DE 99-099

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Proposed Restructuring Settlement

Order Concluding Phase One of Proceeding

O R D E R N O. 23,346

November 16, 1999

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Staff, and Larry Eckhaus, Esq. for the Staff of the New Hampshire Public Utilities Commission.

I. INTRODUCTION

On Friday, November 5, 1999, the Commission concluded 14 days of hearings of the proponents' case concerning the Settlement Agreement entered into by Public Service Company of New Hampshire (PSNH); its parent company, Northeast Utilities; Governor Jeanne Shaheen; the Governor's Office of Energy and Community Services; Attorney General Philip T. McLaughlin; and certain members of the Staff of the Commission ("Settlement Staff"). The Settlement Agreement is offered as a proposal to resolve the outstanding matters concerning the restructuring of PSNH, the Company's rates and a number of other issues regarding PSNH. Because of the importance of this case, and the breadth of issues that are implicated by the Settlement, we extended the hearings four days beyond those originally scheduled in order to ensure that parties had a full opportunity to examine the witnesses for the proponents of the Settlement. In addition, we held seven evening hearings around the state to take public comment on the proposed Settlement.

When we began our consideration of the Settlement, a number of the parties asked that we continue with hearings on the pending PSNH rate case, DR 97-059, and on the rehearing of PSNH's Interim Stranded Costs in the restructuring docket, DR 96-150. The settling parties opposed this request, and argued, among

other things, that it would be unworkable to hold hearings on the Settlement Agreement, the Rate Case and Interim Stranded Costs cases simultaneously. Rather than stay our consideration of the Rate Case and Interim Stranded Costs cases indefinitely, we decided, in Order 23,299 (September 16, 1999), that we would stay these cases temporarily, pending our review of the evidence presented by the proponents of the Settlement Agreement in what we deemed would be the first of two possible phases of hearings in this docket. We determined that we would decide whether to proceed to Phase II of our consideration of the Settlement Agreement upon the conclusion of the proponents' case. The standard we established in Order 23,299 for making the determination of whether to proceed to Phase II requires "the proponents to prove they have submitted sufficient evidence upon which the Commission *could* decide that the proposed Settlement Agreement is in the public interest and consistent with all of the legislative requirements concerning electric industry restructuring including those contained in RSA 374:F:3, RSA 374-F:4 and Laws of 1999, Chapters 289:3, 289:4, 289:6-8."

II. ANALYSIS

We believe the proponents of the Settlement Agreement have met the above-stated burden and therefore we will move on to Phase II. The proponents of the Settlement Agreement have presented evidence in support of their contention that the Settlement meets the requirements of the restructuring statute, RSA Chapter 374-F, and will provide significant benefits for the State of New Hampshire. The proponents point to claimed near-term rate reductions of 18.3 percent, divestiture of generation assets, introduction of competition at some time in mid-2000, and other benefits they state will flow from the Settlement. They have presented evidence from 16 witnesses in support of their claims that the 15 policy principles enumerated in the restructuring statutes will be met by their proposal, and that the Settlement Agreement is in the public interest.

A number of parties have challenged the validity of these claims and have raised questions about the underlying structure of the Settlement. Parties have questioned whether the benefits of the Settlement could not have been achieved without this particular proposal, and whether the Settlement Agreement will achieve the goals its proponents claim for it. Phase II will give these parties an opportunity to develop their positions, and present evidence supporting either rejection of the Settlement Agreement, or conditions that non-signatories

believe must be attached to any Commission approval of the Settlement Agreement. In that regard, we stress that our determination today is not intended to foreclose any of the non-settling parties from presenting additional evidence on matters that were raised during the Phase I hearings, or on new matters not yet explored. Nor is our decision to proceed to Phase II a determination that the Settlement Agreement should be approved.

As we proceed to Phase II, we will continue our stay of the rate case and interim stranded cost dockets, as well as the other dockets implicated by the proposed Settlement Agreement. It has been, and continues to be, unworkable to conduct parallel proceedings to review the Settlement Agreement on the one hand and on the other hand to litigate these related dockets. Thus, our concern is to balance the competing need to give the Settlement Agreement proponents a fair opportunity to demonstrate why their proposal should be considered with the need to have a sufficient basis to conclude that the Settlement Agreement produces the best result when taken as a whole and measured against the benchmark of the likely outcomes of the cases it would displace.

The proponents' evidence is stronger in regard to some issues than others. Taken as a whole, however, this evidence is sufficiently robust that the administration of public policy will be served by continuing with our review of the Settlement Agreement. This is so even though it means that the adversary litigation of the underlying dockets, such as the rate case and Interim Stranded Cost case, must be put aside at least until such time as the Settlement Agreement is rejected or canceled (e.g., by action of the Legislature or the settling parties). At the same time, the necessity to have benchmarks against which to measure the value of the Settlement Agreement means that non-settling parties will be free, as we have stated in our earlier procedural order(s), to explore the issues that would have been litigated in those stayed dockets. Thus, our decision to proceed to Phase II should not be taken as a decision simply to bypass the consideration of the rate and cost issues necessary for an understanding of the relative merits of the Settlement Agreement and reasonable alternatives in the absence of the Settlement Agreement.

III. CONDITION FOR PROCEEDING TO PHASE II

There is one condition that the settling parties must agree to before we can proceed to Phase II. It requires preserving the status quo pending completion of our review of the proposal.

We will require PSNH to agree to designate immediately, to the extent it has not done so already, its divestiture sell and buy teams, and agree that they will conform to the Code of Conduct proposed in the Settlement Agreement. To the extent practical and reasonable, such teams should be the same as the corresponding teams that have handled the sales and purchasing duties for Northeast Utilities (NU) affiliates in other similar sales. Our concern is to ensure that information and insight into the purchasing process does not migrate from affiliate personnel working on a sales team or other functions to members of the buy team for PSNH assets. Such cross-fertilization of information could give NU affiliates an unfair advantage in bidding on PSNH assets. A commitment of the Company to establish the teams at this point, in keeping with the roles such staff have already performed in similar sales, and honoring the Code of Conduct as we proceed to consider the Settlement Agreement, will provide substantial assurance that this kind of unfair advantage will not arise during this period.

The Settling Parties must inform the Commission in writing of their position with respect to this condition by close of business on Monday, November 22, 1999.

IV. DETERMINATION REGARDING LANGUAGE PURPORTING TO BIND THE COMMISSION TO THE TERMS OF THE AGREEMENT

This matter relates to a fundamental question concerning the nature of the agreement itself – an issue that can be determined without further evidence or argument, turning as it does on the Commission's jurisdiction and authority to approve the Settlement Agreement in its present form, and absent which further consideration of the Settlement Agreement would be an exercise in futility.

This concern relates to certain language appearing on page 73 of the Settlement Agreement which provides that the Commission's approval "shall endure so long as necessary to fulfill the express objectives of this Agreement" and that such approval "is binding with respect to matters contained herein."

The general purpose of this language would appear to restrict the ability of later Commissions to alter in any way the decisions embodied in the Settlement Agreement once it is approved. With regard to the creation of an irrevocable property right in the receivables that would be used to retire Rate Reduction Bonds, should securitization be approved, such a limitation on future Commissions would be appropriate within the language of the statute creating such a property interest. However, beyond that unique instance where it is contemplated that the Legislature would specifically limit the Commission's authority, we reiterate a conclusion we have previously stated in

a similar context: "We do not believe we have the authority to bind the State of New Hampshire, other state agencies or future Public Utilities Commissions." *Public Service Company of New Hampshire*, 82 NH PUC 21, 24 (1997).

By statute, we are vested with the express authority, upon notice and hearing, to "alter, amend, suspend, annul, set aside or otherwise modify any order" we issue. RSA 365:28; *see also* RSA 365:25 (providing that rates authorized by Commission "shall remain in effect until altered by a subsequent order of the commission"). In our view, only the Legislature can divest the Commission of powers that the Legislature has specifically vested in us and our successors.

Beyond the legal issue, however, lies an additional concern. Notwithstanding the recent history of relations between PSNH and the Commission, utility regulation under New Hampshire law should normally be an exercise of its constitutional police power, grounded in sound public policy objectives, without contractual (or constitutional Contract Clause) implications. To the extent that a regulated utility and its owners have a reliance interest in any of our determinations, in almost all circumstances the appropriate source of comfort should be the well-established principle that our power to alter or amend prior decisions is subject to limits. *See: Appeal of Office of Consumer Advocate*, 134 N.H. 651, 657-58 (1991) (noting that,

while RSA 365:28 should be "liberally construed," Commission's reconsideration or modification of existing orders "must satisfy the requirements of due process and be legally correct" (citations omitted)); *Appeal of Global Moving & Storage of New Hampshire, Inc.*, 122 N.H. 784, 789 (1982) (because a Commission order is "an administrative decision affecting private rights, it had the affect of a judgment to which the principle of res judicata applies" (citations omitted)). It is time to restore that kind of normalcy to the relations between PSNH and the Commission.

Accordingly, we determine that we cannot and will not approve the above-quoted language as part of the proposed Settlement Agreement, and believe the settling parties have three options: (1) to remove the offending language from the Settlement Agreement altogether; (2) should we ultimately approve the Settlement Agreement at the conclusion of Phase II, to accept the imposition by the Commission of a condition that will render the language in question inoperative; or (3) to seek a legislative remedy of this matter. We note that, with respect to legislative changes, there may be constitutional limits to the power of the Legislature to bind itself in its future exercise of police powers; plumbing such limits is a question beyond our jurisdiction and the scope of this order.

Our determination to proceed to Phase II is not

dependent upon the Settling Parties indicating at this time which option it will pursue; we simply put all parties on notice that the offending language is not acceptable, and it will be a matter that must be addressed if Commission approval is to be obtained.

As indicated above, deciding to move to Phase II of the hearings is without prejudice to any of the issues in this docket, including those that the non-settling parties may wish to bring to the Commission's attention. Our imposition of the condition we have set forth and the determination that certain language purporting to bind the Commission is unacceptable is in no way intended to suggest that we may not, at a later stage in the proceeding, decline to approve the Settlement agreement or deem it appropriate to require additional conditions or modifications to the Settlement Agreement as a condition of its approval.

IV. CONCLUSION

Accordingly, subject to the condition and determination outlined above, we find that the settling parties have shown evidence that could be sufficient for a Commission to conclude that the Settlement Agreement is in the public interest and satisfies the requirements of electric industry restructuring legislation. Therefore, we will proceed to Phase II of our review.

V. SCHEDULING MATTERS

On October 27, 1999, the parties met with the Commission General Counsel to discuss scheduling matters as well as the questions of how to take up the issues of rate design (which we determined on the record is appropriately deferred to Phase II as necessary) and NU's proposed merger with Consolidated Edison, announced just prior to the commencement of the Phase I hearings. The General Counsel, exercising his authority as presiding officer, recommended that: (1) PSNH be required to introduce the cost-of-service and associated testimony that it prefiled in Docket DR 97-059, as updated on September 30, 1998; (2) that PSNH participate in technical sessions related to the study on November 8 and 9, 1999, and provide alternate runs of its cost-of-service study; (3) that PSNH be required to submit any revisions to its rate-design testimony by November 30, 1999, all other parties and Staff be permitted to submit rate design testimony by December 30, 1999, and any rebuttal testimony on the issue of rate design be filed by January 10, 2000; (4) that there be two rounds of discovery on the proposed Consolidated Edison merger, with the first set of data requests due by November 8, 1999 and the second on November 29, 1999, with responses due from PSNH two weeks later in each instance; (5) that any party wishing to submit testimony on the proposed Consolidated Edison merger must do so by December 30, 1999, with any rebuttal testimony due on January 10, 2000; and (6) that the scope of any data requests and testimony regarding the proposed Consolidated Edison merger

be limited to issues relating to whether section XIV(C) of the Settlement Agreement is adequate to protect the interests of the State and PSNH customers in light of the proposed merger.

In addition, the settling parties recommended on November 5, 1999 that in light of the unanticipated extension of the Phase I hearings it would be appropriate to extend the deadline for filing Phase II testimony from November 22 to November 29, 1999. Data requests would be due on December 3, 1999 with responses due on December 17, 1999. On November 8, 1999, the OCA submitted a letter to the Commission objecting to this proposal with respect to filing date for non-settling parties' testimony, arguing that, consistent with the current schedule, 15 working days should be allowed between the close of the Phase I hearings and the filing date.

Given the need to extend the hearings in Phase I a week beyond our original target date for deciding on whether to proceed to Phase II, we will adjust the schedule for the upcoming testimony and discovery, to allow parties sufficient time to prepare their submissions. Similarly, in light of our previous determinations to require the submission of a cost-of-service study in this proceeding and allow consideration of issues related to the proposed merger of Con Edison with NU, additional adjustments of the current schedule are necessary. We therefore adopt the General Counsel’s recommended revisions to the schedule of proceedings in this docket, with the following changes: As to

all issues other than rate design and the Consolidated Edison merger, non-settling parties' testimony is to be filed on November 30, 1999, with data requests due by December 6. Responses to such data requests will remain due by December 17. The testimony, data request and data response filing dates are all for "in-hand" delivery. This requirement may be met with electronic delivery as long as a hard copy follows via overnight mail to the active parties. All non-active parties may be served by regular mail.

For the convenience of the parties and other interested persons, the following is a summary of the revised schedule for the proceeding in light of the determinations made above:

First set Data Requests regarding proposed Merger/Acquisition	November 8, 1999
First set Data Responses	November 22, 1999
Second set Data Requests	November 29, 1999
Second Set Data Responses	December 13, 1999
Non-Settling Parties' Testimony (All issues except rate design)	November 30, 1999
Data Requests re Non-Settling Parties' Testimony	December 6, 1999
Data Responses re Non-Settling Parties' Testimony	December 17, 1999
Testimony re Rate Design and Merger/Acquisition issues and Rebuttal Testimony on all other issues (by any party in response to any issue in direct testimony)	December 30, 1999
Rebuttal Discovery Technical Sessions	January 5-6, 2000
Submission of proposed list of order of witnesses to Commission and parties	January 6, 2000
Rebuttal Testimony re Rate Design and Merger/Acquisition issues	January 10, 2000
Phase II Hearings	January 10-14, 2000 January 18-21, 2000
Briefs	Two weeks from end of hearings

Based upon the foregoing, it is hereby

ORDERED, that, subject to the conditions and schedule

revisions enumerated above, the Commission will proceed to Phase II of the hearings in this docket in accordance with the framework previously outlined in Order 23,299.

By order of the Public Utilities Commission of New Hampshire this sixteenth day of November, 1999.

Douglas L. Patch	Susan S. Geiger	Nancy Brockway
Chairman	Commissioner	Commissioner

Attested by:

Claire D. DiCicco
Assistant Secretary