

DR 94-252

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Special Contract No. NHPUC-98 with
Freudenberg-NOK General Partnership

Order Denying Hearing

O R D E R N O. 23,627

January 29, 2001

I. BACKGROUND

By Order Nisi No. 23,546, dated September 5, 2000, the New Hampshire Public Utilities Commission (Commission) approved an amendment (Amendment) to Special Contract No. NHPUC-98 (Special Contract) between Public Service Company of New Hampshire (PSNH) and Freudenberg-NOK Limited General Partnership - Seal Division(Freudenberg).

The Special Contract, approved by Order No. 21,484, Re PSNH, 80 NH PUC 8 (1995), provided reduced rates for load associated with new molding equipment in excess of a Base Demand as an incentive for production expansion in Bristol, New Hampshire. The current Amendment provides for the Special Contract terms and pricing to apply to newly built Freudenberg Seals Division factories in Franklin and Laconia. The factories were built to accommodate the need for increased capacity in the production molding process which had been originally sited in Bristol.

The approval of the Amendment was based upon the finding that the same processes given discounting under the original Special Contract would continue to receive discounting. The majority found that it was in the public interest to modify certain terms of the Special Contract since the result was consistent with the original intent of the parties and with the Commission's approval of the underlying Special Contract. The dissent by Commissioner Brockway stated that the contract should be considered a request for a new special contract rather than a modification of the existing contract. The dissent also observed that the record did not justify approving a new special contract.

As the Amendment was approved pursuant to an Order Nisi, interested persons were given 30 days in which to request a hearing or otherwise object. On September 29, 2000, the Office of Consumer Advocate (OCA) submitted a timely Motion for a Hearing (Motion), arguing that the Amendment was a new contract that did not meet the requirements of RSA 378:18-a. On October 5, 2000, PSNH and Freudenberg filed separate Objections to the Motion. The OCA, on September 29, 2000, also filed notification that it intended to participate in the docket. At its public meeting on October 16, 2000, the Commission deliberated this matter and denied the OCA's

request for a hearing.

II. POSITIONS OF THE PARTIES

A. OFFICE OF CONSUMER ADVOCATE

The OCA contends that a hearing is warranted in this case for several reasons. First, OCA argues that the provisions of RSA 378:18-a, III cannot be avoided by simply modifying an existing contract because an amended contract is a new contract. The OCA also argues that the contract does not meet the necessary requirements set forth in RSA 378:18-a, III. It states that since construction of the two new facilities was completed in February 2000 and the date of the contract amendment was March 22, 2000, there is no evidence that a special contract rate was necessary to attract load.

Next, the OCA points out that Freudenberg's letter to the Commission, dated August 17, 2000, regarding the creation of 70 new jobs by the end of the third quarter of 2001 as a result of moving equipment from a facility in Georgia to New Hampshire, is inconsistent with PSNH's letter, dated April 10, 2000, in which the commitment to full operation by year-end 2000 had already been made. The OCA goes on to argue that both the spirit and intent of RSA 378:18-a is violated.

The OCA maintains that this "new contract" must fall

within the scope of either RSA 378:18-a I, or III. According to the OCA, even if the contract qualifies for discount treatment pursuant to RSA 378:18-a, I, the Commission's order has not concluded as required by that section that it is in the public interest and equitable to other ratepayers.

The OCA also asserts that it has not been shown that the new contract is consistent with the original intent of the parties as concluded by the Commission. The OCA argues that a hearing is warranted to reconcile the Commission's finding with PSNH's letter of April, 2000, that expresses the fact that neither party envisioned the original expansion to be of such a magnitude that the Bristol facility could not accommodate it.

B. PUBLIC SERVICE OF NEW HAMPSHIRE

In its objection, PSNH urges the Commission deny the Motion for Hearing and argues that the Amendment is not a new contract. According to PSNH, under the Commission's rules a contract change is provided for through the filing of an amendment unless the change is an option clearly delineated in the original Special Contract. PSNH avers that since the original special contract was effective February 1, 1995 by Commission Order No. 21,484, and RSA 378:18-a was effective on June 3, 1996, rendering amended NHPUC-98 a new contract would

be a retrospective application of RSA 378:18-a.

PSNH states that the Special Contract still applies only to the Freudenberg Seals Division and to the same processes discounted under the original contract. According to its Objection, PSNH will receive additional sales and revenues from Freudenberg Seals Division only if the Amendment is approved. By increasing sales, other customers will benefit from a contribution to fixed costs and a contribution to stranded costs. PSNH argues that the OCA's position that other customers will pay for the discounts to Freudenberg is not logical because without the special contract there will be no increase in production and thus no increased contribution to PSNH stranded costs and fixed costs.

C. FREUDENBERG

In its objection to the Motion for Hearing, Freudenberg states that absent the amended special contract rate, Freudenberg will not increase production by transferring equipment and operations from Georgia to New Hampshire. According to Freudenberg, the transfer, if completed, will provide 70 additional manufacturing jobs in the municipalities of Franklin and Laconia. Freudenberg goes on to allege that if a hearing is scheduled in the matter it would be required to terminate planning for the transfer of the employees and

equipment from Georgia.

Freudenberg further argues that none of the issues raised by the OCA in its motion are new. Since these arguments were obviously considered in deliberations Freudenberg contends that any hearing would simply delay the 70 new manufacturing jobs and possibly put those jobs at risk.

III. COMMISSION ANALYSIS

In this case we our asked by the OCA to grant a hearing on our Order Nisi approving an amendment to Special Contract No. NHPUC-98 pursuant to RSA 378:7, the United States Constitution, Amendment V and the N.H. Constitution, Part I, Articles 12 and 15, because it is alleged that the interests of residential ratepayers will be unjustly affected by our Order NO. 23,546. We do not believe such a hearing is warranted or required.

Under RSA 541-A:31, a hearing is required in an "adjudicative proceeding." RSA 541-A:31, III. An "adjudicative proceeding" is required:

if a matter has reached a stage at which it is considered a contested case or, if the matter is one for which a provision of law requires a hearing only upon the request of a party, upon the request of a party. RSA 541-A:31, I.

A "contested case" is defined as "a proceeding in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after notice and an opportunity for hearing." RSA 541-A:1, IV. Pursuant to RSA 378:18, the Commission is specifically required (" . . . shall by order. . .") to allow a public utility to contract for service at rates other than those fixed by its general tariffs if special circumstances exist that support this departure as just and consistent with the public interest. There is no requirement in this statutory section that the finding of "special circumstances" may only be made by the Commission upon a hearing in an adjudicative proceeding.

RSA 378:18-a, III, which applies to special contracts entered into after June 3, 1996 (the effective date of this section), and addresses special contracts designed to "attract load," provides that such contracts "shall be available" if the contract is approved under RSA 378:18 and the Commission determines that no tariffed rate is sufficient to attract the load.¹ As with 378:18, this section does not require a hearing in order to make the determination whether

¹ As we determined in our initial order that the approval requested was for an amendment to the original special contract, entered into prior to the effective date of this statutory section, we do not concede that this section applies. However, we review it here to provide a complete analysis of whether the Legislature contemplated requiring a hearing and adjudicative proceeding for each special contract filing.

or not a currently effective tariffed rate is sufficient to attract the load. Thus, since there is no requirement by law for a hearing, the determination of special circumstances for special contracts is not a "contested case." Nor is there a requirement, in either RSA 378:18 or 378:18-a, III, for a hearing regarding special contracts upon the request of a party. Therefore, the Commission's determinations regarding whether special circumstances exist and whether a current tariffed rate is sufficient to attract the load, are questions of fact that may be made without resort to an adjudicative proceeding, and contrary to the assertions of the OCA, no hearing is necessary.

The OCA's reliance on RSA 378:18-a, I in support of its request for a hearing is also misplaced. This section prevents electric utility companies from "recover[ing] from other ratepayers the difference between the regular tariffed rate and the special contract rate" only if the Commission determines that such recovery is in the public interest and equitable to other ratepayers. Order No. 23,546 does not, however, address that issue. There is no request in the petition that proposes such a revenue recovery, and we have not provided for it. We note that in our decision conditionally approving the PSNH Restructuring Settlement

Agreement, Order No. 23,443, we determined that PSNH's revenue requirements would not at this time be adjusted for alleged shortfalls resulting from the difference between special contracts and regular tariffed rates, and specifically deferred this issue to the rate case anticipated at the end of the 30-month initial rate period. See Order No. 23,443, issued April 19, 2000, at 260-261. Our action in the present case is consistent with that determination, and any claim for recovery of this shortfall resulting from our decision here shall be subject to review in that rate proceeding.

Upon review of the documentation in this case we do not accept OCA's basic premise that this contract is a new special contract and, as such, the provisions of RSA 378:18-a, III cited by the OCA do not apply. This Commission has long acknowledged that amendments to special contracts may be made. NH Code Admin. Rule Puc 1606.04. In *RE Concord Electric Company*, 75 NH PUC 205 (1990), the Commission found that an amendment to an Elektrisola special contract was proper and avoided the necessity of filing a revised contract every time a customer increases its base demand. The facts here present less of a modification than was approved in Elektrisola. As we expressed in Order No. 23,546, the production processes which were the justification for the

original contract have been physically transferred to new locations, leaving a lower monthly demand and usage at the Bristol facility. Neither the base demand levels, nor any terms of the agreement have been modified other than the geographic location of the Seals Division. Thus, we do not agree that this scenario creates a new contract. Rather, we believe that these circumstances provide adequate support and justification for our finding that PSNH and Freudenberg have proposed an amendment to their already existing special contract. Accordingly, we find no basis, either required by law or by the facts at issue, to hold a hearing on this matter.

Based upon the foregoing, it is hereby

ORDERED, that the Office of Consumer Advocate's Motion for Hearing is denied.

By order of the Public Utilities Commission of New
Hampshire this twenty-ninth day of January, 2001.

Douglas L. Patch
Chairman

Susan S. Geiger
Commissioner

Attested by:

Thomas B. Getz
Executive Director and Secretary

DISSENTING OPINION OF COMMISSIONER BROCKWAY

Based on the current record, I cannot join my colleagues in approving this proposed special contract. I see this as a new contract for service at two new locations, rather than as an extension of the existing contract approved in Order 21,484. I do not believe, on the basis of the record in its present state, that it meets the standards that would justify a new special contract.

We should hesitate to extend existing special contracts to new circumstances, and we should put applicants for new special contracts to a high standard. Here, there is evidence that the lower rates associated with the special contract were not determinative in the customer's move from the Bristol location. The customer moved quickly to build the Franklin and Laconia facilities starting last summer, finding demand for its product so intense that it had to find larger and more flexible space than available in Bristol, the location of the original special contract. Unlike the situation facing the customer in 1995, today there is a high likelihood of a general rate decrease for all customers, making the additional discount from a special contract less

dispositive in location and expansion decisions. Also, I would insist on much more detailed support than the representation of either the utility or the customer for the proposition that self-generation is a real threat to load retention over the time period of the contract.

I am concerned about approving any special contract, the trigger factor of which is higher peak demand, given the current issues in ISO-NE with market power and high prices at peak demand times. This concern is mitigated somewhat here by the fact that the proposal is to allow the customer to count demand at its three separate New Hampshire facilities towards the minimum Base Demand, resulting in a lower pressure on peak demand than if the contract provided for a minimum demand at each of the three facilities, but that fact in turn highlights the cost-shifting aspects of the special pricing represented by the contract.

The interplay of RSA 378:18-a and Chapter 374 result in a probability that other customers would be required to pick up the \$184,000 annual difference in stranded costs represented by this proposed special contract. I cannot concur that the present record justifies such a cost shift, nor that we are bound

by our decision in Order No. 21,484. I would grant the hearing requested by the Office of Consumer Advocate, to explore these issues.

Nancy Brockway
Commissioner

January 29, 2001

Attested by:

Thomas B. Getz
Executive Director and Secretary