STATE OF NEW HAMPSHIRE

BEFORE THE

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

Docket No. DE 10-160

Public Service Company of New Hampshire

Investigation into Effect of Customer Migration on Energy Service Rates

POST-HEARING BRIEF AND CLOSING STATEMENT OF NEW ENGLAND POWER GENERATORS ASSOCIATION, INC.

INTRODUCTION

The Commission opened this docket to address a problem: because PSNH's basic default energy service rate is now significantly higher than other New Hampshire utilities' rates for comparable energy service,[1] its default service customers are migrating and its default service costs are being spread over a shrinking customer base. This in turn imposes an ever-increasing cost burden on PSNH's remaining default service customers, which causes more migration and higher default service rates. PSNH has proposed to fix the problem by transferring certain costs of maintaining its generation assets (approximately $40 million in depreciation, property taxes, and the debt service portion of its rate of return[2]) to the distribution rate paid by all customers served by PSNH wires -- including those who no longer take energy service from PSNH.

The New England Power Generators Association, Inc. ("NEPGA"), which represents competitive electric generating companies responsible for roughly two-thirds of New Hampshire's electric generating capacity, responds, in Parts I through III below,

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[1] PSNH's default energy service rate for 2010-2011 is expected to be 8.78¢/kwh, compared to 7.6¢/kwh for Unitil's comparable small customer rate and 7¢/kwh for National Grid's. Transcript of DE 10-160 Hearing (Day 1) (hereinafter "Tr. (Day _)"), pp. 128-29 (testimony of Mr. Baumann).

[2] Tr. (Day 1), pp. 120-21, 123-24 (testimony of Mr. Baumann).

to three of the major issues raised in the Secretarial Letter sent by Executive Director Debra Howland to the Parties on January 21, 2011 (hereinafter "January 21, 2011 Letter"). NEPGA argues, first, that PSNH's proposed non-bypassable charge is impermissible under New Hampshire law; second, that there are no legal impediments to requiring a Request for Proposal process for some, if not all, of PSNH default energy load; and third, that the statutory solution to the problem posed by PSNH is divestiture of PSNH generation assets. NEPGA defers to other parties on the remaining issues.

ARGUMENT

I. PSNH's Proposed Non-Bypassable Charge is Not Permitted Under the Restructuring Statutes

The Commission has asked the parties to address "whether costs to be recovered under PSNH's proposed non-bypassable charge would or should be considered stranded costs within the meaning of RSA 374-F:2, IV, whether a non-bypassable charge is an appropriate recovery mechanism pursuant to RSA 374-F and whether it is permissible under RSA 369-B:3, IV(b)(1)(A) and RSA 374-F." January 21, 2011 Letter, p. 2. Part I of this brief will address these issues in reverse order.

While the Commission has broad authority to set "just and reasonable" rates and charges, a non-bypassable charge imposing generation costs on customers who take only transmission and distribution service ("T&D customers") is not permitted under either RSA 369-B:3, IV (b)(1)(A) or the Restructuring Policy Principles in RSA 374-F, and the charge would not be a permitted "stranded cost."

A. The Proposed Charge is Not "Just and Reasonable"

Commission-approved charges must be "just and reasonable." RSA 374:2. In this docket, a regulated utility subject to cost-of-service ratemaking seeks to continue to rely on above-market supplemental power purchases and "uneconomic assets" (*see* RSA

374-F:2, IV) to serve its energy customers at a significantly higher rate than the competitive market would provide. The proposed non-bypassable charge would force T&D customers who purchase energy service from a competitive supplier to subsidize the costs of generating energy that they have chosen not to purchase through their participation in the competitive marketplace. The non-bypassable charge which PSNH seeks to place on T&D customers does not meet the "just and reasonable" standard.

B. The Proposed Charge To Recoup Default Service Costs Is Impermissible Under RSA 369-B:3, IV(b)(1)(A)

RSA 369-B establishes express parameters for the charges that must be included in default service. The price for default service "shall be PSNH's actual, prudent, and reasonable costs of providing such power, as approved by the commission." RSA 369-B:3, IV(b)(1)(A). PSNH has agreed that the $40 million in "fixed" generation costs that it proposes to include in the non-bypassable charge – property taxes, depreciation, and debt service – are "actual costs prudently incurred" to provide power from its generating assets to its default service customers. Tr. (Day 1), pp. 110-111 (testimony of Mr. Baumann). Assuming the costs associated with the proposed non-bypassable charge are reasonable and can be recovered at all, they cannot be shifted from default service to T&D customers.

C. A Non-Bypassable Charge on T&D Customers to Recoup Costs of Providing Energy Service is Impermissible under RSA 374-F

RSA 374-F established a suite of policy principles to guide the restructuring of New Hampshire's electric industry mandated by the Legislature in 1996. One important objective of these principles is to give retail customers a choice of energy service providers, which the Legislature has found will result in lower costs for ratepayers. RSA 374-F:1, I ("The most compelling reason to restructure the New Hampshire electric

utility industry is to reduce costs for all consumers of electricity by harnessing the power of competitive markets."); *see also* RSA 374-F:1, II (quoting part II, article 83 of the New Hampshire Constitution) and RSA 369-B:1, I ("New Hampshire is implementing such restructuring to create retail customer choice, which will provide retail electric service at lower costs.").

PSNH's proposed non-bypassable charge on T&D customers to offset its cost of providing energy to its default service customers would send confusing price signals to electricity buyers and undermine public confidence in the electric utility industry. *See, e.g.,* RSA 374-F:3, II ("Competitive markets should ... provide ... appropriate price signals, and improve public confidence"). Further, it would violate at least seven of the fifteen restructuring policy principles set out in RSA Chapter 374-F, including:

1. **RSA 374-F:3, II – <u>Customer Choice</u>**

> **Allowing customers to choose among electricity suppliers will help ensure fully competitive and innovative markets. . . . Customers should expect to be responsible for the consequences of their choices. The commission should ensure that customer confusion will be minimized and customers will be well informed about changes resulting from restructuring and increased customer choice.**

For a customer's choice of supplier to be meaningful, price signals in the market place must reflect the costs of the services being provided.[3] *See also* RSA 374-F:1, I. Current T&D customers have taken responsibility for their energy service choices, and under the proposed plan, would be penalized for doing so. This penalty would lead to more, not less, confusion in retail electricity markets.

[3] To the extent that the non-bypassable charge seeks to include the benefit of knowing that default service must be provided if a customer cannot, for whatever reason, continue in the competitive market, those costs and benefits should be addressed through an alternative means. A non-bypassable charge including millions of dollars in fixed costs associated with PSNH's current generation portfolio is a blunt and anti-competitive instrument through which to address the potential risks of customers returning to default service. *See, e.g.*, Tr. (Day 2), pp. 52-53 (testimony of Mr. Hachey).

2. **RSA 374-F:3, III – Regulation and Unbundling of Services and Rates**

> **[S]ervices and rates should be unbundled to provide customers clear price information on the cost components of generation, transmission, distribution, and any other ancillary charges. Generation services should be subject to market competition and minimal economic regulation and at least functionally separated from transmission and distribution services . . . .**

The Legislature recognized that for restructuring to work, price information must be clear and understandable to customers and each component must be separately accounted for. *See also* RSA 374-F:1, II. The proposed non-bypassable charge would "rebundle" generation and distribution costs, destroy the "functional separation" between generation and distribution services, and effectively eliminate fair market competition for generation services.

3. **RSA 374-F:3, V(c) – Universal Service**

> **[T]he commission may implement measures to discourage . . . long-term use[] of default service.**

PSNH's proposed non-bypassable charge would *encourage* the long-term use of default service by requiring competitive market participants to subsidize it, rather than giving customers an incentive to take advantage of retail choice.

4. **RSA 374-F:3, VI – Benefits for All Customers**

> **Costs should not be shifted unfairly among customers.**

Several of the parties to this docket have noted that residential and smaller commercial and industrial customers are not benefiting from deregulation as much as larger customers. It is true that these customers have not chosen to avail themselves of choice and that they may have less opportunity than larger customers. However, shifting default energy service costs to T&D customers addresses only the symptom, not the

underlying cause of the problem. The real question, not answered by a non-bypassable charge, is how to bring the benefits of competition to all customer classes.

5. **RSA 374-F:3, VII – Full and Fair Competition**

> **The rules that govern market activity should apply to all buyers and sellers in a fair and consistent manner in order to ensure a fully competitive market.**

PSNH seeks special treatment via a non-bypassable charge. While an independent generator cannot require an individual who is not its customer to subsidize the costs of its generation facilities, PSNH seeks to charge T&D customers for the costs of its own default service. Thus, a non-bypassable charge bends the rules of the generation market unfairly in PSNH's favor.

6. **RSA 374-F:3, XI – Near Term Rate Relief**

> **The goal of restructuring is to create competitive markets that are expected to produce lower prices for all customers than would have been paid under the current regulatory system. . . . To the greatest extent practicable, rates should approach competitive regional electric rates.**

The most important goal of restructuring was to move towards a competitive market for generation. PSNH stands alone as a New Hampshire utility owning and operating generation facilities governed by cost-of-service ratemaking, leaving higher-than-market generation prices to be paid by ratepayers. The other utilities have divested their generation assets and moved toward market-driven provision of electricity. Tr. (Day 2), pp. 43-44 (testimony of Mr. Traum, colloquy with Chairman Getz). Restructuring transfers the risks of higher prices to independent generators; cost-of-service ratemaking ultimately allocates that risk to ratepayers.

7. RSA 374-F:3, XIV – Administrative Processes

New Hampshire should move deliberately to replace traditional planning mechanisms with market driven choice as the means of supplying resource needs.

Instead of moving deliberately towards market-driven choice, the proposed non-bypassable charge is a step back toward "traditional planning mechanisms" in which cost-based rate setting drives the energy prices paid by electricity consumers.

Measured against the seven restructuring principles set forth above, a non-bypassable charge requiring T&D customers to subsidize a regulated entity's generation costs is clearly impermissible under New Hampshire law.

D. The Proposed Charge is Not a Stranded Cost Under 374-F

The costs of ongoing ownership and continued operation of uneconomic generation facilities are not "stranded costs" under RSA 374-F:2, IV. Costs are stranded only when there is a reasonable expectation of recovery and they are not recoverable under the current regulatory scheme. *Id.* PSNH currently has a "specific mechanism for cost recovery" of debt service, property taxes and depreciation, namely, the sale of electricity. *Id.* On the other hand, when uneconomic assets are sold or retired, and are no longer "used and useful," the costs may become unrecoverable and thus stranded. RSA 378:28. *See also* Tr. (Day 1), p. 148 (testimony of Mr. Baumann); Senate Committee Hearing on SB 170 Relative to Public Service of New Hampshire (March 4, 2003) (hereinafter "2003 Senate Hearing") (attached hereto as Exhibit A, together with the

Committee Report and the then-proposed language of SB 170),[4] pp. 13-14 (statement of Gary Long, President, PSNH) (stating that all costs, including property taxes, for PSNH generating assets are included in approved rates and that there are no other stranded costs and no other charges).

Furthermore, under RSA 374-F:3, XII (b), stranded costs must be "nonmitigatable." To find that the costs are stranded, the Commission must find that PSNH cannot mitigate the costs for which it seeks recovery. Mitigation measures include: "(1) Reduction of expenses. (2) Renegotiation of existing contracts. (3) Refinancing of existing debt. (4) A reasonable amount of retirement, sale, or write-off of uneconomic or surplus assets . . . ." RSA 374-F:3, XII (c). There is no evidence that these mitigation measures have been undertaken, or that retirement, sale, or write-off has been considered (see Part III, below, regarding divestiture).[5] Until the requirements of RSA 374-F can be met, the costs PSNH seeks to recover are not "stranded" and are not recoverable via a non-bypassable charge under RSA 374-F:3, XII (d).

II. A Request for Proposal Process for Default Service Is Entirely Consistent with the Restructuring Principles in RSA 374-F and Is Also Consistent with RSA 369-B:3, IV (b)(1)(A)

The Commission has asked for briefing on whether there may be "legal barriers to requiring PSNH to bid all of its generation into the daily market and purchase all of its energy requirements through a request for proposal process similar to that used by Unitil . . . and . . . National Grid," and on "whether there are any legal impediments to the

[4] The text of SB 170 differs slightly from RSA 369-B:3-a and RSA 369-B:3, IV(b)(1)(A) as ultimately adopted by the Legislature; however, those differences are immaterial to the issues addressed herein. The entire legislative history for SB 170 (2003) is available online at http://gencourt.state.nh.us/bill_Status/sos_archives.aspx?lsr=1138&sy=2003&sortoption=billnumber&txtsessionyear=2003&txtbillnumber=SB170 (last visited February 24, 2011).

[5] Current fixed costs associated with operating generation facilities are not stranded costs. It may well be that changes in circumstances, such as divestiture or other cost mitigation, could result in stranded cost recovery associated with PSNH's generation facilities.

proposals (1) that PSNH issue a request for proposals to cover supplemental energy purchases . . . and (2) that there should be separate default service pricing for those customers returning to PSNH's energy service." January 21, 2011 Letter, p. 2. NEPGA defers briefing of the last of these issues to others. The following section addresses why the Commission can and should require the use of a Request For Proposal ("RFP") process for PSNH's entire default service load requirement or, at a minimum, for any required supplemental power purchases.

A. There are No Legal Impediments to Requiring that PSNH Use An RFP Process for Its Supplemental Power Purchase Requirements

PSNH currently provides for any default service power requirements that it cannot meet from its own generation assets (and Small Power Producer purchases required under RSA 362-A) through bilateral contracts negotiated privately and confidentially with independent generators or brokers. As the record in this docket demonstrates, this private bilateral contracting process, which is neither competitive nor transparent, has resulted in supplemental power purchases over the past few years for which PSNH default service ratepayers could potentially be liable for up to $233 million in above-market costs over five years. Tr. (Day 1), pp. 201-02 (testimony of Mr. Baumann).

1. *There are No Legal Impediments to Immediate Implementation of an RFP Process*

There is no statute that prescribes how PSNH must procure any supplemental power purchases required to provide default energy service above and beyond what its own generating assets can produce. Thus, there is no legal impediment to immediately implementing an RFP program.

That such RFP programs already exist in New Hampshire attests to the potential for immediate implementation. As the Commission has noted, two other New Hampshire regulated utilities -- Unitil and National Grid -- already use exactly such a process. PSNH's affiliates in Massachusetts and Connecticut also use RFP processes. The Commission can immediately require PSNH to take advantage of the competitive market in procuring supplemental power for its default energy services.

2. *An RFP Process Is Consistent With Statutory Restructuring Principles*

Requiring an RFP process would achieve the policy objectives set forth in applicable statutes by harnessing competitive market principles and allowing for the lowest available costs to New Hampshire ratepayers. Among the restructuring policy provisions and principles that would support a transparent, competitive RFP program are:

> (a) RSA 374-F:1, II: "**A transition to competitive markets for electricity is consistent with the directives of part II, article 83 of the New Hampshire constitution** which reads in part: 'Full and fair competition in the...industries is an inherent and essential right of the people and should be protected against all monopolies and compromises which tend to hinder or destroy it.'"
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> (b) RSA 374-F:3, III: **"Generation services** should be subject to **market competition . . . ."**
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> (c) RSA 374-F:3, V(c): **"Default service** should be provided through the **competitive market** and may be **administered by third parties . . . ."**[6]
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> (d) RSA 394-F:3, V(e): **"[A]s competitive markets develop, the commission may approve alternative means of providing . . . default services** which are designed to minimize customer risk, not unduly harm the development of competitive markets, and mitigate against price volatility without creating new deferred costs**, if the commission determines such means to be in the public interest."**

[6] Maine's RFP program for default service is one example of successful administration by a third party. There, the program is administered by the Maine Public Utilities Commission. Tr. (Day 2), p. 93 (testimony of Mr. Hachey). Permitting the Commission to administer an RFP program is not unprecedented under New Hampshire law. *See* RSA 369-B:3, IV(b)(14) ("The commission shall administer any competitive bid process for transition service or default service required by the settlement").

(e) RSA 374-F:3, XI: **"The goal of restructuring is** to create competitive markets that are expected **to produce lower prices for all customers** than would have been paid under the current regulatory system."

(Emphasis added.) The underlying legislative policy goal of transitioning to market competition so that the competitive markets determine the price of electricity can only be achieved by utilizing a competitive RFP process open to all market participants.

3. *An Open RFP Process Would Facilitate Statutory Policy by Ensuring Lowest Available Cost to Ratepayers*

Using an RFP process would facilitate the Legislature's goal of reducing costs to customers because, if properly structured as a transparent, competitive, open process, all generation options available in the competitive market are brought to bear, so that the lowest cost option available would always result. *See* Tr. (Day 1), pp. 225-27 (testimony of Sandi M. Hennequin, Vice President, NEPGA). Using a fair and transparent model "guarantees the most open and cost effective outcome to New Hampshire ratepayers." Direct Pre-filed Testimony of Sandi M. Hennequin, p. 8 (Sept. 15, 2010). Reliance on market principles in this way means that the lowest cost option would be made available to ratepayers. *See* Tr. (Day 1), p. 226 (testimony of Ms. Hennequin).[7] This contrasts with PSNH's unilateral decisions on long-term contracts, which are not competitive or

[7] There is ample information demonstrating that use of transparent, open procurement processes based on competitive market principles allows for the development of criteria, both price and non-price, that permit customers to obtain desired generation with the best fit to customers at the best possible terms. For example, NEPGA provided these three study references to PSNH in response to data requests in this docket: (1) Electric Power Supply Association, *State Competitive Procurement: Model Success Stories and Lessons Learned* (2008), *available at* http://www.epsa.org/forms/uploadFiles/B86D00000034.filename.EPSA_Competitive_Procurement_Case_Studies_4-0 8.pdf (last visited February 22, 2011); (2) National Association of Regulatory Utility Commissioners, *Competitive Procurement of Retail Electric Supply: Recent Trends in State Policies and Utility Practices* (July 2008), *available at* http://www.naruc.org/Publications/NARUC%20Competitive%20Procurement%20Final.pdf (last visited February 22, 2011); (3) Electric Power Supply Association, *Getting the Best Deal for Electric Utility Customers: A Concise Guidebook for the Design, Implementation and Monitoring of Competitive Power Supply Solicitations* (2004), *available at* http://www.epsa.org/documents/industry/merchantPower/Policy_Guide.pdf (last visited February 22, 2011).

open, as well as its reliance on aging generation assets that are unable to provide a lowest cost option to consumers.

B. RSA 369-B:3, IV(b)(1)(A) Does Not Preclude Use Of An RFP Process For Full Requirements Default Energy Service

For all of the reasons cited in Sections II. A. 2 and 3 above, an open, competitive, transparent RFP process would also be a more efficient, much less risky, and no more expensive way of providing Full Requirements Service for PSNH's entire default energy load rather than just for its supplemental power purchases.[8]

The only question is whether there is a legal bar against using such an RFP process not just for supplemental power purchases, but for full requirements default energy service. In its January 21, 2011 Letter, the Commission took note of RSA 369-B:3, IV(b)(1)(A), which provides in relevant part:

> From competition day until the completion of the sale of PSNH's ownership interest in fossil and hydro generation assets located in New Hampshire, PSNH shall supply all[9] . . . default service offered in its retail electric service territory from its generation assets and, if necessary, through supplemental power purchases *in a manner approved by the Commission* . . . .

RSA 369-B:3, IV(b)(1)(A) (emphasis added). While PSNH might argue that this section requires it to meet default energy service load requirements directly with power generated by its own fossil and hydro units, for as long as it owns them, this reading is unnecessarily restrictive and would be inconsistent with the legislative intent underlying this provision and the legislature's stated goal of reducing costs to ratepayers. In

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[8] Daniel Allegretti of Constellation Energy presented compelling results from a study conducted by the Northbridge Group, which showed that the difference in cost between a Managed Portfolio approach and a Full Requirements Service RFP approach is, on average, only 72 cents per megawatt-hour, while the reduction in risk to ratepayers provided substantial public benefit. Tr. (Day 2), pp. 110-112 (testimony of Mr. Allegretti). This evidence provides the Commission with a compelling basis for initiating an RFP approach to full requirements power supply procurement.

[9] The omitted exception for "renewable energy source" options under RSA 374-F:3, V(f) is not relevant to this analysis.

addition, RSA 374-F:3, V(e) gives the Commission broad authority to approve alternative means of providing default service if determined to be in the public interest. RSA 369-B:3 IV(b)(1)(A) should be read in tandem with other statutory provisions that allow the Commission broad authority to act in the public interest.

1. *Divestiture of Generating Assets, Not Continued Ownership, Is Preferred Statutory Route to Restructuring*

The relevant portion of RSA 369-B:3, IV(b)(1)(A) did not take its current form until 2003, seven years after the enactment of the Restructuring Policy Principles in RSA 374-F and three years after the enactment of RSA Chapter 369-B itself. RSA 374-F explicitly contemplated the divestiture of generating assets by New Hampshire regulated utilities.[10] RSA 369-B went further, specifying that divestiture was a goal of state restructuring policy: RSA 369-B:1, II provided that "the divestiture of electric generation by New Hampshire utilities will facilitate the competitive market in generation services."

The recasting of RSA 369-B:3, IV (b)(1)(A) in 2003 did not rescind, repeal or change the goal of divestiture; it simply provided that for so long as PSNH continued to own its fossil and hydro plants, they should be used in a manner approved by the Commission to provide default service to PSNH customers. The assumption, which is unstated in RSA 369-B:3, IV(b)(1)(A) but clearly suggested in RSA 369-B:3-a,[11] was

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[10] For example, see:
- RSA 374-F:3, III: "Generation services should be subject to market competition and minimal economic regulation," although "distribution service companies should not be absolutely precluded from owning small scale distributed generation resources as part of a strategy for minimizing transmission and distribution costs."
- RSA 374-F: V(c): "Default service should be procured through the competitive market . . . ," which is inconsistent with using owned generation assets to provide it.
- RSA 374-F:3, XII(c): "Utilities . . . have an obligation to take all reasonable measures to mitigate stranded costs," including "[a] reasonable amount of retirement, sale or write-off of uneconomic or surplus assets . . . ."

[11] RSA 369-B:3-a, which was enacted in 2003 at the same time as RSA 369-B:3, IV(b)(1)(A), provides in relevant part: ": . . subsequent to April 30, 2006, PSNH may divest its generation assets if the commission finds that it is in the economic interest of retail customers of PSNH to do so, and it provides for the cost recovery of such divestitures . . . ." (Emphsasis added.)

that PSNH's coal and hydro units would produce power at below-market costs, and legislators wanted that cheaper power going to PSNH customers rather than being sold at a profit for PSNH shareholders. The legislative history underlying those provisions also suggests that that this was the goal. *See* Exh. A, 2003 Senate Hearing, p. 2 (statement of Senator Robert Clegg, Jr.) (stating that "we need to do what's best for New Hampshire consumers especially today, and that is to maintain the generation systems for another period of time which guarantees that we have lower rates than anybody in New England").

At the same time, the legislature adopted a standard for the Commission to determine whether and when those generation assets should be divested, *i.e.*, when the Commission finds that sale of the assets to be in the economic interest of retail customers. *See* RSA 369-B:3-a. As explained by Senator Clegg: "if we find that it's not in the consumer's best interest to maintain the power plants, that we have PSNH divest them." Exh. A, 2003 Senate Hearing, p. 2 (statement of Senator Clegg); *see also id.*, p. 13 (statement of Mr. Long, PSNH) ("PSNH should retain generation so long as it is economic for customers.").

Thus, divestiture is still the preferred method for achieving restructuring, as it had been since 1996, and RSA 369-B:3, IV(b)(1)(A) should not be read to prevent PSNH customers from having access to lower-cost energy service once PSNH's fossil and hydro units no longer provide generation service at below-market costs per unit of sales.

2. *An RFP Process May Be Used for Full Requirements Default Service Even Before Divestiture*

Second, even prior to divestiture, consistent with its original intent, RSA 369-B:3, IV(b)(1)(A) should not be read to require that PSNH default service must be provided directly by its owned generating units, but rather that its owned generation resources

should be used to provide energy service in a way that results in least cost to its default service customers. If that means bidding all of its generation into the daily market to take advantage of capacity and ancillary service value and purchasing all of its energy requirements through an RFP process similar to Unitil and National Grid, then the Commission has the authority under the statute to order PSNH to "supply all . . . default service offered in its retail electric service territory from its generation assets ... *in a manner approved by the Commission.*" RSA 369-B:3, IV(b)(1)(A) (emphasis added). That manner may be indirect, *i.e.* bidding PSNH's generating units into the day-ahead market and using the proceeds to acquire as much energy as required for default service requirements, and no more. The critical consideration should be what is in the economic interest of PSNH's retail customers. RSA 369-B:3-a. In light of Mr. Traum's testimony that the all-in 2011 cost to produce default energy from PSNH's owned units is forecast to be roughly $100 million more than the price for power that PSNH could acquire on the open market, the Commission has ample basis to require an RFP process for full requirements default service. *See* Tr. (Day 2), p. 22 (testimony of Mr. Traum) (referencing Trial Exhibit 8 in DE 10-160).

C. Other Alternatives that Might Reduce Default Energy Rates

NEPGA understands that PSNH's relatively high default energy service rate, resulting from above-market supplemental power purchases and a shrinking default service customer base over which to spread both fixed and variable generation costs, is currently imposing a hardship on PSNH's remaining default service customers. Many of these customers are residential or small commercial customers who do not have the same ready market offerings for competitive energy service that are available to larger C & I customers. NEPGA would support any reasonable alternative proposal made by the

OCA or other intervenors[12] that would tend to reduce energy service rates without shifting energy service costs to distribution customers through a non-bypassable charge. However, NEPGA will leave the briefing of those alternatives to parties that have proposed them and have given them more thorough consideration.

III. The Commission Should Require PSNH to Divest Its Generation Assets

Finally, the Commission has asked the parties to address "whether RSA 369-B:3-a allows the Commission to require PSNH to divest its generation assets and, if so, what particular procedures may be appropriate for such a proceeding." January 21, 2011 Letter, p. 2. It is particularly appropriate to address this issue here, as the entire proceeding stems from PSNH's inability to retain sufficient, non-migrating default service customers to support the costs of providing default energy service at reasonable rates. *See* RSA 374:2.

A. Divestiture of Uneconomic Assets Is the Statutory Solution to the Problem PSNH Poses

PSNH suggests that the burden imposed on its remaining default service customers by its high (and getting higher) default service rate is "an unintended result of restructuring." Direct Pre-Filed Testimony of Robert A. Baumann, pp. 5 and 7 (July 20, 2010). However, migration is obviously not the problem, because migration was contemplated and encouraged by the Legislature, as PSNH's witnesses have acknowledged. *See* Tr. (Day 1), p. 143 (testimony of Messrs. Baumann and Hall). The problem is deeper, and it is of PSNH's own making.

First, because PSNH has so far chosen not to divest its fossil and hydro generation assets, those assets remain subject to cost-of-service ratemaking and PSNH is accordingly

[12] Some of the alternatives that have been proposed include "stay-out" provisions, separate default service pricing based on incremental costs for customers returning to PSNH's default energy service and a purchase of receivables (POR) program.

unable to offer larger customers the flexible and competitively priced energy that they can obtain from competitive energy suppliers. The result is that these customers have migrated in droves. Second, PSNH has made a series of ill-advised above-market supplemental power purchases over the past few years, resulting in further inflation of default service costs, which has led even more default service customers to migrate. As a result, its costs to generate energy, which are increasing, are spread over a steadily shrinking default service customer base which means that PSNH can no longer recover the fixed and variable costs of generating power from its own plants at reasonable market rates.

Because PSNH is unable to cover the costs of operating its own generation assets, those generation resources have by definition become "uneconomic assets," and may qualify for recovery of stranded costs if all applicable statutory criteria are met. *See* RSA 374-F:2, IV. Rather than address the issue of uneconomic assets head on, PSNH seeks a band-aid solution for the symptom of the problem rather than its cause. It would impose a non-bypassable charge on the customers of other energy service providers who have sought out lower-cost alternatives, as the restructuring statutes have encouraged those customers to do, rather than divesting its uneconomic assets as the restructuring statutes suggest it should do.

The statutory prescription for dealing with uneconomic assets is not to subsidize their continued operation through non-bypassable charges, but to require divestiture of those assets. This avoids not only imposition of unreasonable rates, but also unnecessary stranded cost recovery. Under RSA 374-F:3, XII(c)(4), utilities are required to "take all reasonable measures to mitigate stranded costs," and such measures include a "reasonable amount of *retirement, sale or write-off of uneconomic or surplus assets . . . .*" (emphasis

added.) Divestiture of PSNH's uneconomic generation assets is the appropriate statutory remedy for the problem presented in this docket.

PSNH counters that the problem is a temporary one, due to "current unprecedented low natural gas prices setting the New England market price and the world-wide economic decline." Direct Pre-Filed Testimony of Robert A. Baumann, p.8 (July 20, 2010). The implication is that divestiture would not be appropriate if the problem is only a short-term one.

However, the weight of informed opinion and certainly the weight of testimony in this docket is that natural gas prices are not likely to rise dramatically in the foreseeable future. For example, Daniel Allegretti of Constellation Energy testified that "we're likely to see modest increases in the price of natural gas going forward, but that the substantial discovery of reserves associated with the Barnett and Marcellus shale have generally led to a consensus view of within the industry, or at least a prevailing view, that energy prices in the coming decades are likely to remain relatively flat to where they are today." Tr. (Day 2), pp. 103-104 (testimony of Mr. Allegretti); *see also* Tr. (Day 2), p. 45 (testimony of Kenneth Traum) ("[T]he energy market has changed, because of the Marcellus shale gas and the great availability of natural gas to the Northeast, and what the projections are for natural gas prices in the longer term right now . . . ."); Tr. (Day 2), pp. 56-57 (testimony of Mr. Hachey) (disagreeing with proposition that this is just a "current short-term issue" and stating that "there's been some fundamental changes in the natural gas market, which, of course, drives electric prices in New England. And, that change . . . relates to the unconventional gases, whether it be shale gas, coalbed methane, other finds and other methodologies of extracting that gas. I think that's led to, in the view of many, an increased supply in this country and in Canada").

Furthermore, NEPGA believes it is more likely that any increases in the price of natural gas over the foreseeable future will be outstripped by the projected increases in PSNH's default service rates due to Merrimack Station Scrubber costs. In response to questioning by Commissioner Below, PSNH witnesses Hall and Baumann testified that the impact of adding $450 million in Merrimack Station Scrubber costs to default service rates is expected to be 1.1¢/kwh in the first 12 months, and that PSNH default service costs are expected to rise from 8.68¢/kwh in 2011 to 10.12¢/kwh in 2015. See Tr. (Day 1), pp. 206-208 (testimony of Messrs. Baumann and Hall). Thus, if anything, the delta between market electric rates and PSNH's default service costs is likely to get wider, not narrower. The issues raised in this docket are not short-term problems.

B. The Commission's Existing Authorities Allow It To Require Divestiture

The Commission is authorized to require divestiture, either directly or indirectly, under its plenary authority over public utilities, as well as under the express authority granted in RSA 369-B:3-a, when generation assets have become uneconomic and adversely impact customer rates, as they have here. As discussed above, there is ample evidence in this and other open dockets that the costs associated with continued operation of certain PSNH generation assets are negatively impacting customer rates, to the point that PSNH now proposes to impose these costs upon ratepayers who have chosen not to use PSNH default service. The evidence presented to date in this docket is sufficient for the Commission to make the findings necessary either to require timely divestiture or to establish conditions regarding future rate approvals and stranded cost recoveries that would provide PSNH with an economic incentive to divest.

1. *The Commission Has Plenary Authority to Require Divestiture*

The Legislature created the Commission as a state tribunal with important judicial and administrative duties, endowing it with plenary administrative and supervisory powers limited only by the delegation contained in express enactments and their fairly implied inferences. *See Petition of Boston & Maine Railroad*, 82 N.H. 116, 116-17 (1925); *State v. NH Gas & Electric Co.*, 86 N.H. 16, 29 (1932). In particular, the Commission is charged with "the general supervision of all public utilities *and the plants owned, operated or controlled by the same* so far as necessary to carry into effect the provisions of this title." RSA 374:3 (emphasis added). "This title" is Title 34, "Public Utilities," which includes the restructuring statutes, RSA chapters 374-F and 369-B.

The Legislature has also expressly addressed the need for divestiture as a key component of rate reduction, not only for energy service customers, but for T&D customers as well:

> The divestiture of electric generation by New Hampshire electric utilities will facilitate the competitive market in generation service. Further the proceeds of generation divestitures may decrease rates for the customers of transmission and distribution utilities.

RSA 369-B:1, II. A reasonable inference can be made that the Commission's plenary authority to issue orders in matters before it under RSA 363:17-b includes the ability to issue an order addressing divestiture. Such an order is appropriate in this docket, where PSNH's own testimony confirms that its energy service customer base is no longer large enough to support the fixed and variable costs of providing default energy service at rates that are within the zone of reasonableness. RSA 374:2 (rates must be just and reasonable); s*ee Petition of Public Service Company of New Hampshire*, 130 N.H. 265,

274 (1988) (describing "just and reasonable" rate as one that, after consideration of relevant competing interests, falls within the "zone of reasonableness").

Finally, RSA 374:28 confers on the Commission the discretion to authorize any public utility to "discontinue . . . any part of its service" or "to discontinue . . . and remove the equipment" when the public good does not require continuation of the service. It is reasonable to conclude that the Commission is already authorized to review whether removal or discontinuance of generation assets and related services, regardless of whether the utility seeks it, would advance the public good. Because public utilities are always entitled to transfer their generation assets, subject to Commission findings and approval, *see* RSA 374:30, a reasonable reading of RSA 374:28 is that the Commission has independent and plenary authority to pursue divestiture as a "discontinuance" solution to a utility's inability to support uneconomic assets. *Cf. Appeal of Legislative Utility Consumers' Council*, 120 N.H. 173, 175 (1980) ("[A] public utility is not bound to supply consumer energy needs beyond its financial capacity to do so.").

2. *The Commission Has Specific Authority to Require Divestiture under RSA 369-B:3a*

The Commission has noted its authority under RSA 369-B:3-a regarding divestiture of PSNH generation assets. This statute does two things. First, it prohibits the sale of PSNH fossil and hydro assets before April 30, 2006. Second, after April 30, 2006 and notwithstanding PSNH's independent right to transfer assets under RSA 374:30 (subject to Commission approval), the Commission can allow for divestiture if it "finds that it is in the economic interest of retail customers of PSNH to do so, and provides for the cost recovery of such divestiture." RSA 369-B:3-a.

The reference to RSA 374:30 in RSA 369-B:3-a is critical because RSA 374:30 gives the utility the discretion to decide whether divestiture is appropriate or necessary,

subject to Commission approval based on findings of public good. *See Appeal of Legislative Utility Consumers' Council, supra* at 174 ("RSA 374:30 permits a public utility to transfer any part of its franchise, works or system when the commission finds that it will be for the public good."). Under that statute, the reasons for divesting are advanced by the utility in its request for Commission approval, so that the Commission's role is driven by what is proposed by the utility. *Id.* ("What is for the public good is not easy to define because it is impossible to foresee all the possible reasons that could be advanced for or against divestiture.").

In contrast to RSA 374:30, under RSA 369-B:3-a, the Commission is charged with making a particular finding at the point in time when divestiture becomes economically advantageous to retail customers. By establishing a standard under which the Commission is to decide whether divestiture was in the economic interest of retail customers, the legislature granted the Commission discretion to decide when divestiture of PSNH generating assets should occur. The legislative history of SB 170 supports this view. *See, e.g.*, Exh. A, 2003 Senate Hearing, p. 2 (statement of Senator Clegg) ("if we find that it's not in the consumer's best interest to maintain the power plants, that we have PSNH divest them"); *see also id.*, p.15 (statement of Mr. Long, PSNH) ("I think the bill, as written, works quite well. It puts matters in the hands of an overseeing body, the Public Utilities Commission.") and p.17 (statement of Mr. Long, PSNH) ("You don't need to look at it every two years because this sets the standard of economics for customers and I think it is a good standard.").

The statute is crafted so that if the Commission makes its finding after April 30, 2006, then PSNH is not prohibited from divesting and the Commission can require it. This is in contrast to the pre-2006 prohibition against divestiture. When read in

conjunction with the RSA 374-F:3, XII(c) requirement for mitigation of stranded costs, RSA 369-B:3-a suggests that PSNH can be required to divest some or all of its generation assets, either as a means to address the economic interests of retail customers (RSA 369-B:3-a), or as a means to mitigate stranded costs that would otherwise be imposed upon ratepayers (RSA 374-F:3, XII(c)(4)).

That the Commission's actions under RSA 369-B:3-a may include orders or other steps towards accomplishing divestiture is supported by the accompanying requirement that the Commission provide for cost recovery of such divestiture. Including such a provision only makes sense where the Commission can require that divestiture proceedings be initiated, as opposed to waiting for a PSNH proposal to do so. For example, under RSA 374:30, which allows utilities to transfer generation assets, among other things, the Commission is not directed to provide for cost recovery upon approval of a utility's decision to transfer those assets. There would be no reason to include an express requirement for cost recovery in RSA 369-B:3-a, given existing statutory provisions for cost recovery, unless the Commission were being granted accompanying authority to require divestiture. *See* Exh. A, 2003 Senate Hearing, p.2 (statement of Senator Clegg) ("I'm just restating that they have the ability to get their stranded cost but the big part of that is that if we find that it's not in the consumer's best interest to maintain the power plants, that we have PSNH divest them.").

Although one might interpret the statutory language as "permissive" because it states that "PSNH may divest its generation assets," this permissive language is only relevant to the timing of divestiture, *i.e.*, the prohibition against divestiture prior to April 30, 2006, and not to the Commission's authority to require divestiture after that date. Allowing PSNH to dictate whether or when certain uneconomic generation assets are

divested would make no sense in the context of the overall statutory scheme, as it would allow PSNH to retain uneconomic generation assets indefinitely. *See, e.g.,* RSA 369-B:1, II (enumerating some benefits of generation asset divestiture by New Hampshire's electric utilities); RSA 374:30 (allowing utilities to transfer works and system); RSA 374-F:3, XII(c)(4) (requiring reasonable amount of sale, retirement or write-off of uneconomic assets). Thus, this permissive language was likely chosen to address the temporary moratorium on divestiture before 2006 rather than to shift discretion from the Commission to PSNH. Even though the Commission has approval authority in all divestiture situations, the proactive language of RSA 369-B:3-a provides ample authority for the Commission to make the necessary findings and to initiate proceedings to accomplish divestiture, as described further in Section 3 below.

In addition, there is nothing in the statute to indicate that PSNH can prevent the Commission from addressing divestiture, especially where the Commission has adequate evidence to find that divestiture is in the economic interest of retail customers. To the extent that PSNH seeks to avoid such action, the Legislature has allowed for PSNH to seek modification or retirement as alternative measures or to seek recovery of qualifying and mitigated stranded costs. *See* RSA 369-B:3-a.

3. *Procedures Appropriate for Divestiture Proceedings*

The Commission has asked what procedures may be appropriate for a proceeding to require divestiture of certain PSNH generation assets. *See* January 21, 2011 Letter, p. 2. In light of the statutory authorities described above, there is a range of procedural options available to the Commission, depending upon the Commission's determinations as to its legal authority to proceed in a given way.

The first option would be a one-step process by which the Commission would make a finding in this docket that divestiture is in the economic interest of retail customers under RSA 369-B:3-a and immediately proceed to order divestiture based upon the data presented in this and other pending dockets before the Commission, using its plenary and specific authority.

The second option would be a two-step process by which the Commission would take no further action in this docket (other than to deny PSNH's request for a non-bypassable charge) and either open a new docket or expand another pending docket, such as the PSNH Lease Cost Integrated Resource Plan Docket (DE 10-261), to include exploration of divestiture. In either case, the Commission could then proceed to make the requisite RSA 369-B:3-a finding and order PSNH to divest its generation assets.

The third option would be a three-step process in which the Commission would initiate an investigation into the economic costs associated with divestiture versus power purchase on the open market. The Commission could then proceed to the RSA 369-B:3-a determination and, if it is found to be in the economic interest of retail customers, put PSNH on notice that no rate increases would be approved until divestiture is accomplished. Alternatively, the Commission could simply deny any new rate increases until divestiture is completed.

Even if the Commission is uncertain of its existing authority to require divestiture of PSNH generation resources, it certainly has the authority to decide, under RSA 369-B:3-a, whether divestiture of PSNH generation assets would be "in the economic interest of retail customers." This finding could be made in this docket, in the pending docket on PSNH's Least Cost Integrated Resource Plan (Docket DE 10-261), or in a new docket opened for the purpose of investigating economic cost data, and need not

be initiated by PSNH. In light of the substantial adverse consequences to ratepayers of PSNH continuing to own and operate generation assets that can no longer be supported at reasonable rates, NEPGA urges the Commission to proceed expeditiously to address this issue.

To the extent the Commission does not issue a direct order regarding divestiture under RSA 369-B:3-a, it could still indirectly require that divestiture be implemented. For example, following an RSA 369-B:3-a finding on the impact to the economic interests of retail customers, the Commission could require divestiture of remaining generation assets as a condition of further rate approvals. *See* RSA 378:40. Also, because stranded costs include only costs and investments for which recovery can be reasonably expected, *see* RSA 374-F:2, IV, failure to divest could provide the basis for limiting stranded costs incurred after a time period established by the Commission for initiation and completion of divestiture.

In that regard, the Commission could require that PSNH, as a condition for cost recovery, submit a divestiture implementation plan for approval by the Commission. Failure to do so could be found to violate the statutory requirement for mitigation of stranded costs. *See* RSA 374-F:3, XII(c)(4) (utilities are obligated to mitigate stranded costs, including retirement, sale or write-off of uneconomic assets). Such findings would put PSNH on notice that continued operation of uneconomic assets would impact future cost recovery while fulfilling the RSA 369-B:3-a requirement to provide for cost recovery, as the Commission would define the criteria and timetables for such cost recovery.

Because RSA 369-B:3-a provides for cost recovery only for divestiture, retirement or modification, and not for continued operations, to the extent that PSNH

chooses to continue to operate uneconomic generation assets after the Commission makes an RSA 369-B:3-a finding, cost recovery and rate approval for the fixed and variable costs associated with continued generation operations would be subject to disapproval by the Commission. Providing such an economic incentive for divestiture would be consistent with the statutory requirements that stranded costs be mitigated by the utility and that rates be just and reasonable.

IV. Closing Statement

PSNH's proposed non-bypassable charge is not permissible under New Hampshire law. Even if it were permissible, it would address only the symptom (customer migration) and not the underlying cause of the problem (uneconomic generation assets). The problem posed by PSNH should be addressed by the remedy contemplated in the restructuring statutes -- divestiture of PSNH's remaining generation assets. PSNH's proposed non-bypassable charge on T&D customers would be a giant step backward in New Hampshire's restructuring efforts. It is time to move forward and complete the restructuring mandated by the General Court fifteen years ago, in 1996.

PSNH has sought to frame the issue in this docket as a problem of fairness to small residential ratepayers, as if PSNH itself is not responsible for the high costs of its default energy service. The cost of service to PSNH's remaining default energy customers is too high, but the solution is not to impose energy-related charges on PSNH's T&D customers, thereby subsidizing the continued inefficient operation of uneconomic assets. The solution is to reduce PSNH's default energy service costs through the divestiture of uneconomic generation assets and the use of a competitive, transparent RFP bidding process to supply PSNH's remaining generation resource needs.

The Commission should act to carry out the legislative goal of reducing costs for all consumers of electricity and harnessing the power of competitive markets by denying PSNH's request for a non-bypassable charge, ordering PSNH to procure its energy service needs through a transparent RFP bidding process, and initiating divestiture proceedings.

Respectfully submitted,

NEW ENGLAND POWER GENERATORS ASSOCIATION, INC.

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Dated: February 25, 2011

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Post-Hearing Brief and Closing Statement of New England Power Generators' Association, Inc. and attached Exhibit A have on this 25th day of February, 2011 been served by email to each person on the Commission's service list for Docket DE 10-160, including the Office of Consumer Advocate.

By: Maureen D. Smith

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