

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL.

Joint Application of Public Service Company of New Hampshire,
The Connecticut Light & Power Company, Western Massachusetts
Electric Company, Fitchburg Gas and Electric Company, Concord
Electric Company, Exeter & Hampton Electric Company, Granite
State Electric Company and New England Power Company for
Findings under Section 32(C) of the Public Utility Holding
Company Act of 1935

Order Nisi Regarding Findings Pursuant to Section 32(C) of the
Public Utility Holding Company Act of 1935

O R D E R N O. 23,629

January 29, 2001

I. PROCEDURAL HISTORY

On September 8, 2000, the Petitioners, Public Service Company of New Hampshire (PSNH), Connecticut Light & Power Company (CL&P), Western Massachusetts Electric Company (WMECO), Fitchburg Gas and Electric Company (FGEC), Concord Electric Company (CEC), Exeter & Hampton Electric Company (E&H), Granite State Electric Company (GSEC) and New England Power Company (NEP)(collectively referred to as "Joint Applicants") submitted an application for an Order *Nisi* containing findings by the New Hampshire Public Utilities Commission (Commission) pursuant to Section 32(C) of the Public Utility Holding Company Act of 1935 (15 U.S.C. §79, referred to as "PUHCA") in connection with the sale of Millstone Station, a three-unit nuclear generating station

located in Waterford, Connecticut, to a subsidiary of Dominion Resources, Inc. (Dominion). The filing requests a determination by the Commission that allowing the existing rate-based Millstone station to become an "eligible facility" as defined by 15 U.S.C. § 79z-5a(2) is consistent with the requirements of the 1935 Act.

On September 11, 2000, PSNH Senior Counsel Gerald M. Eaton filed the remaining executed original signature pages from the Joint Application.

On September 13, 2000, the Office of Consumer Advocate provided notification to the Commission, pursuant to the Inter-Agency Memorandum of Understanding of April 28, 2000, of its intent to participate in this docket on behalf of residential ratepayers.

On October 2, 2000, the Governor's Office of Energy and Community Services (ECS) and the Commission's Staff-members who had joined the Agreement to Settle PSNH Restructuring and had been previously designated in Docket No. DE 99-099 as Staff Advocates (together, the "State Team") provided joint comment on the Application.

II. POSITIONS OF THE PETITIONERS AND COMMENTORS

A. Joint Applicants

The Joint Applicants make the following claims in support of their petition:

PSNH, an electric utility providing retail service to approximately 420,000 customers in New Hampshire, is a wholly-owned operating company subsidiary of Northeast Utilities (NU), a registered holding company under PUHCA. PSNH's retail rates, terms and conditions of service are subject to the jurisdiction of the Commission under Title 34 of the New Hampshire Revised Statutes Annotated. PSNH is a joint owner in the Millstone Station, owning 2.85% of Millstone Unit 3. The treatment of PSNH's share of Millstone Unit 3 is governed by the Agreement to Settle PSNH Restructuring approved by the Commission in Docket No. DE 99-099. Order No. 23,443, at 270-271 (April 19, 2000).

CL&P is an electric utility providing retail service in Connecticut, subject to the jurisdiction of the Connecticut Department of Public Utilities Control (DPUC) pursuant to Title 16 of the Connecticut General Statutes, and is a wholly-owned operating company subsidiary of NU, and an affiliate of PSNH. CL&P has no customers in New Hampshire. CL&P is a joint owner in the Millstone Station, owning 81% of Millstone Units

1 and 2 and 52.93% of Millstone Unit 3.

WMECO is an electric utility providing retail service in western Massachusetts subject to the jurisdiction of the Massachusetts Department of Telecommunications and Energy (DTE) pursuant to Chapter 164 of the Massachusetts General Laws, and is a wholly-owned operating company subsidiary of NU and an affiliate of PSNH. WMECO has no customers or facilities located in New Hampshire. WMECO owns 19% of Millstone Units 1 and 2 and 12.24% of Millstone Unit 3.

FG&E is a combination gas and electric utility company providing retail service in north central Massachusetts subject to the jurisdiction of the Massachusetts DTE pursuant to Chapter 164 of the Massachusetts General Laws., and is a wholly-owned subsidiary of Unitil Corporation, a registered public utility holding company under PUHCA. FG&E is an affiliate of CECO and E&H, whose retail rates are subject to the jurisdiction of this Commission. CECO and E&H provide retail electric service to approximately 69,000 customers in New Hampshire. FG&E owns 0.22% of Millstone Unit 3. None of FG&E's entitlements to Millstone Unit 3 are sold to, or purchased by, its New Hampshire affiliates or their wholesale supplier, Unitil Power Corp.

NEP is a wholly owned generation and transmission

subsidiary of National Grid USA, a registered public utility holding company under PUHCA. NEP does not engage in local distribution of electricity, but does provide service directly to two end-use customers in Vermont. GSEC is an affiliate of NEP providing retail electric service to approximately 37,000 customers in New Hampshire and whose retail rates are subject to the jurisdiction of this Commission. NEP owns 16.21 % of Millstone Unit 3.¹

The Joint Applicants state that PSNH, CL&P, WMECO, FG&E, and NEP (the "Selling Applicants") are divesting themselves of their ownership in generating assets as part of each company's plans for restructuring in the state in which they operate. The Millstone assets were offered for sale in a public auction conducted pursuant to Connecticut Public Act 98-28, "An Act Concerning Electric Restructuring" (Conn. Gen. Stat. Section 16-244f) ("P.A. 98-28").

¹ In November 1999, NEP entered into a settlement agreement with CL&P, WMECO and NU addressing litigation and arbitration filed by NEP against those companies for damages related to any earlier shutdown of Millstone 3. Under the terms of the Settlement Agreement, NU agreed to include NEP's 16.21% minority interest in Millstone 3 in the auction to be conducted pursuant to the Connecticut Act. As part of the settlement, NEP's proceeds from the sale and obligations for decommissioning were set at a fixed amount and NU agreed to indemnify NEP from any residual liabilities or costs resulting from the sale, including any requirement to purchase power from the unit. This Settlement Agreement was described in further detail in "Report on Reconciliation of Contract Termination Charge from New England Power Company to Granite State Electric Company" filed with the Commission on December 1, 1999.

Pursuant to Section 7 of P.A. 98-28, the DPUC selected J.P. Morgan Securities, Inc. (J.P. Morgan), a nationally prominent investment banking firm, to conduct the auction of Millstone nuclear units 1, 2, and 3, under the supervision of the DPUC's appointed Utility Operations Management Analysis auction team.

On August 7, 2000, J.P. Morgan announced that Dominion was the winning bidder for each of the Millstone nuclear units. Dominion Nuclear Connecticut, Inc. (DNC), an indirect wholly-owned special-purpose subsidiary of Dominion Energy, Inc., which in turn is a wholly-owned subsidiary of Dominion, will be the legal entity holding the divested Millstone assets. Dominion is an integrated natural gas and electric power provider with over \$24 billion in assets, over \$8 billion in annual revenue, and over \$2 billion in annual operating cash flow. Dominion, through its subsidiary, Virginia Power, is the licensed owner and operator of the North Anna and Surry nuclear stations.

Pursuant to laws that pertain to each applicant, the Joint Applicants have filed separate petitions with the Connecticut DPUC and the Massachusetts DTE, for approval of these sales. The Joint Applicants have also filed applications with the DPUC, DTE and the Vermont Public Service

Board (PSB) for the same PUHCA-required findings requested in this Joint Application.² A similar filing was also made before the Maine Public Utilities Commission (MPUC) due to the recent approval of the merger between Central Maine Power, another owner of Millstone Unit 3, and Energy East, a registered holding company under PUHCA. In addition, similar petitions have been filed with the regulatory commissions in New York, New Jersey and Pennsylvania due to recent mergers and pending mergers that result, or if consummated prior to the closing of the Millstone transaction would result in those jurisdictions falling within the purview of Section 32(c) of PUHCA.

In Order No. 23,443 in Docket No. DE 99-099, and as confirmed by the subsequent Order No. 23,549 (Rehearing), this Commission approved the transfer of PSNH's interest in Millstone Unit 3 as part of the Agreement to Settle PSNH Restructuring. The Joint Applicants state that no further Commission approval of this sale is necessary or required as the other Selling Applicants divesting their ownership interests in Millstone station have no retail customers in New

²Although NEP has an affiliate which provides retail electric service in Rhode Island, the Joint Applicant's submit that no filing for "eligible facilities" determinations is necessary in that state because the findings required by PUHCA Section 32(c) are contained in Rhode Island's restructuring statute. R.I. Gen. Laws § 39-1-27(e).

Hampshire.

The Selling Applicants state that they intend to close on the sale of the auctioned generating assets as soon as possible. As a condition to closing of the sale, DNC must obtain the determination of the Federal Energy Regulatory Commission (FERC) that the divested generating facilities are "eligible facilities" and that DNC is an Exempt Wholesale Generator (EWG) under Section 32 of PUHCA. The Joint applicants claim that EWG status is critical to DNC (and to any other potential purchaser) because it allows the purchaser to avoid regulation by the United States Securities and Exchange Commission (SEC) as an "electric utility company" under PUHCA.

The FERC's determination of EWG status for DNC will be based, in part, on a finding that the purchased facilities are "eligible facilities." An "eligible facility" is defined as:

a facility, wherever located, which is either (A) used for the generation of electric energy exclusively for sale at wholesale, or (B) used for the generation of electric energy and leased to one or more public utility companies; Provided, That any such lease shall be treated as a sale of electric energy at wholesale for purposes of sections 205 and 206 of the Federal Power Act (16 U.S.C. §§824d and 834e).

If the direct cost of such facilities were reflected in a seller's retail rates on October 24, 1992, (i.e., were "rate-based facilities at that time) the FERC cannot determine that they are "eligible facilities" without the consent of:

(1) the state regulatory commission having jurisdiction over the retail rates of such seller, and

(2) every state commission having jurisdiction over the retail rates of an affiliate, if the seller is part of a registered holding company, as defined in PUHCA.

The specific findings required of the DTE, DPUC, PSB, MPUC and this Commission under Section 32 (c) of PUHCA are that allowing the assets sold to be "eligible facilities":

- (a) will benefit consumers;
- (b) is in the public interest; and
- (c) does not violate State law.

A final order, not subject to rehearing, is necessary from this Commission and the other state commissions before DNC can petition the FERC for an EWG determination.

The Joint Petitioners assert that the Commission should make these findings for several reasons. First, it is claimed that consumers will benefit because additional generating capacity and associated energy will be available for sale in the competitive market. The EWG determinations requested from the state regulatory agencies are necessary for the purchaser, DNC, to be able to operate these facilities

outside the regulatory framework of a public utility holding company subject to the jurisdiction of the Securities and Exchange Commission. The Joint Applicants claim that because the competitive market is expected to function more efficiently than the rate-regulated system of generation, consumers should benefit through lower prices, and that this benefit has been recognized by the New Hampshire Legislature in the context of its approval of electric utility restructuring legislation. See, RSA 374-F:1.

Second, the Joint Petitioners claim that designation of the facilities as "eligible facilities" is in the public interest because it exceeds the Legislature's stated goal of "at least functional separation of centralized generation services from transmission and distribution services." RSA 374-F:1, I.

Third, the Joint Applicants argue that "eligible facility" designation does not violate state law. They assert that there is no provision of New Hampshire law purporting to govern the designation of a facility as an "eligible facility," nor has the Legislature curtailed the Commission's jurisdiction to issue the Section 32 (c) approvals. None of the Selling Applicants except PSNH has retail customers in New Hampshire, and the facilities to be sold are not located in

New Hampshire.

Finally, it is claimed that granting the three findings requested will help further the restructuring efforts in New England, an objective clearly favored under the New Hampshire Electric Industry Restructuring Law. RSA 374-F:3, XIII.

The Joint Applicants point out that this Commission has granted the approvals necessary under Section 32(c) in prior asset divestitures. In Order No. 23,354 issued in Docket No. DE 99-117, the Commission held:

that allowing the generating assets in question to be an "eligible facility" will be beneficial to consumers and is in the public interest because the assets in question are being transferred to an entity that will be engaged in the competitive electricity market in New England, and the development and growth of that market is in the interest of New Hampshire electric customers. We also find that such designation would not violate state law. (Order No. 23,354 at 16.)

Similarly, in Order No. 23,254, issued in Docket No. DE 99-074, the Commission held:

Because the assets in question are being transferred to an entity that will be engaged in the competitive electricity market in New England, we find that the designation of those assets as eligible facilities will benefit consumers, in general, and is in the public interest. In addition, we are aware of no state law that would prohibit this designation. . . .

Accordingly, based on the record before us, we make the requested findings of Section 32(c) of PUHCA. (Order No. 23, 254 at 6).

The Joint Applicants submit that its requested relief should not be controversial, and therefore request that the Commission issue an Order *Nisi* with publication and require parties who would object to the Commission's making these findings to file written objections within fourteen days of publication of the Order *Nisi*, and limit any such objections to the question of "whether those assets, if sold, should be allowed to be deemed as 'eligible facilities'." See, Order 23,354 at 17.

B. The State Team

The State Team's letter commenting on the Joint Application states that approval is in the public interest, that granting eligible facility status to Millstone Station will further the goals of RSA 374:F, and will help make competition in New Hampshire a reality. The State Team points out that if the requisite findings are made in each of the states having jurisdiction over this matter, and Dominion becomes an EWG, it must restrict the sale of output of Millstone to the wholesale market, which, it claims, will enable Dominion to operate the facilities in the competitive

market outside the regulatory framework of the FERC and the SEC.

The State Team claims that classification as an eligible facility "will benefit consumers" because the output will be sold into the competitive market which is expected to bring lower prices and choice to customers, and that if it does not receive this classification, the ultimate sale price is likely to be for a lesser amount than due under the Purchase and Sale Agreement.

Second, the State Team states that classification "is in the public interest" because it will help make the competitive wholesale market a reality, and that five other New England Commissions have found that development of this market is in the public interest.

Third, the State Team states that the requested finding does not violate state law, noting that the Commission has previously found that no state laws are violated by the granting of eligible facility status.

The State Team also discusses issues that were raised in Docket No. DE 99-117, which concerned PSNH and NU's request for similar eligible facility findings concerning other NU owned plant, regarding whether there requested findings would enable PSNH and NU to argue that they were not

in breach of the Rate Agreement, the Capacity Transfer Agreement and the Sharing Agreements entered into with the State in 1989. The State Team argues that those concerns are not present here now that the Agreement to Settle PSNH Restructuring has been approved in Docket No. 99-099, and that once that Agreement is implemented, those concerns will disappear entirely. In addition, the State Team points out that in DE 99-117, PSNH agreed not to argue in any other forum that the Commission's findings under Section 32(c) of PUHCA would constitute a decision or admission in any other forum with respect to the above referenced agreements of the prudence of PSNH's or NU's actions, and that if necessary, it would appear to be a *pro forma* matter to obtain the same commitments in this case. Finally, the State Team supports the request for an issuance of an Order *Nisi*.

III. COMMISSION ANALYSIS

The PUHCA states that if the costs of a generating facility were included in retail rates under the laws of any state, in order for that facility to be considered an "eligible facility," every state utility commission having jurisdiction over that facility's rates must determine that allowing the designation "eligible facility": 1) will benefit customers; 2) is in the public interest; and 3) does not

violate state law. The PUHCA further provides that if the facility in question is owned by an affiliate of a registered holding company, then each state commission having jurisdiction over the retail charges of any other affiliate of that registered holding company must make the same three determinations in order to obtain the "eligible facility" designation. Because Millstone Station's costs are directly in the retail rates of the New Hampshire consumers of certain of the Joint Applicants, and other Joint Applicants regulated by the Commission are either subsidiaries or affiliates of a holding company that owns, either directly or through an affiliate, a portion of Millstone, PUHCA requires that this Commission, along with the relevant commissions of Connecticut, Massachusetts, Maine, Vermont, New York, New Jersey, Pennsylvania and Rhode Island make the same three specific determinations in order to obtain the "eligible facilities" designation.

The Joint Applicants have placed before the Commission the limited question of whether the designation of the facilities as eligible under PUHCA is beneficial to consumers, in the public interest and does not violate the

state law.³

Based upon the record before us, we make a limited and narrow determination that allowing the Millstone generating assets in question to be designated an "eligible facility" will be beneficial to consumers and is in the public interest because the assets in question are being transferred to an entity that will be engaged in and selling to the wholesale competitive electricity market in New England, and the development and growth of that market is in the interest of New Hampshire electric customers. We also find that such designation would not violate state law. While recent events in New England and California have highlighted problems with the wholesale markets, the capacity represented by this sale is de minimis for New Hampshire's utilities. The Commission will continue to monitor the markets and advocate market reforms as needed.

In reaching this decision, the Commission has

³ We note that many of the issues that the PUHCA was intended to address, such as the regulation of affiliate transactions within a vertically integrated monopoly utility holding company, are not implicated here as Dominion's distribution operations are centered in Pittsburgh, Virginia and North Carolina. See Dominion's 2000 Annual Report, of which we take administrative notice. The purchase of the Millstone generation assets by Dominion will provide it a stake in only one sector of the New England electricity market. While this does not remove concerns about the exercise of market power within the energy market, it does not raise additional problems such as cross-subsidization, tying arrangements and other related issues that are implicated when a competitive energy provider is affiliated with a transmission and/or distribution company in the same operational region.

interpreted the terms "benefit to consumers" and "public interest" in 15 U.S.C. § 79z-5(a)(c) as applying only to the question of whether those assets, if sold, should be allowed to be deemed "eligible facilities." By making these findings the Commission has not rendered an opinion on the terms of the proposed underlying sale of these generating assets.

We also determine that all questions concerning the status of the Sharing Agreement and the Capacity Transfer Agreement, the prudence of PSNH's actions with respect to these Agreements, and PSNH's and NU's obligations under the Rate Agreement referenced in the State Team's letter will be resolved when the Commission's orders in Docket No. 99-099 are implemented and are therefore not necessary to consider at this time.

Based upon the foregoing, it is hereby

ORDERED NISI, that the findings requested by the Joint Applicants are approved as described herein; and it is

FURTHER ORDERED, that the Petitioner shall cause a copy of this Order Nisi to be published once in a statewide newspaper of general circulation or of circulation in those portions of the state where operations are conducted, such publication to be no later than February 1, 2001 and to be documented by affidavit filed with this office on or before

February 9, 2001; and it is

FURTHER ORDERED, that all persons interested in responding to this petition be notified that they may submit their comments or file a written request for a hearing on this matter before the Commission no later than February 7, 2001; and it is

FURTHER ORDERED, that any party interested in responding to such comments or request for hearing shall do so no later than February 9, 2001; and it is

FURTHER ORDERED, that this Order Nisi shall be effective February 13, 2001, unless the Commission provides otherwise in a supplemental order issued prior to the effective date; and it is

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	Nancy Brockway Commissioner
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Attested by:

Thomas B. Getz
Executive Director and Secretary