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A Northeast Utilities Company

Robert A. Bersak
Assistant Secretary and
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March 1, 2011

Debra A. Howland
Executive Director and Secretary
New Hampshire Public Utilities Commission
21 S. Fruit Street, Suite 10
Concord, New Hampshire 03301-2429

Re: *Northeast Utilities-NSTAR Merger Review*
Docket No. DE 11-014



Dear Secretary Howland:

On February 25, 2011, the Office of Consumer Advocate (“OCA”) and the New England Power Generators Association, Inc. (“NEPGA”) filed comments with the Commission on the pending transaction in which Northeast Utilities (“NU”), parent holding company of Public Service Company of New Hampshire (“PSNH”, and together with NU, the “Companies”), will acquire NSTAR. OCA and NEPGA urge the Commission to assert jurisdiction over the transaction, but they base their arguments on factual inaccuracies and mischaracterizations of the transaction and the law. The Companies are submitting this letter to respond to those inaccuracies and mischaracterizations.

OCA Comments

The OCA concedes that the proposed transaction is structured as an acquisition of NSTAR (OCA Comments at 1), but argues that the Commission with its “broad grant of power” has the “statutory authority to review and approve the merger under RSA 374:33,¹ and in this case more specifically also has jurisdiction pursuant to RSA 369-B:3, IV (b)(4), subparagraphs (A) and (B)” (OCA Comments at 2). As demonstrated in the discussion below, the OCA’s arguments are flawed on a number of grounds.

¹ The OCA’s recognition that the transaction involves an acquisition of NSTAR by NU clearly demonstrates the applicability of the Commission’s decision in *National Grid Group, PLC*, Petition for Approval of Merger, Order No. 23,640, 86 NH PUC 95 (2001), wherein the Commission has previously determined that it does not have jurisdiction over the acquisition of an out-of-state utility holding company by the holding company of a New Hampshire public utility.

The authority to regulate public utilities is a legislative function that has been delegated to the Commission. *Legislative Utility Consumers' Council v. Public Service Company of New Hampshire*, 119 N.H. 332, 340 (1979); *Appeal of Richards*, 134 N.H. 148, 158 (1991). It is a well-settled principle in New Hampshire that the Commission's authority is limited as provided by statute. *State of New Hampshire v. New Hampshire Gas & Electric Co.*, 86 N.H. 16 (1932); *H.P. Welch Co. v. State*, 89 N.H. 428 (1938); *Blair and Savoie v. Manchester Water Works*, 103 N.H. 505 (1961); *State v. New England Telephone & Telegraph Co.*, 103 N.H. 394 (1961). The New Hampshire Supreme Court has stated that the Commission "is a creation of the legislature and as such is endowed only with the powers and authority which are expressly granted or fairly implied by statute . . . and may not be derived from other generalized powers of supervision. *Appeal of Public Service Co.*, 122 N.H. 1062, 1066 (1982). The Commission has consistently recognized that it possesses only the powers granted to it by the legislature. See, e.g., *Re Congestion on the Telephone Network Caused by Internet Traffic*, 89 NH PUC 173, 175 (2004); *Re Public Service Company of New Hampshire*, 88 NH PUC 239 (2003); *Re Public Service Company of New Hampshire*, 87 NH PUC 295 (2002).

Contrary to the assertions of OCA, the Commission cannot disregard the legal structure of the proposed transaction. If the transaction is outside the scope of authority delegated to the Commission in RSA 374:33 and RSA 369-B:3, IV (b)(4), the Commission cannot assert jurisdiction in reliance upon general "broad powers" or the characterizations of the proposed transaction being advanced by the OCA. The record in this docket clearly establishes that NU's acquisition of NSTAR is outside the scope of each of these statutes.

The OCA claims that RSA 374:33 applies because the transaction "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)." OCA Comments at 3. OCA's statement is incorrect. In fact, NU is not being acquired and none of the currently outstanding NU shares are being transferred or sold as part of the transaction. The current NU shareholders are not transferring their shares, but must approve the issuance of *additional* NU shares by the company, as the merger consideration to be paid to NSTAR shareholders in exchange for their shares of NSTAR.² Following the transaction, there will be a larger number of NU shares (as authorized by current NU shareholders), NSTAR shares will cease to exist, and its former shareholders will hold NU shares. The former NSTAR shareholders will hold approximately 43.7% of larger pool of NU shares, but this cannot occur unless and until authorized by current NU shareholders. Thus, contrary to the assertions of OCA, there is no public utility, public utility holding company, or for that matter, any other entity that "shall directly or indirectly acquire 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" NU, for purposes of jurisdiction under RSA 374:33.

The OCA also claims that "post-merger decision making for NU will be shared 50-50 with NSTAR," and raises concerns regarding changes to the NU Board of Trustees ("NU Board") and the designation of a new chief executive officer of NU (OCA Comments at 2).

² OCA also incorrectly states that the transaction will result in NSTAR shareholders owning 1.312 million NU shares. This is incorrect. The figure "1.312" is the exchange ratio, meaning that NSTAR shareholders will receive 1.312 NU shares for each NSTAR share they own.

However, changes to public utility and holding company boards and management occur in the ordinary course of business, are not subject to Commission jurisdiction and do not equate to an acquisition or transfer of corporate control for purposes of RSA 374:33 or RSA 369-B:3, IV (b)(4). NU and PSNH will not be “acquired or otherwise sold or merged” in the transaction, and the corporate governance and management changes that are contemplated do not alter those facts. Further, the OCA cites to no statutory authority that would allow the Commission to assert jurisdiction over such changes, in a merger context or otherwise. NU has had five different chief executive officers in the last 30 years. Shareholders have routinely elected NU Board members at the annual shareholder meetings, and the number of trustees on the NU Board has varied substantially over the years. None of these changes, nor the issuance of additional NU shares upon approval of the shareholders, are subject to review and approval by the Commission. The fact that they are occurring as part of NU’s acquisition of NSTAR does not bring the transaction within the scope of RSA 374:33 or RSA 369-B:3, IV (b)(4) or otherwise provide any basis for the Commission to assert jurisdiction.

Finally, the Companies note that the corporate governance changes of concern to OCA are not well-founded. Following the transaction, the NU Board will consist of 14 trustees, all with a fiduciary duty to NU shareholders. The NU Board will continue to be governed by its existing independence guidelines that comply with rules of the New York Stock Exchange (as approved by the Securities and Exchange Commission), and that require a majority of trustees on the NU Board to be independent from the company. This will continue to be the case following the transaction.

NEPGA Comments

The NEPGA comments do not address RSA 374:33, RSA 369-B:3, IV (b)(4) or any other statute, and therefore provide no assistance to the Commission in assessing the limits of its jurisdiction over the transaction. Instead, NEPGA urges the Commission to act based upon NEPGA’s unfounded, nonspecific and overstated concerns regarding generation development, customer impacts and competitive markets, all of which are contrary to the information provided to the Commission in this docket.

Unconstrained by the information in this docket,³ NEPGA freely mischaracterizes the transaction (“will create a new entity”), the companies’ future plans (“definitive plans to aggressively expand development of renewable and other generation resources”) and impacts (“potential to undermine competitive markets, competition and established competitive practices”) (NEPGA Comments at 2-3). Indeed, NEPGA’s comments are deficient at the most basic level; they provide no explanation or description whatsoever of the competitive “impacts” that they allege, much less why it is plausible to believe such impacts (whatever they are) would result from a merger between two utilities having *de minimis* generation ownership and whose activities are subject to comprehensive regulation by multiple state and federal agencies. NEPGA does not refute the Companies’ legal analysis, or that the transaction will not change or

³ As a participant in the other state and federal proceedings related to the transaction, NEPGA also has access to all of the docket information filed with the Massachusetts Department of Public Utilities, the Maine Public Utilities Commission, the Connecticut Department of Public Utility Control and the Federal Energy Regulatory Commission.

limit the Commission's continuing jurisdiction over PSNH. PSNH will continue to be regulated by the Commission as a public utility, will remain subject to all outstanding orders and commitments, and the interests of customers will be fully protected following the transaction, as they are today, through the Commission's continuing authority over the rates, terms, services and operations of PSNH.

NEPGA's allegations of concern regarding PSNH's generation are particularly disingenuous given the fact that NEPGA members own or control approximately 90% of the New England's generating capacity,⁴ own approximately 280,000 megawatts of generating capacity that is developed or in development,⁵ and include major utilities such as Constellation Energy, Dominion Resources, Dynegy, Entergy, Exelon, GenOn Energy (Mirant), NextEra Energy Resources (FPL), NRG Energy and PSEG Power. In contrast, PSNH owns a scant 1150 megawatts of generation, all of which is used to supply default service needs.

RSA 369:8, II(b)(1)

The OCA also addressed RSA 369:8, II(b)(1), which establishes an expedited process for certain mergers or acquisitions if the transaction is otherwise subject to Commission approval under other statutes, such as RSA 374:33. The Companies explained in their February 1, 2011 filing that the transaction is not subject to the Commission's jurisdiction under other statutes, and therefore the provisions set forth in RSA 369:8, II(b)(1) do not apply. However, notwithstanding these limitations, the process described in RSA 369:8, II(b)(1) may be instructive to the Commission in determining next steps in this docket.

RSA 369:8, II(b)(1) states that "*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 not have an adverse effect on the rates, terms, service or operation of the public utility within the state*" (emphasis added). The Companies provided such written representation in their February 1, 2011 filing. This written representation was further supported by many thousands of pages of information filed with the Commission in this docket, and by the information provided by Mr. McHale during the public information session on February 7, 2011. Mr. McHale has also provided an affidavit, which is attached, to attest to the filed information in support of the Companies' written representation.⁶

⁴ NEPGA member companies represent approximately 27,000 megawatts in New England. NEPGA Comments at 2. According to ISO-New England, the Total New England Installed Capability (Summer) is approximately 30,000 megawatts.

⁵ Based on publicly available information on NEPGA member websites, a table providing the derivation of member generating capacity is attached to this response.

⁶ The instant transaction is different than the situation discussed by the Commission in *New England Electric System*, Order Approving Petition, Order No. 23,308, 84 NH PUC 502 (1999), on two counts. First, as described herein, the Companies have demonstrated that NU's acquisition of NSTAR is not subject to the Commission's jurisdiction under RSA 374:33 and RSA 369-B:3, IV (b)(4). Second, neither PSNH nor its parent, NU, are being acquired or merged, as was the case in the *New England Electric System* ("NEES") case, where National Grid was acquiring NEES, and its subsidiary companies including Granite State Electric Company. The Commission's subsequent decision in *EnergyNorth Natural Gas, Inc.*, Order Approving Settlement Agreement, Order No. 23,470, 85 NH PUC 360 (2000), further demonstrates that RSA 369:8 is inapplicable. There, discussing RSA 369:8, the Commission held, "the Commission must independently verify that no adverse effect on the rates, terms, service or

The Companies have demonstrated that NU's acquisition of NSTAR is not subject to the Commission's jurisdiction under RSA 374:33 and RSA 369-B:3, IV (b)(4). Notwithstanding these statutes, the process set forth in RSA 369:8, II(b)(1) could provide a way for the Commission to proceed without having to address the contested question of jurisdiction, by acknowledging that "the approval of the commission shall not be required" based on the absence of an adverse effect on the rates, terms, service or operation of PSNH.

PSNH appreciates this opportunity to respond to the comments filed by OCA and NEPGA and will be pleased to provide any further information deemed necessary by the Commission concerning NU's acquisition of NSTAR.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert Bersak", written in a cursive style.

Robert A. Bersak
Assistant Secretary and
Assistant General Counsel

Enclosures

cc: Service List
Office of Consumer Advocate
NEPGA
N.H. Legal Assistance

SERVICE LIST - EMAIL ADDRESSES - DOCKET RELATED

Pursuant to N.H. Admin Rule Puc 203.11 (a) (1): Serve an electronic copy on each person identified on the service list.

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FILING INSTRUCTIONS:

- a) Pursuant to N.H. Admin Rule Puc 203.02 (a), with the exception of Discovery, file 7 copies, as well as an electronic copy, of all documents including cover letter with:**
- DEBRA A HOWLAND
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NHPUC
21 S. FRUIT ST, SUITE 10
CONCORD NH 03301-2429
- b) Serve an electronic copy with each person identified on the Commission's service list and with the Office of Consumer Advocate.**
- c) Serve a written copy on each person on the service list not able to receive electronic mail.**