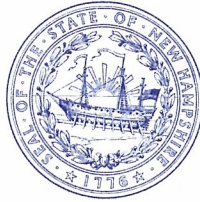


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February 25, 2011

Debra Howland  
Executive Director & Secretary  
New Hampshire Public Utilities Commission  
21 S. Fruit Street, Suite 10  
Concord, New Hampshire 03301-7319



**RE: DE 11-014 NU and NSTAR Merger Review**

Dear Ms. Howland:

On October 18, 2010, Northeast Utilities ("NU") and NSTAR (together, the "Companies") announced a merger, with the intent of creating "one of the nation's largest utilities." Press Release, *Northeast Utilities and NSTAR Agree to \$17.5 Billion Merger of Equals, Forming New England's Premier Utility Company* (Oct. 18, 2010) ("Merger Announcement"). The Companies assert that the merger combines NSTAR's "strong cash flows" with NU's "attractive regulated investment opportunities." *Id.* NU is the parent holding company of four utility subsidiaries, including Public Service of New Hampshire ("PSNH"), the largest electric utility in New Hampshire, and NSTAR is the parent holding company of NSTAR Electric Company and NSTAR Gas Company. Letter from Robert A. Bersak to Debra M. Howland, DE 11-014 (Feb. 1, 2011) ("PSNH Merger Review Letter"). In effect, the NU and NSTAR merger will result in a "strategic business combination" which is intended "to be a merger of equals" and "will create a larger company." Proxy Statement to Shareholders of NU and NSTAR (Jan. 6, 2011 Filing), filed with PSNH Merger Review Letter, on Disk 1b.

Although NU and NSTAR chose to structure the merger as an acquisition of one holding company, NSTAR, by subsidiaries of the other, NU, the impact of the merger, particularly on the operations of NU and its existing subsidiaries, is akin to a merger of NU and NSTAR at the holding company level. The merger combines the assets of NU and NSTAR, and in consideration of this combination, results in NSTAR shareholders owning and controlling 1.312 million NU shares. *See* Merger Announcement. Approximately 44% of NU's total value and control is being acquired by NSTAR

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shareholders. *Id.* As part of the merger, NSTAR's CEO will become the President and CEO of NU. *Id.* Also, post-merger decision making for NU will be shared 50-50 with NSTAR, as the Board of Trustees of NU will be made up of seven members nominated by NSTAR and seven members nominated by NU. *Id.*; *see also* SEC Form 8K (Oct. 18, 2010), filed with PSNH Merger Review Filing, on Disk 1a. As a result, control over NU is being significantly diluted and shared with NSTAR owners, both via the transfer of NU shares, by way of substantial changes to NU's Board, and with the appointment of NSTAR's chief executive as the new head of NU.<sup>1</sup>

In a letter dated January 18, 2011, the New Hampshire Public Utilities Commission ("Commission") commenced an investigation of the proposed merger and sought information from NU regarding the extent of the Commission's authority over the proposed merger, under the following New Hampshire statutory provisions: RSA 369:8; RSA 369-B:3, IV, (b)(4); RSA 374:30; and RSA 374:33. At a hearing on February 7, 2011, the Commission received a presentation from NU, and then invited other stakeholders, such as the New Hampshire Office of the Consumer Advocate (OCA), to file comments on jurisdiction.

In its response, dated February 1, 2011, PSNH and NU contended that New Hampshire law does not require Commission approval of the merger. PSNH and NU asserted that the Commission regulates "the acquisition, sale and merger of public utilities and public utility holding companies doing business in New Hampshire" and argued that the merger of NU and NSTAR "will not combine holding companies, but rather, will combine NSTAR and two special purpose *subsidiaries* of NU created to effectuate the proposed merger." PSNH Merger Review Letter, p. 3. The OCA views the proposed merger structure as a legal fiction, and PSNH and NU's position on the Commission's authority as one of form over function.

Generally, the Commission "was established to provide comprehensive provisions for the establishment and control of public utilities in the State[.]" has "broad statutory powers[.]" *Appeal of Verizon New England*, 153 N.H. 50, 64 (2005). The Commission "must perform duties statutorily created[.]" and it must "exercise those powers inherent within its broad grant of power." *Id.* Therefore, the Commission has statutory authority to review and approve the merger under RSA 374:33, and in this case more specifically also has jurisdiction pursuant to RSA 369-B:3, IV (b)(4), subparagraphs (A) and (B).

RSA 374:33 provides the Commission with jurisdiction over the merger. RSA 374:33 states:

No public utility or public utility holding company defined in section 2(a)(7)(A) of the Public Utility Holding Company Act of 1935<sup>2</sup> shall *directly or indirectly* acquire

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<sup>1</sup> The Merger Agreement further changes NU's management, providing that the resulting company will have dual headquarters – one in Hartford, Connecticut (where NU is located) and one in Boston, Massachusetts (where NSTAR is currently located). *See, e.g.,* Northeast Utilities, Form 8-K Filing (Oct. 18, 2010) p. 2, section 1.01. filed with PSNH Merger Review Filing, on Disk 1a.

<sup>2</sup>(7) "Holding company" means—

more than 10 percent, or more than the ownership level which triggers reporting requirements under 15 U.S.C., section 78-P, whichever is less, of the stocks or bonds of any other public utility or public utility holding company incorporated in or doing business in this state, unless the commission finds that such acquisition is lawful, proper and in the public interest...

RSA 374:33 (emphasis added). The proposed merger involves the acquisition of approximately 43.7% of the stock of a public utility holding company doing business in New Hampshire (*i.e.*, NU) by the stockholders of a public utility holding company (*i.e.*, NSTAR). Northeast Utilities, Form 8-K (Oct. 18, 2010), section 2.19, filed with PSNH Merger Review Filing, on Disk 1a ("NSTAR is a public utility holding company as defined by PUHCA 2005 and applicable FERC orders"). Through its stockholders, NSTAR acquires the indirect ownership contemplated by RSA 374:33. Thus, the Commission may properly exercise its jurisdiction under RSA 374:33.

In addition to RSA 374:33, the Commission has a specific jurisdictional mandate under RSA 369-B:3, IV (b) (4), subparagraphs (A) and (B), to review and approve the proposed merger of NU and NSTAR. This statute, enacted as part of the settlement of litigation over electric restructuring, states:

In the event that PSNH or its parent company is acquired or otherwise sold or merged:

(A) Such merger, acquisition, or sale shall be subject to the jurisdiction of the commission under RSA 369, RSA 374, RSA 378 or other relevant provisions of law, and the merger, acquisition, or sale shall be approved only if it is shown to be in the public interest;

(B) In recognition of the extraordinary benefits provided to PSNH from rate reduction financing, should PSNH or its parent company be acquired or otherwise sold or merged, such merger, acquisition or sale shall be subject to the jurisdiction of the commission under the standard set forth in the original proposed settlement. The commission may approve such a merger if such approval results in the receipt by PSNH customers of a just and reasonable amount of the cost savings that result from such merger, acquisition or sale.

RSA 369-B:3, IV (b) (4), subparagraphs (A) and (B). As proposed, a significant portion of NU ownership and control is being indirectly acquired by NSTAR. Also, the plain

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(A) any company which directly or indirectly owns, controls, or holds with power to vote, 10 per centum or more of the outstanding voting securities of a public-utility company or of a company which is a holding company by virtue of this clause or clause (B) of this paragraph, unless the Commission, as hereinafter provided, by order declares such company not to be a holding company; and

(B) any person which the Commission determines, after notice and opportunity for hearing, directly or indirectly to exercise (either alone or pursuant to an arrangement or understanding with one or more other persons) such a controlling influence over the management or policies of any public-utility or holding company as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that such person be subject to the obligations, duties, and liabilities imposed in this chapter upon holding companies.

language of this statute requires the Commission to include in its determinations whether the proposed acquisition will result in costs savings and the sharing of those savings with its customers. The Legislature viewed the benefits to PSNH and NU of rate reduction financing as “extraordinary” and conditioned their receipt by PSNH on continued jurisdiction of the Commission over acquisition or merger of its parent company, NU, as well as the sharing of any economies resulting from an acquisition or merger of NU. The words of this statutory mandate are plain and the meaning is clear: The Commission must exercise jurisdiction over the NU/NSTAR merger.

The provisions of RSA 369-B:3, IV (b) (4) cited above have no expiration or time limit.<sup>3</sup> Moreover, the Commission’s order resolving the financing issues related to stranded costs resulting from the restructuring of PSNH, following the enactment of this statute, specifically included this requirement as a condition of financing. *Re PSNH Proposed Restructuring Settlement*, 85 NH PUC 567, 601 (2000). That order also did not put a time limit on the condition. As that order notes, PSNH specifically “committed in writing” to fulfill all of these conditions. *Re PSNH Proposed Restructuring Settlement*, 85 NH PUC at 592.

The other two statutes referenced in the Commission’s January 18 letter, RSA 374:30 and RSA 369:8, do not seem to apply to the circumstances of the proposed merger. The OCA agrees with PSNH and NU, that RSA 374:30 is inapplicable to the transaction because the proposed merger will not change the ownership or operation of PSNH’s franchise, works or system. PSNH Merger Review Letter, pp. 5-6. The OCA also agrees with PSNH that the Commission’s authority under RSA 369:8, II (b)(1) is “derivative,” *i.e.*, it depends on whether the transaction is subject to its approval under another statute. PSNH Merger Review Letter, p. 4. Since, as noted above, the OCA believes that both RSA 374:33 and RSA 369-B:3 provide a basis for the Commission to assert jurisdiction over the proposed merger, the next consideration is whether the Commission’s review pursuant to RSA 374:33 and RSA 369-B:3 is constrained to the type of review contemplated by RSA 369:8. The OCA believes that it is not.

The plain language of RSA 369:8, II (b)(1) supports the OCA’s position that RSA 369:8, II (b)(1) – and the expedited process afforded by it – is not applicable to the proposed merger. RSA 369:8, II(b)(1) states as follows:

To the extent that the approval of the commission is required by any other statute for any corporate *merger or acquisition involving parent companies of a public utility* whose rates, terms, and conditions of service are *regulated by the commission*, the approval of the commission shall not be required if the public utility files with the commission a detailed written representation no less than 60 days prior to the anticipated completion of the transaction that the transaction will

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<sup>3</sup> Although the August 1999 Agreement to Settle PSNH Restructuring did contain a section specifically authorizing PUC review of a merger and that section contained a five year time limit, that agreement predated the enactment of RSA 369-B:3 and the issuance of the financing order referred to above and that time limit was not brought forward and is not included in either the law or the order. Moreover, a provision in a settlement agreement cannot be elevated over, or conflict with, the law or a Commission order.

not have an adverse effect on rates, terms, service, or operation of the public utility within the state.

RSA 369:8, II(b)(1) (emphasis added). The proposed merger does not involve parent companies of a utility regulated by the Commission. The proposed merger involves one parent company of a New Hampshire utility and another parent company of one or more utilities regulated outside of New Hampshire. Thus, the Commission's review pursuant to RSA 374:33 and RSA 369-B:3, IV(b) (4) should not be constrained or shaped by the requirements of RSA 369:8, II (b)(1).

In the alternative, should the Commission determine that RSA 369:8, II (b)(1) applies to its review of the proposed transaction between NU and NSTAR, the OCA submits that this statute is more procedural than substantive and the time frames provided under this statute have been utilized in a variety of different ways in similar proceedings before the Commission. Consequently, the OCA respectfully suggests that the Commission look to its other RSA 369:8, II (b) (1) proceedings for direction on how to review this transaction from a procedural perspective.

Also, to the extent that the Commission decides that its review should be limited by RSA 369:8, II (b)(1), the OCA notes that there were several questions posed by the Commission during the informational meeting held in this docket on February 7, 2011, for which neither NU nor NSTAR had definitive answers. For example, in response to the Chairman's questions about integration of the customer service operations, Mr. McHale qualified his response several times with statements such as, "But I'll be careful to say -- not to go much further, because we really haven't studied this. And that will be something that we're looking at. Now, sort of the local presence of those may not change, but the systems and the technology and the like, that's something that we'll be studying as well[.]" Transcript of Information Session (Transcript), p. 17, lines 16-18; and "But that will be something we study over the coming months and quarters, and maybe even longer, about how to really optimize customer care for our customers throughout New England." Transcript, p. 18, lines 3-7. In response to the Chairman's question the about Companies' future plans, Mr. McHale qualified his testimony, "I'd go even one step further in saying there are no plans quite yet for anything. I mean, that's -- I'm not trying to be too flip about that. But we're at the very forefront on it." Transcript, p. 18, lines 12-16. Consequently, the OCA urges that the Commission, at the very least, require NU and NSTAR to provide answers to these questions before the Commission makes any determination pursuant to RSA 369:8, II (b)(1). Further, the Commission should explore with the parties ways to make enforceable the many representations of NU and NSTAR of the various benefits and lack of harm to ratepayers that they expect will occur following the transaction.

In conclusion, NU and NSTAR ask the Commission to elevate the legal form of the merger -- one holding company merging into subsidiaries of another holding company -- over the factual substance of the proposed transaction, to attempt to avoid Commission jurisdiction (and spare NSTAR shareholders from certain tax consequences). The merger, in the Companies' own words, however, "brings together two companies[, NU and

NSTAR,] with complementary distribution and transmission assets, reputations for operating excellence and talented employees[,]” “creates a larger company with total assets of approximately \$25 billion ... 3,000,000 electric distribution customers ... 500,000 gas distribution customers ... 4,500 miles of electric transmission, 72,000 miles of electric distribution and 6,300 miles of gas distribution ... [which upon] completion of the merger ... will continue [to operate] under the name Northeast Utilities.” Proxy Statement to Shareholders of NU and NTAR (Jan. 6, 2011 Filing), filed with PSNH Merger Review Letter, on Disk 1b. The proposed transaction is none other than “a merger of equals” that will result in the sharing of control over NU, parent to New Hampshire’s largest electric distribution company. Id. Considering these and other factual representations of the Companies, the Commission’s authority to review and approve the proposed merger is clear, is consistent with RSA 374:33 and RSA 369-B:3, IV (b)(4), and is required in order to protect PSNH’s customers.

Thank you for the opportunity to comment, on behalf of the OCA, and for consideration of the OCA’s comments.

Respectfully,



Rorie E.P. Hollenberg  
Staff Attorney

cc: electronically to service list