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NEW HAMPSHIRE ELECTRIC COOPERATIVE, INC. AND
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Pilot Pay-As-You-Save (PAYS) Energy Efficiency Program

Order on Preliminary Issues,
Motion for Confidential Treatment
and Proposed Procedural Schedule

O R D E R N O. 23,758

August 7, 2001

I. PROCEDURAL HISTORY

As required by the New Hampshire Public Utilities Commission (Commission) in Order No. 23,574 (November 1, 2000), the New Hampshire Electric Cooperative, Inc. (NHEC) and Public Service Company of New Hampshire (PSNH) initiated this docket on April 12, 2001 to request the Commission's approval of a pilot "Pay As You Save" (PAYS) energy efficiency products program. As noted by the petitioning utilities, PAYS products are energy efficiency measures that are billed as part of the monthly electric bills of the customers who receive the savings resulting from the measures. PAYS was first described in a 1999 paper by the Energy Efficiency Institute (EEI) and commissioned by the National Association of Regulatory Utility Commissioners (NARUC). NHEC and PSNH have employed the Energy Efficiency Institute in this proceeding as their consultant.

The Commission conducted a duly noticed Pre-Hearing Conference on June 5, 2001 and, thereafter, entered Order No. 23,726 (June 14, 2001). In Order No. 23,726, the Commission approved intervention petitions submitted by the Governor's Office of Energy and Community Services (ECS), EnergyNorth Natural Gas d/b/a KeySpan Energy Delivery New England (KeySpan) and Granite State Electric Company (GSEC); the Commission also noted that the Office of Consumer Advocate (OCA) had entered an appearance on behalf of residential ratepayers. Further, as recommended by the parties and Staff, the Commission requested briefs from the parties with regard to two threshold issues: (1) whether the Commission has the authority to permit a utility to disconnect the service of a customer for non-payment of PAYS charges; and (2) whether the Commission has the authority to permit a utility to cause PAYS charges to "run with the meter," i.e., to require a new customer to assume remaining PAYS charges when a previous customer has left a PAYS measure behind on the premises.

The parties and Staff conducted technical sessions on June 5, 2001 and July 25, 2001. Staff, in conjunction with the parties present at the July 25 session, thereafter proposed a procedural schedule to govern the remainder of the proceeding.

The Commission received briefs from PSNH, ECS and OCA, the latter two filing jointly. In addition, PSNH filed a motion on June 21, 2001 seeking confidential treatment of certain proprietary materials of EEI that had been produced in discovery. We take up each of the pending issues in order.

II. DISCONNECTION AUTHORITY

A. Positions of the Parties

All parties that submitted briefs agreed that the Commission has the authority to permit a utility to impose disconnection on a party failing to honor PAYS obligations as reflected on the utility bill.

Noting that the Commission's ratemaking authority is plenary, PSNH contends that if the Commission approves PAYS as a tariffed service then it is consistent with the Commission's enabling statutes and existing regulations to permit disconnection for non-payment of PAYS charges. In that regard, PSNH cites RSA 363-B:1 (authorizing termination of utility service for "good cause," defined as "violation of any tariff provision then in force . . . or nonpayment of charges that are past due and remain unpaid after proper demand for them") and the Commission's Rule Puc 1203.11(d)(2) (noting that disconnection may be imposed only for failure to pay for "basic utility service"). PSNH further notes that "basic

utility service" is defined in relevant part at Puc 1202.02 as "any tariffed fee or rate that has been filed with and approved by the commission."

According to PSNH, it would be possible to operate a PAYS program without the ability to disconnect for non-payment of PAYS charges, but the program would be far more administratively expensive as a result.[1] According to PSNH, the existing credit and collection procedures of regulated utilities provide an appropriate and administratively convenient way to collect PAYS charges.

ECS and OCA note that, in addition to the Commission's statutory authority to establish and enforce utility rates that are just and reasonable, the Commission is authorized pursuant to RSA 378:30-b to include the cost of conservation measures in utility rates. According to ECS and OCA, because the Commission has plenary authority to engage in ratemaking, its power to design and implement conservation measures should also be interpreted broadly.

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[1] By letter dated June 26, 2001, PSNH advised the Commission that its consultant, EEI, does not agree with this statement. According to EEI, "We don't think you can run this program without disconnection. Without disconnection for non-payment you cannot expect to recover your investment so the revolving loan fund would quickly fail. In effect, you would be running a subsidy program with much higher subsidies than you now have for your other programs."

As did PSNH, ECS and OCA take the position that PAYS should be deemed a "basic utility" service for the purposes of Rule Puc 1202.02. ECS and OCA point out that Puc 1203.11(d)(2) was drafted with an explicit exclusion of "merchandise, appliance sales, or repairs" from the definition of "basic utility service," the non-payment for which can trigger disconnection. Therefore, according to ECS and OCA, it may be necessary to amend the rule and/or to approve the proposed PAYS tariff on a temporary basis for the purpose of evaluating the PAYS pilot.

ECS and OCA stress that, under *Komisarek v. New England Telephone & Telegraph Co.*, 111 N.H. 301 (1971), the PAYS tariff must be clear and unambiguous in order to permit its enforcement. They also note that utilities must follow the relevant disconnection procedures. In general, ECS and OCA urge the Commission to allow utilities to impose disconnection for non-payment of PAYS charges, but only to the extent necessary to implement the pilot program.

B. Commission Analysis

We agree with the parties that it is well within our statutory authority to permit a utility to impose disconnection on a customer for failure to make payment on PAYS charges, assuming the other requirements for

disconnection are met. We begin with the premise that the statutory scheme under which the Commission operates give it "plenary" ratemaking authority over the state's utilities, except in circumstances specifically enumerated in the statute. *Legislative Utility Consumers' Council v. Public Service Co. of N.H.*, 119 N.H. 332, 341 (1979). While it could be argued that establishing the ground rules for disconnection is not, strictly speaking, ratemaking, the approval of utility tariffs is clearly within the Commission's ratemaking jurisdiction. The statute governing disconnection, in turn, requires "good cause" for such utility action, defined for this purpose as "violation of any tariff provision then in force as approved by the public utilities commission, or nonpayment of charges that are past due and remain unpaid after proper demand for them." RSA 363-B:1, I and II. A tariff duly approved by the Commission has "the force and effect of law." *Appeal of Pennichuck Water Works*, 120 N.H. 562, 566 (1980).

There is a general and well-established principle in utility law that a regulated monopoly providing an essential public service "cannot refuse to render the service which it is authorized by its charter (or by law) to furnish, because of some collateral matter not related to that service." *Edris*

v. Sebring Utilities Comm'n, 237 So.2d 585, 587 (Fla. App. 1970) (citations omitted). Thus it has been held that a water utility could not require customers to purchase electric service as a condition precedent to obtaining water. *Id*. Likewise, it is inappropriate for a utility to disconnect service at one location because the customer refuses to pay a past-due bill at another location. *Berner v. Interstate Power Co.*, 57 N.W.2d 55, 57 (Iowa 1953); *see also Josephson v. Mountain Bell*, 576 P.2d 850, 851-53 (Utah 1978) (precluding disconnection of home phone for non-payment of business phone charges); *but see Allstates Transworld VanLines, Inc. v. Southwestern Bell Telephone Co.*, 937 S.W.2d 314, 318 (Mo. App. 1997) (permitting, as consistent with tariff language, disconnection of telephone service for non-payment of telephone directory advertising charges).

It is telling that the Missouri Court of Appeals focused on the putative disconnection's consistency with the applicable tariff, *see id.*, notwithstanding the fact that commercial directory advertising is arguably collateral to the provision of actual telephone service. The relevant New Hampshire case, *Komisarek v. New England Telephone & Telegraph Co.*, 11 N.H. 301 (1971), also counsels such an approach. In

Komisarek, the New Hampshire Supreme Court concluded that the Commission erred in permitting a telephone utility to disconnect a customer based on non-payment for a separate, disconnected line. The Court's holding was that, if the utility intended to make such action possible, "it was incumbent upon it to make this plain to its customers by tariff." *Id*. at 304.

In light of these authorities, it is clear that we have the authority to permit disconnection for non-payment of PAYS charges as long as this is clearly indicated in the utility's tariff. We believe this would be so even if New Hampshire applied a strict "collateral matter" rule of the sort stated by the *Edris* court. It was the *Edris* court's ruling that "[w]ater and electrical services are not complimentary or so interlocked that neither can be effective without the other." *Edris*, 237 So.2d at 587. By contrast, PAYS measures and conventional electric service are complimentary and interlocked in this sense. A PAYS measure generates no savings and is thus ineffective without the associated electric service and, in turn, an important policy objective associated with electric service, *see* RSA 374-F:3, IX (noting importance of energy efficiency in context of restructured electric industry), is at least arguably less

effective without PAYS. As noted by ECS and OCA, the key is clear tariff language – and, by extension, appropriate affirmative disclosures to PAYS customers about the consequences of non-payment.

We defer consideration of the ultimate question of whether we would endorse such an aspect of the PAYS pilot. We note, with interest, EEI's view that disconnection authority is vital to the success of a PAYS initiative. However, we believe it would be imprudent to rule on the details of the proposal at this preliminary stage of the docket.

III. PAYS OBLIGATIONS AS "RUNNING WITH THE METER"

A. Positions of the Parties

The next question posed for briefing concerns whether a PAYS measure can lawfully "run with the meter." In other words, given that a PAYS customer could terminate service at a particular location and leave the installed PAYS measure behind before the measure has been fully paid for, the issue is whether a utility can impose the remaining PAYS obligation on a successor customer as a condition of receiving service at that location.

PSNH answers the question in the affirmative. It reasons by analogy, pointing to the provisions in its tariff relating to line extensions. According to PSNH, when it

becomes necessary to extend a distribution line more than 300 feet or across private property in order to serve a customer, its tariff provides for customer payment of the relevant expenses over a 60-month period. PSNH further avers that, although these obligations are not recorded in the registry of deeds, the tariff provides for imposing this obligation on a successor customer who takes service at a location before the conclusion of the 60-month period. Similarly, PSNH points out, a new customer requesting service along a previously built line extension still within its payment period must agree to a proportional share of the expense, with the original customer's obligation reduced accordingly. Thus, according to PSNH, line extension obligations "run with the meter" and there is precedent for the relevant aspects of the PAYS proposal.

PSNH's position is that the legality of this aspect of the PAYS program depends on adequate notice to the customer. In that regard, PSNH and NHEC have provided sample forms, developed by EEI, designed to meet this need. However, PSNH avers that the wording of these notices is subject to negotiation prior to the conclusion of this docket.

Finally, PSNH relies on the concept of unjust enrichment to argue that PAYS obligations must be passed on

from original to successor customers in the manner contemplated. According to PSNH, if a successor customer were allowed to take advantage of a PAYS measure (i.e., receive the benefit of its energy savings) without paying for it, the customer would be unjustly enriched at the expense of the source of PAYS funds.

ECS and OCA take a far more skeptical view of this aspect of the PAYS initiative, but without going so far as to allege that it would be contrary to law. According to ECS and OCA, and pointing in particular to the statute requiring encumbrances on real estate to be recorded in order to be enforceable against subsequent purchasers, in order for the obligation to pay for a PAYS measure to "run with the meter," the relevant utility must ensure that prior and complete notice is afforded to the successor customer. In the view of ECS and OCA, in the absence of a lien explicitly authorized by statute or "special agreement" (by which we take ECS and OCA to mean the assent of the customer in question), a public utility cannot impose liability for utility charges incurred on anyone other than the customer originally contracting for the services.

ECS and OCA draw the Commission's attention to the statute covering mechanic's liens, RSA 447:2. According to

ECS and OCA, this could provide a basis for transferring a PAYS obligation to a successor customer, but would apply only to fixtures (as opposed to portable PAYS measures) and would be valid for only 120 days after the services are performed.

Noting that a utility's tariff does not simply state the contractual terms between the utility and its customers but has the force and effect of law because of its Commission approval, ECS and OCA nevertheless contend that this would be insufficient to bind successor PAYS customers. According to ECS and OCA, this is because the PAYS tariff is not of general application and, therefore, it would be improper to presume constructive knowledge of the PAYS tariff provisions.

Next ECS and OCA raise the possibility of requiring PAYS measures to be recorded security interests within the meaning of the New Hampshire version of the Uniform Commercial Code (UCC). Characterizing this approach as useful and perhaps advisable, ECS and OCA take the position that UCC filings with the Secretary of State and the appropriate town clerk would not necessarily provide adequate notice to prospective buyers or renters.

Relying on *PK's Landscaping v. New England Telephone*, 128 N.H. 753 (1939), ECS and OCA take the position that the PAYS obligation of a subsequent customer may be

voidable as an improper "contract of adhesion." They concede that, in the cited case, a contract involving a commercial telephone directory was not voidable absent customer misinformation or behavior on the part of the telephone company that was coercive or fraudulent. However, according to ECS and OCA there is danger here that customers will buy or rent property and move in with no knowledge, either actual or constructive, of the PAYS measure. In these circumstances, according to ECS and OCA, it would be inherently coercive to require an unwilling customer to honor the PAYS obligation. In particular, they point out by way of example that a customer who does not do laundry at home may inherit a PAYS washing machine or a business customer may have new uses for a premises that are incompatible with existing PAYS lighting.

In support of its view that timely notice is a crucial requirement with regard to successor PAYS customers, ECS and OCA draw the Commission's attention to certain statutes requiring disclosures in real estate sales transactions. Specifically, they point to the disclosure requirement regarding radon gas and lead paint, subsurface disposal systems, water supply systems, sewage disposal systems, insulation and the existence of a lease relating to the property.

ECS and OCA conclude their discussion of this issue with a critique of the draft EEI forms provided by PSNH and NHEC in discovery. They aver that they are willing to continue to work with the utilities and the Commission Staff to ensure that adequate disclosure is a precondition to PAYS obligations being imposed on customers inheriting PAYS measures.

B. Commission Analysis

We have a somewhat different way of defining the problem than do PSNH, ECS or OCA. Specifically, we believe the relevant issue is not whether a PAYS charge can "run with the meter," a concept borrowed from the law governing real estate covenants and equitable servitudes. Our powers are limited to those expressly granted by statute or fairly implied from such enactments, *Appeal of Public Service Co. of N.H.*, 122 N.H. 1062, 1066 (1982), a limitation that, we believe, does not permit us to create covenants or servitudes that would automatically bind successive purchasers of the ostensibly encumbered realty. Our focus is much narrower; in our view, the relevant question is whether we may permit or require a utility to deny service to a new customer unless the customer agrees to assume any unsatisfied PAYS obligations relating to PAYS measures left on the premises by a

predecessor customer. In this sense, although we have previously employed the phrase "run with the meter" as a shorthand description of the issue, it is potentially misleading.

Given this formulation of the problem, we are unable to agree with ECS and OCA that the law governing real estate transfers, contracts of adhesion, recorded security interests or mechanics liens is applicable beyond providing potentially useful policy guidance. As already noted, once a tariff is duly approved by the Commission it has "the force and effect of law and bind[s] both the utility and its customers." *Pennichuck Water Works, supra*. The question thus reduces to whether, if we approved the tariff provisions in question and vested them with the force and effect of law, we would be exceeding the statutory authority granted us by the Legislature.

We conclude that we would not. We find the relevant authority in several of our enabling statutes. The Legislature has vested us with the authority to determine whether "*[a]ll* charges made or demanded by any public utility" are "just and reasonable." RSA 374:2 (emphasis added). It is our responsibility to exercise "general supervision of all public utilities" in New Hampshire. RSA 374:3.

In relevant part, the term "public utility" is defined for purposes of Commission regulation as a corporation or other entity "owning, operating or managing any plant or equipment or any part of the same . . . in the generation, transmission or sale of electricity ultimately sold to the public." RSA 362:2. Based on this definition alone, it could be argued that a company like NHEC or PSNH is not acting as a "public utility" within the meaning of RSA 362:2, and thus would not be subject to Commission regulation, when it is selling or installing PAYS measures because such activity is not the generation, transmission or sale of electricity. However, as already noted, the Legislature has explicitly declared energy efficiency to be one of the policy principles that must guide the restructuring of the electric industry in New Hampshire. *See* RSA 374-F:3, X.

Specifically, the Legislature has declared in the Electric Utility Restructuring Act that "[r]estructuring should be designed to reduce market barriers to investments in energy efficiency and provide incentives for appropriate demand-side management and not reduce cost-effective customer conservation. Utility sponsored energy efficiency programs should target cost-effective opportunities that may otherwise be lost due to market barriers." *Id*. PAYS, assuming Commission acceptance of its premises, speaks directly to the reduction of market barriers to investments in energy efficiency. The implementation provisions of the Restructuring Act leave no doubt that the Commission is the agency of government vested with the authority to advance the goal of energy efficiency as well as the other policy principles in the statute. *See* RSA 374-F:4, VII ("The Commission is authorized to order such charges and other service provisions and to take such other actions that are necessary to implement restructuring and that are substantially consistent with the principles established in this chapter."). Accordingly, both the Restructuring Act and the Commission's general supervisory authority over public utilities provide ample authority for the Commission to direct NHEC and PSNH to structure their tariffs in the manner

contemplated.

We decide simply that we have the authority to permit a utility to require a new customer to assume a PAYS payment obligation when beginning service at which a PAYS measure has been installed.[2] We express no view at this time about the notice and disclosure issues discussed by PSNH, ECS and OCA in their briefs since these are policy questions that do not go to the question of our authority. It would appear from the discussion of these subjects in the briefs that we have reason to be optimistic that the parties will be able to resolve these important aspects of the PAYS pilot by agreement. We also do not decide what if any disclosure obligations the law may impose on sellers or lessors of property that includes a PAYS measure to which a continuing payment obligation applies.

IV. MOTION FOR CONFIDENTIAL TREATMENT

Finally, we consider PSNH's motion for confidential treatment of certain materials developed by EEI and furnished in discovery. These materials consist of forms, drafts of notices and agreements to be used by program participants,

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[2] By "assume a PAYS payment obligation" we mean that a customer may be required take over the responsibility for *future* payments as they accrue. As we understand the proposed pilot program, a customer who leaves a PAYS measure behind remains responsible for all PAYS payment obligations that accrued while the customer was receiving electric service at the subject location.

i.e., utilities, contractors, landlords and customers. PSNH also seeks confidential treatment with regard to certain materials not yet furnished, comprising materials developed by EEI in connection with the Burlington Electric Department in Vermont. No party has indicated any opposition to the motion.

The New Hampshire Right-to-Know Law provides each citizen with the right to inspect all public records in the possession of the Commission. *See* RSA 91-A:4, I. The statute contains an exception, invoked here, for "confidential, commercial or financial information." RSA 91-A:5, IV. In *Union Leader Corp. v. New Hampshire Housing Finance Authority*, 142 N.H. 540 (1997), the New Hampshire Supreme Court provided a framework for analyzing requests to employ this exception to shield from public disclosure documents that would otherwise be deemed public records. There must be a determination of whether the information is confidential, commercial or financial information "*and* whether disclosure would constitute an invasion of privacy." *Id*. at 552 (emphasis in original, citations omitted). "An expansive construction of these terms must be avoided," lest the exemption "swallow the rule." *Id*. at 552-53 (citations omitted). "Furthermore, the asserted private confidential, commercial, or financial interest must be balanced against the public's interest in disclosure, . . .

since these categorical exemptions mean not that the information is *per se* exempt, but rather that it is sufficiently private that it must be balanced against the public's interest in disclosure." *Id*. at 553 (citations omitted).

Our applicable rule is designed to facilitate the employment of this balancing test. We require a motion for confidentiality to contain (1) the specific documents or portions thereof for which confidential treatment is sought, (2) reference to statutory or common law authority favoring confidentiality, (3) "[f]acts describing the benefits of non-disclosure to the public, including evidence of harm that would result from disclosure to be weighed against the benefits of disclosure to the public," and certain evidence. Puc 204.06(b). The evidence must go to the issue of whether the information "would likely create a competitive disadvantage for the petitioner." *Id*. at (c).

In support of its motion, PSNH indicates that the materials in question are considered "proprietary" by EEI, having been "developed based on EEI's vast background and experience in this field." Motion of Public Service Company of New Hampshire's [sic] for Protective Order Relative to EEI Propriety Materials (PSNH Motion) at 2. According to PSNH, it

would take a competitor of EEI many person-hours to develop the expertise to fashion these documents. PSNH further avers that this proposed PAYS pilot is the first such program to be so close to implementation and, accordingly, these materials "are not widely distributed in the public domain." *Id*. According to PSNH, EEI has an interest in protecting these materials in order to preserve its business interest in providing similar services in other jurisdictions. PSNH further notes that EEI places a copyright notice on the documents and has applied for trademark protection for "PAYS" and "Pay As You Save."

We have reviewed the documents in question and find that they do not contain information in which EEI has a reasonable expectation of confidentiality. Typically, the Right-to-Know Law protects what can be characterized as business secrets – internal data, methodologies and other information that would illuminate a business entity's strategy for competing in the marketplace. This, presumably, is what the New Hampshire Supreme Court had in mind when it noted that "commercial or financial" information within the meaning of RSA 91-A:5, IV encompasses "information such as business sales statistics, research data, technical designs, overhead and operating costs, and information on financial condition."

Union Leader, 142 N.H. at 553 (citation and internal quotation marks omitted). Documents such as form contracts and information notices that are necessary to the operation of a public program are of a wholly different character, despite their having been copyrighted.

Even assuming that EEI's forms and other similar documents could be deemed "confidential, commercial or financial information" of the sort that the Right-to-Know Law potentially exempts from disclosure, the public's interest in disclosure clearly outweighs EEI's interest in maintaining its confidentiality. As suggested by the extensive discussion of information disclosure issues in the brief submitted by ECS and OCA, the details of the various forms to be used in the PAYS program are key aspects of whether PAYS is in the public interest and, ultimately, whether the proposed pilot will successfully reduce market barriers to energy efficiency and therefore merit a fullscale PAYS program for New Hampshire. Thus, a member of the public desiring to keep abreast of how the Commission is considering the PAYS initiative would have a definite and reasonable interest in having access to the documents for which confidential treatment is sought.

Further, we note that PSNH in its motion does not suggest that these materials are presently maintained on a

confidential basis. Rather, PSNH avers that "these materials are not widely distributed in the public domain." PSNH Motion at 2. We can only infer from this statement that some or all of these materials are available to those who would infringe EEI's copyright and/or its pending trademark. This further attenuates EEI's interest in maintaining the confidentiality of these documents in this proceeding.

The asserted private confidential, commercial, or financial interest, when balanced against the public's interest in disclosure, does not merit confidential treatment of the documents in question. Therefore, they are not entitled to exemption from disclosure under RSA 91-A:5.

V. PROCEDURAL SCHEDULE

As noted above, Staff and the parties participating in the July 25, 2001 technical session have submitted a proposed procedural schedule to govern the remainder of the docket, *viz*:

Questions re forms to EEI	Aug. 3, 2001
Responses by PSNH/NHEC to 7/25 data requests	Aug. 6, 2001
Responses to forms-related questions from EEI	Aug. 17, 2001
Draft Settlement circulated by PSNH and Staff	Aug. 17, 2001
Settlement conference	Aug. 30, 2001

Staff's letter transmitting this proposal expressed the view that the docket is progressing satisfactorily toward a negotiated resolution of outstanding issues, and that the objective of the scheduling proposal is to permit implementation of the PAYS Pilot Program by January 1, 2002. The parties have proceeded on the assumption that their proposed schedule will gain approval.

We have only one concern with the schedule as proposed. In light of our ruling on the motion for confidential treatment of the forms and other documents prepared by EEI, it may become difficult or impractical for the Staff and parties to meet the timetable they have proposed for completing the necessary discovery and discussion of issues related to these documents. Accordingly, we will schedule the Merits Hearing for September 18, 2001 and we will provisionally approve the remaining aspects of the proposed procedural schedule as consistent with the public interest. Staff is instructed to keep the Commission informed if agreement is not reached as to treatment of the EEI documents in dispute and, if so, whether changes in the schedule are necessary or warranted.

Based upon the foregoing, it is hereby

ORDERED, that the motion of Public Service Company of New Hampshire for confidential treatment of certain documents is **DENIED**; and it is

FURTHER ORDERED, that the procedural schedule proposed by Staff and the parties participating in the July 25, 2001 technical session is hereby **APPROVED**, subject to possible further revision as noted herein.

By order of the Public Utilities Commission of New Hampshire this seventh day of August, 2001.

Douglas L. Patch
Chairman

Susan S. Geiger
Commissioner

Attested by:

Thomas B. Getz
Executive Director and Secretary