has deemed a request substantially similar to that in

PNE's Petition² to be a request for a declaratory judgment. Under Rule Puc 207.01 (c) (emphasis added):

The commission *shall dismiss* a petition for declaratory ruling that:

- (1) Fails to set forth factual allegations that are definite and concrete; [or]
- (2) Involves a hypothetical situation or otherwise seeks advice as to how the commission would decide a future case.

“Rules shall be valid and binding on persons they affect, and shall have the force of law unless amended or revised or unless a court of competent jurisdiction determines otherwise.” RSA 541-A:22, II; *see also In re Mooney*, 160 N.H. 607, 611–12 (2010) (“Rules and regulations promulgated by administrative agencies pursuant to a valid delegation of authority have the force and effect of law.”) (quoting *State v. Elementis Chem.*, 152 N.H. 794, 803 (2005)).

16. The Commission has noted that the use of the word “shall” denotes a mandate. *New Hampshire Electric Cooperative*, 76 NH PUC 72, 75 (1991) (“the word ‘may’ makes enforcement of a statute permissive and ... the word ‘shall’ requires mandatory enforcement.”). The New Hampshire Supreme Court takes the same position. “The general rule of statutory construction is that ‘the word ‘may’ makes enforcement of a statute permissive and that the word ‘shall’ requires mandatory enforcement.’” *City of Rochester v. Corpening*, 153 N.H. 571, 574 (2006) (quoting *Town of Nottingham v. Harvey*, 120 N.H. 889, 895 (1980)); *see also Appeal of Rowan*, 142 N.H. 67, 71 (1997) (“The intention of the Legislature as to the mandatory or directory nature of a particular statutory provision is determined primarily from the language thereof. Words and phrases which are generally regarded as making a provision mandatory include ‘shall’ and ‘must.’ On the other hand, a provision couched in permissive terms is generally regarded as directory or discretionary. This is true of the word ‘may.’ It is the general

rule that in statutes the word ‘may’ is permissive only, and the word ‘shall’ is mandatory.”); *In the Matter of the Liquidation of The Home Insurance Company*, 157 N.H. 543 (2008) (use of the word “shall” is presumed to indicate a mandate rather than a matter of discretion). Hence, Rule Puc 207.01 requires that the Commission *shall* dismiss Petition2, as it “[f]ails to set forth factual allegations that are definite and concrete” and it “seeks advice as to how the commission would decide a future case.”

17. Petition2 fails to meet the standards necessary for the Commission to issue a declaratory ruling. A declaratory ruling cannot be issued unless a “present legal or equitable right” and “an adverse claim that is ‘definite and concrete touching the legal relations of parties having adverse interests’” have been demonstrated. *Delude v. Town of Amherst*, 137 N.H. 361 (1993); *Silver Bros., Inc. v. Wallin*, 122 N.H. 1138 (1982). PNE’s Petition2 expressly states that “PNE is not seeking a ‘rate adjustment’ in this proceeding. Any ‘rate adjustment’ would take place in a subsequent PSNH general rate case.” (Petition2, ¶8.) Thus, Petition2 does not seek a ruling that would take effect today on a “present legal or equitable right,” but instead seeks a ruling that would pertain to a decision in a future rate case, the timing of which is unknown. PNE bases Petition2 on allegations that may or may not be accurate when PSNH’s next rate case takes place. Petition2 at ¶4 states that “The rate of migration of PSNH’s smaller customers away from PSNH is still relatively low... .” What the migration situation will be when PSNH’s next rate case occurs cannot be determined today. Petition2 at ¶5 states that “Large increases to PSNH’s default energy service rates are expected to occur over the next three or four years.” It is unknown today whether such alleged large increases to PSNH’s energy service rates will in fact occur, or whether changes in the wholesale energy market will alter that prediction. Petition2 at

¶6 states that “PSNH’s small customers should have the same opportunities to migrate away from PSNH such as those enjoyed by PSNH’s large customers... .” It cannot be determined today how many competitive suppliers will be marketing to smaller customers when a future PSNH rate case occurs. It is not presently known when such a future rate case will occur, what the competitive electric supplier landscape will be at that time, or how PSNH’s energy service rate will compare to wholesale market rates. In essence, the very foundations of Petition2 articulated by PNE present hypothetical situations that may or may not be accurate when the Commission decides a future PSNH rate case.

18. In conclusion, in the Order of Notice for this proceeding the Commission pondered “whether it is useful for the Commission to conduct a review of the reasonableness of the approved tariff charges separate from a review of PSNH’s revenue requirements in the context of a future distribution rate case.” Precedent and Commission rules have answered that question in the negative. Thus, PNE’s Petition2, which seeks a determination today regarding how the Commission would act in a future case and which is based upon factual situations that are neither proximate nor ripe, *must* be dismissed under both Rule Puc 203.07 and Commission precedent.

WHEREFORE, PSNH respectfully requests that the Commission:

- A. Grant this Motion and dismiss the Petition filed by PNE, and
- B. Grant such other relief as is just and equitable.

Respectfully submitted this 4th day of January, 2013,

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE



By: _____

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Certificate of Service

I hereby certify that a copy of this Motion has been served electronically on the persons on the Commission's service list in this docket in accordance with Rule Puc 203.11 this 4th day of January, 2013.



Robert A. Bersak