

DE 00-269

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Retail Delivery Tariff Compliance Filing

Order Following Prehearing Conference

O R D E R N O. 23,618

January 10, 2001

APPEARANCES: Robert A. Bersak, Esq. for Public Service Company of New Hampshire; New Hampshire Legal Assistance by Alan M. Linder, Esq. for the Save Our Homes Organization; Senior Assistant Attorney General Wynn E. Arnold and Meredith A. Hatfield, Esq. for the Governor's Office of Energy and Community Services; Kenneth Traum of the Office of Consumer Advocate on behalf of residential ratepayers; and Donald M. Kreis, Esq. for the Staff of the New Hampshire Public Utilities Commission.

I. BACKGROUND AND PROCEDURAL HISTORY

At issue in this docket is the revised Retail Delivery Tariff, NHPUC No. 2, submitted by Public Service Company of New Hampshire (PSNH or Company) on September 29, 2000 following the approval by the New Hampshire Public Utilities Commission (Commission) of the PSNH Restructuring Settlement Agreement in Docket No. DE 99-099. See Order No. 23,443 (April 19, 2000) (approving Restructuring Settlement Agreement) and Order No. 23,549 (September 8, 2000) (denying motions for rehearing and directing PSNH to file compliance tariff by September 29, 2000). The PSNH Restructuring Settlement Agreement, the Commission's approval of which is presently on appeal to the New Hampshire Supreme Court, would

resolve pending federal litigation between PSNH and the Commission, clearing the way for PSNH to divest its generation facilities, unbundle its rates, establish a formula for the recovery of certain stranded costs associated with restructuring and open PSNH's service territory to the possibility of retail competition in electric generation services.

As noted in Order No. 23,549, at a hearing conducted on July 7, 2000 to consider then-pending clarification and rehearing motions related to the Restructuring Settlement Agreement, the Governor's Office of Energy and Community Services (GOECS) and the Save Our Homes Organization (SOHO) raised certain issues relating to the Retail Delivery Tariff that PSNH had filed along with the "conformed" version of the Agreement.¹ Specifically, GOECS and SOHO

questioned (a) the insertion of the qualifier "willful" as a limitation on the Company's liability in the case of its negligence, (b) the inclusion of

¹ PSNH submitted a proposed Retail Delivery Tariff at the time of the initial filing of the proposed Restructuring Settlement Agreement in 1999. In Order No. 23,443, the Commission conditioned its approval of the Agreement on certain modifications to it. Thereafter, the Legislature required certain additional changes to the Agreement in exchange for its approval of a key element of the proposal - the securitization of certain of PSNH's stranded costs. See generally 2000 N.H. Laws 249 (Chapter 249). The "conformed" version of the Agreement is designed to reflect these modifications.

a \$5 fee for changing to transition or default service,² or between suppliers, (c) the unavailability of Transition Service to low-income customers not receiving LIHEAP³ who have previously left Transition Service and wish to return, and (d) the Company's offering of collection services to competitive suppliers.

Order No. 23,549, slip op. at 63. As further noted in Order No. 23,549, PSNH agreed to modify its proposed tariff so as to specify that customers receiving or eligible for means-tested energy assistance programs could return to Transition Service. *Id.* at 64. However, PSNH objected to the Commission's consideration of the remaining three issues raised by GOECS and SOHO, on the ground that these contentions had not been raised in any motions for rehearing. The Commission therefore "ruled that it was out of order to pursue these topics at this time," but also noted it would "permit the parties to raise these questions once the Company has filed its Compliance

² "Transition Service" is "electricity supply that is available to existing retail customers prior to each customer's first choice of a competitive electric supplier and to others, as deemed appropriate by the commission." RSA 374-F:2, V. "Default Service" is "electric supply that is available to retail customers who are otherwise without an electricity supplier and are ineligible for transition service." RSA 374-F:2, I-a. Under the Restructuring Settlement Agreement, Transition Service would be available for three years after the date on which PSNH's service territory is opened to retail competition. See Order No. 23,443, slip op. at 22.

³ LIHEAP is the federally funded Low Income Home Energy Assistance Program.

Tariff in [Docket No. DE 99-099]," and would "determine at that time whether, how and when to consider the changes requested by GOECS and SOHO." *Id.*

Thereafter, the Commission assigned Docket No. DE 00-202 to PSNH's Tariff 39, which implemented a 5 percent rate reduction required under Chapter 249. *See* RSA 369-B:3 (b)(3)(G). In the interest of administrative simplicity, the Commission assigned Docket No. DE 00-269 to the separately filed retail delivery compliance tariff, NHPUC No. 2. GOECS and SOHO filed objections and petitions to intervene in Docket No. DE 00-202 that clearly raised issues arising under Docket No. DE 00-269, including but not entirely limited to the concerns described in Order No. 23,549. Accordingly, the Commission deemed the GOECS and SOHO filings to be applicable to this docket. PSNH filed a written response to the comments of GOECS and SOHO on November 3, 2000.

The Commission issued an Order of Notice on December 8, 2000, scheduling a prehearing conference for December 21, 2000, directing PSNH to provide public notice of the conference by publication in a newspaper with statewide circulation, and directing that any additional petitions to intervene be filed by December 18, 2000. PSNH provided the requisite public notice and there were no additional

intervention petitions. On December 18, 2000, the Office of Consumer Advocate (OCA) notified the Commission that it would be appearing in the docket on behalf of residential ratepayers. The prehearing conference took place as scheduled on December 21, 2000, after which the parties and the Staff of the Commission (Staff) held a technical session for the purpose of agreeing upon a proposed schedule for the remainder of the proceeding.

II. PETITIONS TO INTERVENE

The Commission received no objections, either in writing or at the prehearing conference, to the intervention petitions submitted by GOECS and SOHO. Accordingly, the Commission granted the petitions.

III. PRELIMINARY POSITIONS OF THE PARTIES

A. Save Our Homes Organization

The first issue raised by SOHO in its written filing concerns language in the proposed tariff purporting to limit Transition Service to those customers who have continually received such service since Competition Day, i.e., the date on which PSNH's service territory is opened to potential retail competition. In SOHO's view, Transition Service should also be available to customers who are new to PSNH following Competition Day - a modification to which PSNH agreed during

the hearings in Docket No. DE 99-099. PSNH agreed at the prehearing conference to make the applicable change in the tariff and, accordingly, SOHO indicated that it deemed the issue to have been resolved.

SOHO also expressed concerns in its filing about the language in the tariff permitting PSNH to refuse to serve certain customers in some circumstances. However, SOHO indicated at the prehearing conference that it was withdrawing its objection to this language.

The written comments filed by SOHO also expressed concerns about the proposed tariff language limiting PSNH's civil damages liability for delivery service "variance, interruption, curtailment or suspension" to cases of "willful default" or "willful neglect." The analogous language in previous tariffs referred to "willful default or neglect." At the prehearing conference, SOHO indicated that it was withdrawing this objection, deeming it "not ripe" and more appropriate for resolution before a Court than before the Commission.

However, SOHO indicated at the prehearing conference that a critical issue from its standpoint is the need to make clear to PSNH customers that PSNH will not have the authority to disconnect service for non-payment of any sum owing to a

competitive energy supplier. SOHO noted that a customer whose service is discontinued by such a competitive supplier for non-payment will have the option of switching to default service. SOHO indicated that it supports the proposed tariff revision submitted by GOECS to cover this issue.

The final issue raised by SOHO concerns language in the proposed tariff that would impose a \$5.00 fee on a customer who switches energy suppliers. According to SOHO, such a practice discourages customer choice and imposes an inappropriate financial burden on low-income customers.

B. Governor's Office of Energy and Community Services

As did SOHO, GOECS indicated that some of the issues it raised in its written submission had been resolved to its satisfaction. Specifically, GOECS indicated that it no longer had concerns about the proposed "refusal to serve" language in the tariff. GOECS accepted PSNH's explanation that the "refusal to serve" language is designed to protect PSNH and its ratepayers from bearing the cost of hooking up new customers who require major line extensions, or other similar situations.

With regard to the \$5.00 fee to be imposed on customers who change competitive suppliers, GOECS urged the Commission to reconsider whether such a fee is justified at

all. According to GOECS, the fee is not "cost-based" - i.e., was not determined based on cost-of-service ratemaking principles - could discourage customer choice and would impose an undue financial burden on low-income customers and others who do not use large amounts of electricity. GOECS avers that its understanding is that such fees are not charged by PSNH's affiliates in Connecticut and Massachusetts, nor by other electric utilities in Massachusetts, Pennsylvania or Rhode Island. According to GOECS, it is difficult to track the incremental costs to an electric distribution company associated with switching a customer between competitive suppliers and, indeed, such costs may actually be too small to warrant any switching fee at all.

GOECS objected in particular to PSNH's proposal to impose the \$5.00 switching fee on customers as opposed to energy suppliers. According to GOECS, suppliers could absorb some of the fee into their profit margins and the Commission should require "every incentive" to be put in place to encourage customers to take service from competitive suppliers. GOECS recommended that the Commission resolve this issue in a separate, generic docket that would apply to all electric distribution companies in New Hampshire.

Unlike SOHO, GOECS indicated that it would not

withdraw the concern it expressed in its filing relative to the proposed change in the damages liability section of the tariff. According to GOECS, changing the phrase "willful default or neglect" to "willful default or willful neglect" is a substantive change that would have the effect of imposing an additional burden on customers who suffer a service-related loss. According to GOECS, PSNH's Connecticut and Massachusetts affiliates operate under the old "willful default or neglect" standard, as do all New Hampshire electric utilities except the Unitil Companies (Concord Electric Company and Exeter & Hampton Electric Company). In the view of GOECS, there is no policy reason to make such a change at this time, simply to enhance PSNH's position in litigation with certain customers.

With regard to disconnections, GOECS recommends that the Commission require the addition of the following language in the "Collection Services" section of the tariff: "The Company shall fully and clearly disclose to customers, in both written and oral communications, that it is performing Collection Services on behalf of a Supplier and that such collection activities will not include disconnection of service." Like SOHO, GOECS believes it is important that PSNH customers be informed of this limitation on PSNH's ability to

impose disconnections. GOECS proposed that PSNH be directed to work with the Commission's Consumer Affairs Department on the precise manner in which customers are so informed.

As did SOHO, GOECS indicated that its concern about the availability of Transition Service to customers who are new to PSNH after Competition Day is adequately addressed by PSNH's agreement to modify the tariff accordingly.

C. Office of Consumer Advocate

OCA indicated that it supports the positions of SOHO and GOECS, with the exception of SOHO's withdrawal of its objection to the "willful default or willful neglect" liability standard.

D. Public Service Company of New Hampshire

According to PSNH, given that it submitted a compliance tariff with the original Restructuring Settlement Agreement, and given that the Commission in Order No. 23,443 approved the proposed tariff with certain changes, it is inappropriate to revisit tariff-related issues here. Thus, PSNH asks the Commission to limit the issues here to the four questions specifically reserved in Order No. 23,549.

In PSNH's view, if other parties are free to raise new tariff-related issues in this docket, then it should also

be permitted to address new issues arising in connection with the tariff that it did not previously raise, e.g., the effects of rising energy prices and the effect of the Commission's proposed winter disconnection moratorium. However, PSNH conceded that most of the issues raised by GOECS and SOHO, as clarified and limited at the prehearing conference, are among those the Commission indicated in Order No. 23,549 that it would at least potentially take up here. The only exception is the issue raised by GOECS, concerning whether PSNH should be permitted to impose a \$5.00 fee for switching energy suppliers. According to PSNH, the Commission reserved for further discussion the issue of whether the fee should be imposed on suppliers or on customers, but not whether PSNH should be able to collect such a fee.

PSNH characterized as mere "housekeeping" the change in the liability section of the tariff from "willful default or neglect" to "willful default or willful neglect." According to PSNH, the proposed change does not alter the standard of liability in any respect because the only reasonable interpretation of the phrase "willful default or neglect" is that the adjective "willful" applies to both "default and "neglect." In support of that proposition, PSNH relies upon *The Singer Co. v. Baltimore Gas and Electric Co.*,

558 A.2d 419 (Md. App. 1989). In the view of PSNH, its proposed clarification would simply have the salutary effect of avoiding costly and unnecessary future litigation on the subject. Moreover, according to PSNH, because the tariffs applicable to the Unitil Companies already include the change requested by PSNH, refusing to allow PSNH to adopt the change would violate its right to equal protection of the laws as secured by the U.S. and New Hampshire constitutions.⁴

In the view of PSNH, it is unnecessary to require the Company to inform customers that it lacks the authority to disconnect them for non-payment of charges to competitive suppliers. According to PSNH, the Commission's existing disconnection rule, Puc 1203.11, is adequate to protect customers. Specifically, PSNH notes that the rule requires any disconnect notice to specify the reason for disconnection. To the extent that GOECS or SOHO is suggesting that PSNH should be required to provide oral notice of any customer rights related to disconnection, PSNH characterizes such a requirement as "unnecessary and cumbersome."

⁴ PSNH further avers that GOECS is factually incorrect in its contention that PSNH's Connecticut affiliate, Connecticut Light and Power Company (CL&P), operates under the "willful default or neglect" standard. According to PSNH, the relevant CL&P tariff language provides for no utility liability whatsoever in connection with losses attributable to interruptions or changes to service.

With regard to the \$5.00 change-of-supplier fee, PSNH contends that the charge is appropriate both in terms of its existence and the fact that it is imposed on the customer rather than the supplier. According to PSNH, customers are familiar with similar charges they are required to pay their local telephone company when changing long-distance carriers. Thus, PSNH contends, a similar customer fee in the electric realm would minimize customer confusion. Further, according to PSNH, long-distance telephone carriers routinely pay such fees for customers as part of their promotional efforts and it is reasonable to expect similar programs to be offered by competitive electric suppliers.

E. Staff

Staff noted its disagreement with PSNH's view concerning the range of tariff-related issues the Commission may now consider. According to Staff, the Commission's statutory authority to "alter, amend, suspend, annul, set aside or otherwise modify any order made by it" after notice and hearing, see RSA 365:28, provides ample basis for the Commission to consider the tariff issues raised here, particularly to the extent they were not explicitly dealt with in Docket No. DE 99-099. Further, according to Staff, the Commission's ruling in Order No. 23,549 that it would "permit

the parties to raise" its previously articulated tariff concerns when the Company has filed its compliance tariff was intended simply to defer these issues, not to limit the scope of the compliance tariff proceeding.

Concerning the \$5.00 change-of-supplier fee, Staff drew the Commission's attention to its ruling in Order No. 23,443 as to charges for certain new services, including customer-initiated supplier changes, occasioned by restructuring.⁵ The Commission ruled that, "[s]ince these are new services that will impose additional costs on the Company, they are proper for recovery from suppliers taking the services." Order No. 23,443, slip op. at 259. Thus, according to Staff, the Commission has already resolved the issue of who, as between competitive suppliers and customers, should be responsible for change-of-customer fees. Staff indicated, however, that it would support revisiting the

⁵ Specifically, the referenced "new services" include "Customer Change of Supplier," "Customer Usage Data," "Telemetry Interval Data Access," "Load Pulses Output," "Extended Metering Service," "Special Requests," "Customer Load Analysis," "Customer Service," "Billing and Payment Service" and "Collection Service." Order No. 23,443, slip op. at 259. A "Schedule of Charges" specifies that PSNH would recover sums ranging from zero (for Customer Usage Data) to an "[a]greed-upon price" (for Load Pulses Output) to specified per-month, per-hour, per-minute or per-bill, as appropriate. *Id.* In the case of change-of-supplier charges, the Order specifies that no charge would apply when a customer terminates Transition Service. *Id.*

entire issue in the context of a generic proceeding designed to achieve a consistent result for all New Hampshire electric customers.

Staff disagreed with PSNH's position with regard to the liability language in the tariff. According to Staff, the change proposed by PSNH is substantive in nature. Staff noted that, in the *Singer* case relied upon by PSNH, an intermediate appellate court in Maryland construed the phrase "willful default or neglect" in a manner that reduces the word "neglect" to mere surplusage. The Court first construed "willful default or neglect" as referring to "willful default" or "willful neglect." *Singer*, 558 A.2d at 428. Then the Court defined the former phrase as "an intentional omission or failure to perform a legal or contractual duty" and the latter phrase as "intentional, conscious, or known negligence - a knowing disregard of a plain or manifest duty." *Id.*

According to Staff, the two phrases as defined in *Singer* are indistinguishable from each other, and it is far from clear that the same result would obtain as a matter of New Hampshire law. Thus, Staff took the position that the Commission should either deny PSNH's request to modify the tariff language in question or use this occasion to clarify the applicable liability standard.

Finally, Staff indicated that it supported the views of SOHO, GOECS and OCA regarding the need to notify customers that PSNH may not impose disconnections on customers who fail to pay charges to competitive suppliers.

IV. SCHEDULING ISSUES

Following the technical session, the parties and Staff conducted a technical session and, *inter alia*, agreed upon a proposed schedule to govern the remainder of the proceeding. The parties and Staff agreed that the development of an additional factual record beyond that which was adduced in Docket No. DE 99-099, and thus the conducting of a contested hearing in this docket, would not be necessary in order to resolve the tariff-related issues as they were narrowed at the prehearing conference. Accordingly, Staff and the parties proposed that written filings be submitted on or before January 31, with replies due on or before February 7, with the Commission to rule thereafter.

We accept the hypothesis that no hearing is necessary here, but only provisionally. In particular, and as noted by Commissioner Brockway at the prehearing conference, we are aware that the classic justification for including in a utility's retail tariff any liability-limitation language is that such a limitation lowers the utility's revenue

requirement and thus yields customer savings. At present, the Commission lacks a factual record from which to determine that such a basis supports liability limitation language in PSNH's tariff. Thus, depending on our view of the case once we have had the opportunity to review any filings submitted under the proposed briefing schedule, we reserve the right to schedule an evidentiary hearing prior to resolving this or any other issue in the docket finally.

Accordingly, we will accept the proposed briefing schedule and, upon completion of the briefing, will issue an order that will either resolve all outstanding issues or specify what further proceedings we deem to be necessary.

Based upon the foregoing, it is hereby

ORDERED, that the proposed procedural schedule described above is approved, subject to further order of the Commission upon completion of the briefing authorized therein.

By order of the Public Utilities Commission of New
Hampshire this tenth day of January, 2001.

Douglas L. Patch
Chairman

Susan S. Geiger
Commissioner

Nancy Brockway
Commissioner

Attested by:

Thomas B. Getz
Executive Director and Secretary