DE 00-269

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Retail Delivery Tariff Compliance Filing

Order Approving Compliance Filing in Part

O R D E R N O. 23,659

March 22, 2001

I. BACKGROUND AND PROCEDURAL HISTORY

This docket concerns the revised Retail Delivery Tariff, NHPUC No. 2, filed by Public Service Company of New Hampshire (PSNH) to implement the PSNH Restructuring Settlement Agreement approved by the Commission in Docket No. DE 99-099. The Restructuring Settlement Agreement would resolve pending litigation between the Commission and PSNH relative to electric industry restructuring, clear the way for PSNH to divest its generation facilities, unbundle the Company's rates, establish a formula for PSNH to recover certain of its stranded costs while requiring the write-off of others and open PSNH's service territory to the possibility of retail competition in electric generation services.

PSNH initially submitted a proposed Retail Delivery Tariff at the time of the initial filing of the proposed Restructuring Settlement Agreement in August 1999. The Commission approved the Restructuring Settlement Agreement, subject to certain significant modifications, in Order No.

23,443 (April 19, 2000), without discussing the proposed tariff language itself. Thereafter, the Legislature required certain additional changes to the Restructuring Settlement Agreement in exchange for legislative approval of a key element of the Agreement – the securitization of certain of PSNH's stranded costs. *See generally* 2000 N.H. Laws 249 (Chapter 249). PSNH filed a "conformed" version of the Restructuring Settlement Agreement, to reflect the changes ordered by the Commission and the Legislature, on June 23, 2000. Accompanying this filing was a new proposed compliance tariff.

On September 8, 2000, the Commission entered Order No. 23,549 in Docket No. DE 99-099. The purpose of Order No. 23,549 was to address motions for clarification and rehearing, to require certain additional modifications to the Restructuring Settlement Agreement and to make certain findings as required by the Legislature under Chapter 249 as a condition to implementing the Agreement.

In Order No. 23,549, the Commission noted that two intervenors – the Governor's Office of Energy and Community Services (GOECS) and the Save Our Homes Organization (SOHO) – had raised questions about certain aspects of the compliance tariff PSNH had filed with the conformed copy of the

Restructuring Settlement Agreement. *See* Order No. 23,549, slip op. at 63. Among the issues raised by GOECS and SOHO were (a) the use of the qualifier "willful" as a limitation on PSNH's liability to customers for its negligence, (b) "the inclusion of a $5 fee for changing to transition or to default service, or between suppliers," and (c) PSNH's offering of collection services to competitive suppliers of energy at retail. *Id*. at 63. Given that PSNH was instructed in Order No. 23,549 to file a revised compliance tariff by September 29, 2000, the Commission deferred the consideration of these issues, noting that it would "permit the parties to raise these questions once the Company has filed its Compliance Tariff" and would "determine at that time whether, how and when to consider the changes requested by GOECS and SOHO." *Id*. at 64.

Upon the Company's September 29, 2000 filing, the Commission opened this docket for the purpose of reviewing the proposed Retail Delivery Tariff and, in particular, the issues raised by GOECS and SOHO. The Office of Consumer Advocate (OCA) entered an appearance and, on December 21, 2000, the Commission conducted a pre-hearing conference. At a technical session following the pre-hearing conference, the parties and Commission Staff (Staff) agreed to propose that the Commission

resolve the outstanding issues on written briefs, as opposed to conducting an evidentiary hearing and developing a factual record beyond the one adduced in Docket No. DE 99-099. The Commission provisionally accepted the proposition that no hearing would be necessary and authorized the filing of briefs and reply briefs. *See* Order No. 23,618 (January 10, 2001), slip op. at 16. PSNH, GOECS, SOHO and Staff thereafter filed timely briefs according to the schedule established by the Commission.

As noted in Order No. 23,618, the issues in the docket have narrowed significantly and have been refocused somewhat since GOECS and SOHO first made objection to the compliance tariff in Docket No. DE 99-099. It is clear from the parties' briefs that only three remain: (1) whether PSNH should be permitted to revise the phrase "willful default or neglect," limiting its potential liability to customers for service interruptions, to "willful default or willful neglect," (2) the references in PSNH's disconnection notices to sums owing to competitive energy suppliers as opposed to PSNH itself, and (3) whether PSNH should be permitted to impose a $5.00 change-of-supplier fee and, if so, whether such fee should be paid by the competitive energy supplier or the customer. We address each of those issues separately.

II. LIABILITY LIMITATION LANGUAGE

PSNH's proposed tariff includes language limiting its liability in cases of service interruptions to cases of "willful default or willful neglect." The current language refers to "willful default or neglect."

According to PSNH, this amounts to a mere clarification of the tariff, offered so as to eliminate what PSNH characterizes as costly and unnecessary future litigation. In PSNH's view, the only reasonable interpretation of the phrase "willful default or neglect" involves applying the adjective "willful" to both "default" and "neglect."

In support of its view, PSNH relies on *Singer Co. v. Baltimore Gas & Electric Co.*, 558 A.2d 419 (Md. Ct. Spec. App. 1989). According to PSNH, the Maryland Court of Special Appeals was called upon to interpret the very tariff phrase at issue here and concluded that "willful default or neglect" must be construed to mean "willful default or willful neglect."

PSNH further contends that, because the Commission has permitted Concord Electric Company and Exeter & Hampton Electric Company to adopt the "willful default or willful neglect" language in their retail tariffs, the change proposed

by PSNH creates no new precedent for the Commission. Moreover, according to PSNH, if the language in the Concord Electric and Exeter & Hampton tariffs had been problematic, the Commission would have received complaints and acted to change the language. Moreover, according to PSNH, subjecting it to a higher standard than other similarly situated New Hampshire electric utilities would violate PSNH's constitutional right to equal protection of the laws.

GOECS views the proposed change in the liability language as substantive and, therefore, inappropriate. According to GOECS, there is no factual or legal basis for making such a change at this time. In the view of GOECS, adopting PSNH's proposal would amount to enhancing the Company's possible litigation position in disputes with customers at a time when the its customer relationships, and those of other New Hampshire electric utilities, are evolving in light of industry restructuring. GOECS urges the Commission to defer the question raised by PSNH's proposal to a later time, when potential impacts on ratepayers are better understood and the Commission may be in a position to consider the issue on an industry-wide basis.

OCA likewise urges the Commission to defer this issue. According to OCA, the current tariff language should

remain in effect until either (1) the Commission conducts a generic proceeding that embraces not only the liability limitation language but also outage-related disallowances and fines, or (2) the next PSNH rate case.

Staff shares the views of GOECS and OCA on this issue. According to Staff, the New Hampshire Supreme Court has never considered the question presented by the *Singer* case and it would therefore be inappropriate for the Commission simply to assume that *Singer* would apply in New Hampshire. According to Staff, deeming the phrase "willful default or neglect" to mean "willful default or willful neglect" would be contrary to New Hampshire law because the phrase "willful neglect" would be meaningless in the circumstances.

Moreover, Staff directs the Commission's attention to the New Hampshire Supreme Court's warning that tariffs "do not simply define the terms of the contractual relationship between a utility and its customers. They have the force and effect of law and bind both the utility and its customers." *Appeal of Pennichuck Water Works*, 120 N.H. 562, 566 (1980). Thus, according to Staff, the Commission's task here is very much that of a legislature as opposed to that of a court. Therefore, Staff asserts, while it may have been proper for the *Singer* court to resolve an ambiguity it perceived in the

tariff, the Commission cannot take the same action without considering the policy implications. As did GOECS, Staff asserts that the present proceeding is not the appropriate setting for such a consideration, given the lack of a full factual record on the issue.

In reply, PSNH notes that the language at issue was included in the compliance tariff it filed in August 1999 with the original version of the Restructuring Settlement Agreement. Thus, according to PSNH, the issue has been before the Commission since the outset of Docket No. DE 99-099 and the lack of a factual record, as well as what PSNH characterizes as other parties' failure to raise the issue, is not the fault of PSNH. In the view of PSNH, the Commission's approval of the Restructuring Settlement Agreement in Order No. 23,443 should be construed as an approval of the "willful default or willful neglect" liability limitation language included in the tariff that was part of the filing considered by the Commission in that order. Finally, PSNH criticizes Staff's emphatic rejection of the *Singer* court's analysis. According to PSNH, there would be no point to a liability limitation clause in a tariff if it were construed to hold PSNH to a standard of ordinary negligence – which, PSNH asserts, is precisely the result of not applying the adjective

"willful" to the word "neglect." In PSNH's view, this is precisely the common sense principle recognized by the *Singer* decision.

Commission Analysis

We agree with GOECS and Staff that the present proceeding is an inappropriate occasion for deciding whether to revise the PSNH Retail Delivery Tariff's liability limitation language in the manner proposed by PSNH. Our review of the retail tariffs of utilities providing electric distribution services in New Hampshire reveals a diversity of approaches to the question of liability limitation. As noted by PSNH, Concord Electric and Exeter & Hampton limit liability to instances of "willful default or willful neglect." The phrase "willful default or neglect" appears in the tariff of the Connecticut Valley Electric Company (CVEC) and the New Hampshire Electric Cooperative (NHEC) as well as the current PSNH tariff. Neither phrase is included in the retail tariff of the Granite State Electric Company (GSEC). We agree with PSNH that there may be problems with allowing utilities to employ different liability language in similar circumstances, but we are unable to accept the hypothesis that the change is merely one of housekeeping. We therefore will instruct the executive director to open a docket for the purpose of

conducting an investigation into what the appropriate liability limitation language is for all electric distribution utilities under our jurisdiction. Meantime, we deny without prejudice PSNH's request for amended liability limitation language.

III. DISCONNECTION NOTICE LANGUAGE

At the pre-hearing conference in this docket, GOECS SOHO, OCA and Staff expressed concerns with regard to the provision of the retail tariff governing collection services. GOECS requested that the following language be added to this section: "The Company shall fully and clearly disclose to customers, in both written an oral communications, that it is performing Collection Services on behalf of a [competitive energy] Supplier and that such collection activities will not include disconnection of services." SOHO supported this proposal, indicating that it is critical that PSNH make clear to its customers that it will not have the authority to disconnect service for non-payment of any sum owing to a competitive energy supplier. Staff noted its agreement with GOECS and SOHO at the pre-hearing conference.

In their filings submitted after the pre-hearing conference, GOECS, SOHO and OCA indicate that they have negotiated a proposed resolution of this issue with PSNH.

Specifically, these parties agreed upon language for PSNH to insert in its disconnect notices in cases where there is an arrearage due both PSNH and a competitive supplier. Under the agreement, the disconnect notice would state that the latter sum "is overdue for energy provided by third-party suppliers, but service cannot be disconnected for failure to pay this amount."

Staff does not agree with this proposed resolution. According to Staff, the appropriate action is for the Commission to require PSNH to delete all references to competitive supplier charges in disconnect notices. Staff points out that, under Puc 1203.11(b)(2), any disconnection notice sent to a PSNH customer must contain a specific set of information, including "the reason for disconnection of service." In the view of Staff, sums owed to a competitive supplier are not such a reason and, therefore, references to such sums are inappropriate for disconnection notices. Staff's suggestion is that PSNH and/or competitive suppliers in PSNH's service territory should be required to use other means for communicating with customers about arrearages owed to competitive suppliers.

In reply, PSNH contends that Staff's proposed resolution would lead to customer confusion. Specifically,

according to PSNH, customers with arrearages will be confused when disconnect notices fail to remind customers of sums owing to competitive suppliers because (assuming payment of delivery service charges to PSNH and avoidance of disconnection) subsequent bills will again show those energy-related arrearages. According to PSNH, these conflicting messages will lead to more calls to PSNH's customer service center. PSNH also takes the position that Staff's view is inconsistent with RSA 374-F:3, III (requiring that customers receive "clear price information") and would discourage competitive energy suppliers from doing business in New Hampshire.

Commission Analysis

Upon careful review of this issue, we are of the view that this issue should be the subject of further negotiation among the parties and Staff. Our understanding of the settlement discussions that have occurred thus far on this issue is that there is general agreement as to (1) the need to change PSNH's current disconnection notice to reflect PSNH's new role as a distribution company, (2) the desirability of making clear to customers receiving disconnection notices that disconnection only applies to arrearages owed the distribution company, as opposed to a competitive supplier, and (3) the value of making clear to customers that sums may also be owed

to a competitive supplier and that non-payment of such sums may also have consequences (i.e., being placed on default service, which is likely to offer terms less favorable than those of competitive suppliers). We agree these are the relevant issues, and given the lack of serious disagreement about them we are confident that if given more time the parties and Staff will be able to reach agreement.

We offer some principles to guide the negotiations. In our view, a disconnect notice sent to a PSNH customer receiving energy from a competitive supplier for which PSNH is supplying billing services should, at a minimum, inform the customer of (1) the total amount due on the customer's electricity bill, (2) the amount overdue to PSNH that must be paid in order to avoid disconnection, (3) the amount overdue to the competitive supplier, and (4) the consequences of non-payment of the sum due the competitive supplier. In the past, space limitations have tended to circumscribe the amount of information PSNH has been required to include on disconnection notices. Given the sweeping changes to retail electricity service in New Hampshire occasioned by industry restructuring, our intention with regard to disconnection notices and billing issues in general is to be guided henceforth by the relevant public policy issues rather than the logistics utilities

confront in generating such notices. If meeting the requirements for generating adequate bills and disconnection notices requires PSNH or another utility to expand their capabilities, we will expect them to do so.

Therefore, we direct Staff to convene further negotiations on the issue and will require a report within 30 days of this order. We note that holding this aspect of the docket open for another 30 days will have no adverse consequences because there is no possibility of PSNH needing to generate disconnection notices within the next month that would go to customers receiving electricity from a competitive supplier.

IV. CHANGE-OF-SUPPLIER FEE

The proposed tariff submitted by PSNH would impose a $5.00 fee on a customer for changing energy suppliers. SOHO asks the Commission not to impose such a fee on customers. According to SOHO, requiring customers to pay such a fee upon changing suppliers undermines the goal of near-term rate relief in the Restructuring Act, RSA 374-F:3, XI, runs contrary to the statute's expressed objective of reducing costs for all consumers of electricity, RSA 374-f:1, I, and also runs counter to the act's goal of providing customers with the "option of stable and predictable ceiling electricity

prices through a reasonable transition period," RSA 374-F:3, V(b).

According to SOHO, it would be especially inequitable to impose the $5.00 fee on a customer moving onto default service after receiving energy from a competitive supplier. SOHO notes that, pursuant to RSA 374-F:2, I-a, default service is designed for "retail customers who are otherwise without an electricity supplier" and thus, presumably, are in need of the service through no fault of their own. As a general proposition, SOHO points out that not all customers will change suppliers out of choice, given that some suppliers will leave the market, go out of business or terminate individual customers' accounts for various reasons. In SOHO's view, requiring customers to pay $5.00 in these circumstances would be unfair.

SOHO further contends that low-income customers are especially harmed by the $5.00 fee that PSNH seeks. According to SOHO, it would be appropriate to exempt low-income customers from such a fee as one of the "[p]rograms and mechanisms that enable residential customers with low incomes to manage and afford essential electricity requirements" as encouraged in the Restructuring Act. *See* RSA 374-F:3, V(a).

Finally, SOHO points out that the Restructuring Act

does not contain an express authorization of a change-of-supplier fee. According to SOHO, "imposing a switching fee on residential customers would appear to be an odd way of encouraging customers to leave transition service and enter the competitive market." Comments of Save Our Homes Organization at 3.

GOECS contends that a change-of-supplier fee is unwarranted whether it is charged to the customer or to the supplier. According to GOECS, there is no support in the record of Docket No. DE 99-099 to support such a fee – and, particularly, no basis for the Commission to determine that a $5.00 fee is cost-based. According to GOECS, the Commission should either reject the fee outright or approve it with the explicit understanding that the question will be revisited at the next appropriate opportunity pursuant to RSA 365:28 (providing Commission with authority to "alter, amend, suspend, annual, set aside or otherwise modify" orders upon notice and hearing).

Noting that PSNH will incur an incremental charge in order to cause customers to switch from one supplier to another, OCA recommends implementing the $5.00 fee on a temporary basis. According to OCA, the Commission should use the next PSNH rate case to determine a cost-based change-of-

supplier fee. In OCA's view, few if any residential customers will be changing suppliers during the initial 33 months that will precede the next PSNH rate case under the Restructuring Settlement Agreement. Thus, according to OCA, residential customers will not be harmed if the $5.00 fee is authorized on a temporary basis. OCA supports charging the fee to customers rather than suppliers, at least for the present. According to OCA, this would appropriately allow PSNH to recover the fee from customers who return to transition service after receiving energy from a competitive supplier.

Staff takes the position that this issue was resolved by Order No. 23,443 and should not be revisited. Staff draws the Commission's attention to the language in Order No. 23,443, determining that the change-of-supplier fee, plus several other restructuring-related charges enumerated in the order, "impose additional costs on the Company" and are therefore "proper for recovery from suppliers taking the services." See Order No. 23,443, slip op. at 259. According to Staff, it is appropriate for the Commission to change a prior order only when the previous determination reflects an error of law or when the facts or circumstances have changed. In Staff's view, that is not the situation here.

In light of Order No. 23,443, Staff objects to

PSNH's proposal to assess the fee against customers rather than suppliers. According to Staff, the issue is not simply how to account for a charge that customers will ultimately pay in any event, because assessing the fee against suppliers would preclude PSNH from collecting anything when a customer switches from a competitive supplier back to Transition Service, as is permitted under the Restructuring Settlement Agreement in certain circumstances, or to Default Service.

Staff agrees with GOECS that the $5.00 fee is problematic because it is not cost-based. According to Staff, the next PSNH rate case is the appropriate juncture for revisiting both the fee and the issue of whether it should be assessed against customers or suppliers. Staff points out that a case can be made for imposing the fee either on the customer or the supplier, noting that the latter option would discourage 'slamming.'

PSNH disagrees with Staff's view of Order No. 23,443. According to PSNH, notwithstanding the language quoted by Staff the April 2000 order actually approved PSNH's proposal to impose the $5.00 change-of-supplier fees on customers as opposed to suppliers.

In support of this view, PSNH makes two points.

First, the Company notes that Order No. 23,443 acknowledges that the "Terms and Conditions for Suppliers" section of the proposed tariff, which includes the change-of-supplier fee, "is designed to address and govern the day to day dealings primarily between the Company and a Supplier and in some situations with the customer." *See* Order No. 23,443, slip op. at 258. According to PSNH, the $5.00 fee is one such 'situation with the customer.'

Second, PSNH notes that the tariff submitted with the Restructuring Settlement Agreement in 1999 made clear that the $5.00 fee would be imposed directly on customers. In PSNH's view, Order No. 23,443 operates as an approval of this proposed tariff and all of the language contained within it. In this regard, PSNH points to the determination in Order No. 23,443 that the "overall structure of the Delivery Service tariff is appropriate" and that the Commission therefore "approves it." *Id*. at 243.

PSNH disagrees with Staff's suggestion that imposing the fee on suppliers would discourage slamming. According to PSNH, because the change-of-supplier fee would not be imposed in connection with customer moves from Transition Service to a competitive supplier, a competitive supplier that is inclined to slam would still be able to do so in most instances.

According to PSNH, imposing the fee on suppliers rather than customers would lead to the "nonsensical result" of denying PSNH the opportunity to recover any fee in cases where a customer is discontinuing the receipt of energy from a competitive supplier and switching to Transition or Default Service. Reply Memorandum of Public Service Company of New Hampshire at 3. PSNH notes that it cannot compel a supplier to continue to serve an individual customer. Thus, according to PSNH, it would be unfair to deny it the opportunity to recover a change-of-supplier fee in situations where a competitive supplier is no longer providing service to one or more PSNH customers.

PSNH disputes SOHO's suggestion that the fee as proposed would discourage customers from doing business with competitive energy suppliers or would be particularly unfair to low-income customers. In this regard, PSNH points out that no fee would be assessed against customers moving from Transition Service to a competitive supplier. PSNH also notes that it has agreed to permit low-income customers to return to Transition Service for as long as it is offered.

PSNH characterizes its proposed change-of-supplier charge as "virtually identical" to the one imposed by local telephone companies when a customer changes long-distance

carriers. *Id*. The Company suggests that, as with long-distance companies in the telephone industry, competitive energy suppliers could agree to absorb the $5.00 fee as a marketing tool. Conversely, according to PSNH, requiring the competitive suppliers to pay this fee could discourage them from entering the market. PSNH agrees with OCA's suggestion that a salutary effect of assessing the fee against customers is that it is a regime with which customers are familiar based on their experience with telephone companies.

Commission Analysis

The plain language of Order No. 23,443 includes a determination that a $5.00 change-of-supplier fee is "proper for recovery from suppliers taking the services." Order No. 23443, slip op. at 259. As PSNH notes, we did approve the "overall structure" of the proposed tariff in our April 2000 order. *Id*. at 243. But, in the next sentence, we made clear that such approval was conditioned by our subsequent discussion of certain provisions that we then went on to discuss – including the discussion of the change-of-supplier fee noted above.

We agree with the intervenors' suggestion that the rate case that will mark the end of the 33-month initial delivery charge period under the Restructuring Settlement

Agreement is an appropriate juncture for an in-depth revisitation of this issue. We share the concern of GOECS that the current $5.00 fee may not be cost-based, and should be designed to permit PSNH to recover its costs and nothing more. We expect to consider that question in the next rate case, and we also intend to revisit the issue of whether it is appropriate to impose this charge on the customer or the supplier.

V. CONCLUSION

The Commission thanks PSNH and the intervenors for their thoughtful comments on the proposed tariff and for their assistance in resolving by negotiation many of the issues initially articulated in this docket. With the exceptions noted above, we approve the proposed PSNH Retail Delivery Tariff and are confident that it sets out appropriate terms of service for PSNH to adopt at the advent of industry restructuring in the Company's service territory.

Based upon the foregoing, it is hereby

ORDERED, the proposed Public Service Company of New Hampshire Retail Delivery Tariff, PSNH No. 2, is hereby approved with the exceptions noted above, and it is

FURTHER ORDERED, that Public Service Company of New

Hampshire shall file a compliance tariff, reflecting the changes discussed in this Order, within ten days, and it is

FURTHER ORDERED, that the Parties and Commission Staff report within 30 days of this Order on the result of negotiations concerning the content of PSNH disconnection notices, as discussed more fully above.

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

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

Attested by:

Thomas B. Getz
Executive Director and Secretary