DE 03-166

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Petition for Authority to Modify Schiller Station

Order on Motion for Rehearing

O R D E R N O. 24,342

June 29, 2004

I. Introduction and Background

Four jointly appearing intervenors -- Pinetree Power, Inc., Pinetree Power-Tamworth, Inc., Bridgewater Power Company, L.P. and Hemphill Power & Light Company (collectively, the "Existing Wood-Fired Plants"), seek rehearing pursuant to RSA 541:3 of Order No. 24,327, entered by the New Hampshire Public Utilities Commission (Commission) on May 14, 2004 in connection with this proceeding. At issue in this case is a proposal by Public Service Company of New Hampshire (PSNH) for authority pursuant to RSA 369-B:3-a to replace one of the three boilers at its Schiller Station in Portsmouth with one capable of burning either wood or coal. At present, Schiller Station is fueled by coal with a backup capacity to burn oil.

This proceeding has an extensive history, *see* Order No. 24,276 (February 6, 2004), slip op. at 1-10 and Order No. 24,327, slip op. at 1-4, which is repeated here only in relevant part. In Order No. 24,276, following hearings, the Commission denied PSNH's petition as it was originally filed but described certain additional conditions that, if accepted by PSNH, would allow the project to proceed under RSA 369-B:3-a. The Existing Wood-Fired Plants sought rehearing and PSNH filed a motion for reconsideration, the latter joined by the Office of Consumer Advocate (OCA) as well as the Office of Energy and Planning (OEP) and the New Hampshire Timberland Owners' Association (NHTOA). The Commission conducted an

additional hearing and, in Order No. 24,327, granted the reconsideration motion and denied the rehearing motion. On June 11, 2004, the Existing Wood-Fired Plants requested rehearing of this most recent determination on the merits.

II. Summary of the Rehearing Motion

The Existing Wood-Fired Plants advance several arguments in support of rehearing. First, they contend that Order No. 24,327 is unlawful, unjust and unreasonable because the Commission did not apply the requisite statutory standards.

Specifically, the Existing Wood-Fired Plants contend that the Commission deviated from the statutory mandate when it (1) improperly "collapsed" the public interest determination required by RSA 369-B:3-a into a prudence assessment, (2) failed to determine that the project would result in a net benefit to, or even no harm to, PSNH's customers, (3) did not consider alternatives to the project, (4) failed to determine specifically that the project is in the public interest of PSNH's retail customers (as opposed to the general public), (5) did not evaluate whether the requirements of RSA 374-F with respect to stranded cost recovery had been met with respect to the recovery of certain project-related costs, (6) failed to determine whether the least-cost planning requirements of RSA 374-F and RSA 378 had been met and (7) did not determine whether the project conforms to PSNH's least cost integrated resource plan as required by RSA 378:41. Wood Plants' Motion for Rehearing (Motion) at 9-10.

With respect to the argument about prudence, the Existing Wood-Fired Plants take issue with the determination in Order No. 24,327 with respect to the possibility of the project's recoverable capital costs being adjusted upward in certain circumstances beyond the presently contemplated range of $72 to $75 million. Order No. 24,327 concluded that such

possibility "only adds minimally to customer risk" because "such a revision would occur only upon rigorous Commission scrutiny and determination that additional capital costs beyond those included in the record evidence of this proceeding are reasonably necessary for the convenience or welfare of the public." Order No. 24,327, slip op. at 14.

According to the Existing Wood-Fired Plants, this determination "effectively substitutes the after-the-fact prudence standard" required by RSA 378:28 for the RSA 369-B:3-a requirement of "before-the-fact approval under the public interest standard." Motion at 10. In the view of the Existing Wood-Fired Plants, if this were consistent with the law then virtually any objection to an RSA 369-B:3-a project could be overcome on the ground that incurred costs will ultimately be reviewed by the Commission for prudence. The Existing Wood-Fired Plants express the concern that at some point the project "will have gone too far to turn back" because, escalating capital costs notwithstanding, it would be improvident given demand to leave an essential generating facility such as one of the Schiller boilers idle.

According to the Existing Wood-Fired Plants, had the Commission applied the statute properly this issue would have been avoided because RSA 369-B:3-a requires the Commission "to make a determination, *before* any costs are incurred, as to whether the modification is in the public interest at all *in light of the specified characteristics of the project*." Motion at 11 (emphasis in original). The Existing Wood-Fired Plants allege that PSNH failed to present evidence of "a sufficiently mature project that the Commission could approve in advance" and, thus, the Commission "sought to shore up its approval of the Schiller conversion through reliance on the prudence standard." *Id*.

With respect to its argument about the "net benefit" and "no harm standards," the Existing Wood-Fired Plants draw the Commission's attention to its decision in *Eastern Utilities Associates*, 76 NH PUC 236 (1991). The Existing Wood-Fired Plants noted that in the Eastern Utilities case, the Commission applied the "no harm" test, as opposed to the "net benefit" test, to the issue of whether a proposed utility merger should gain Commission approval. According to the Existing Wood-Fired Plants,

> [t]he Commission reasoned that it would be irrational to prohibit the otherwise lawful conveyance of shares when the conveyance would not harm the utility's customers. The public interest determination of RSA 369-B:3-a, however, is explicitly concerned with the interests of retail customers *only*. PSNH's interests are not so much as mentioned. Thus, to take PSNH's interests into account – i.e., to balance the interests of PSNH and its ratepayers – as the Commission does in the Order is in contravention of the statute. Unlike in *Eastern Utilities*, the question here is not whether PSNH should be allowed to take some action that is of interest primarily to PSNH and its own shareholders such as the issuance of new shares. Rather, the question is whether the proposed modification offers some advantage to PSNH's retail customers, i.e., a net benefit, such that it is worth incurring additional public expense and risk.

Motion at 12 (emphasis in original). The Existing Wood-Fired Plants allege that because the Commission neither determined that the project would confer a net benefit on PSNH customers nor result in no harm to them, the Commission's public interest determination was "standardless and unreasonable." *Id*. In the view of the Existing Wood-Fired Plants, as a matter of logic one must apply either the "net benefit" or "no harm" test to the RSA 369-B:3-a determination. They further contend that because the project would increase risk to ratepayers (in the form of exposure to higher rates) the project can satisfy neither standard.

Next the Existing Wood-Fired Plants contend that Order No. 24,327 was deficient in failing to consider alternatives to the boiler modification proposal. They rely on *Appeal of Easton*, 125 N.H. 205 (1984) as well as a 1987 decision of the Commission, *Public Service Co. of N.H.*, 72 NH PUC 284 (1987), which concerned proposed financings of generation assets. According to the Existing Wood-Fired Plants, the project cannot be in the public interest of PSNH's retail customers if cheaper or more efficient alternatives exist. Noting that they already sell electricity to PSNH, the Existing Wood-Fired Plants complain that PSNH presented no evidence that the "touted benefits of a sustainable wood market and fuel diversity" could not be obtained more efficiently or more cheaply by purchasing more power from existing generators. Motion at 14.

The Existing Wood-Fired Plants further contend that the Commission did not focus on the interests of PSNH's customers, as required by RSA 369-B:3-a, but, rather, on benefits to the public generally. According to the Existing Wood-Fired Plants, PSNH introduced no evidence as to the importance of the wood market to PSNH's customers and the Commission made no findings on this subject. Noting that PSNH would be under no obligation to purchase wood from New Hampshire suppliers, the Existing Wood-Fired Plants contend that even if strengthening the in-state wood market were important to PSNH customers any such benefit to them would be "illusory." Motion at 15. Similarly, with respect to air emissions, the Existing Wood-Fired Plants contend that record evidence is lacking as to (1) the actual quantity of emissions from Schiller Station either before or after the proposed modification, and (2) how reduced emissions would benefit PSNH's customers as a class. On the issue of fuel diversity, the Existing Wood-Fired Plants contend that PSNH presented no evidence as to whether its

customers need improvements in this area or whether the customers would benefit from increased reliance on wood as opposed to other fuel sources. The Existing Wood-Fired Plants also allege that PSNH submitted no evidence to establish that its current system do not achieve adequate reliability and, thus, what "increment" of reliability would be gained by the project. *Id*. at 16.

According to the Existing-Wood Fired Plants, because PSNH proposes to recover its costs associated with the project through Transition Service and Default Service rates, PSNH was required but failed to demonstrate that the project complies with the public policy objectives set forth in RSA 374-F:3. Specifically, the Existing Wood-Fired Plants invoke RSA 374-F:3, IX, which states that "[i]ncreased future commitments to renewable energy resources should be consistent with the New Hampshire energy policy as set forth in RSA 378:37," which, in turn, favors meeting the energy needs of the state "at the lowest reasonable cost while providing for the reliability and diversity of energy sources." The Existing Wood-Fired Plants also contend that the proposal approved by the Commission violates language in RSA 374-F:3(V)(e) precluding "new deferred costs" in connection with transition or default service. Additionally, conceding that RSA 374-F:3(XII)(b) authorizes recovery of certain stranded costs, the Existing Wood-Fired Plants contend that the costs proposed to be recovered here are beyond the scope of the statutory definition of stranded costs contained in RSA 374-F:2, IV (limiting stranded costs to certain commitments that antedated the statute, renegotiated commitments approved by the Commission and "[n]ew mandated commitments approved by the commission").

The Existing Wood-Fired Plants further complain that the Commission failed to comply with an RSA 378 requirement to evaluate the proposed modification for conformity with

PSNH's most recently approved least-cost integrated resource plan. In the view of the Existing Wood-Fired Plants, nothing in RSA 369-B:3-a relieves the Commission from these obligations.

According to the Existing Wood-Fired Plants, Order No. 24,327 erred as a matter of law by authorizing PSNH to recover "windfall" compensation as an incentive to move forward with the Schiller modification project. The Existing Wood-Fired Plants contend that no legal basis exists for providing such an incentive. They also take the position that the Commission's determination, that the incentive is designed to induce PSNH to undertake the project, is at variance with PSNH's testimony, which suggests that the purpose of the incentive is to encourage PSNH to minimize its capital costs. According to the Existing Wood-Fired Plants, the proffered justification of the incentive overlooks the fact that it was PSNH that sought approval of the project in the first place.

The Existing Wood-Fired Plants complain that Order No. 24,327 does not hold PSNH to its estimate of capital costs and, thus, grants significant benefits to PSNH without a corresponding benefit to customers. According to the Existing Wood-Fired Plants, the Commission erred by not requiring PSNH to provide a current estimate of capital costs and by not requiring PSNH to guarantee any projected amount of incremental revenue to offset incremental revenue requirements. They further complain that because the revised proposal approved in Order No. 24,327 is based on what they characterize as an outdated $69 million estimate of project costs, it creates a situation in which PSNH could receive an incentive payment while ratepayers absorb a shortfall in incremental revenue. This, according to the Existing Wood-Fired Plants, would occur if incremental revenues exceed the revenue targets but fall short of the actual incremental revenue requirements.

According to the Existing Wood-Fired Plants, Order No. 24,327 improperly requires PSNH customers to bear 100 percent of the risk arising out of the revenue targets having been based on a $69 million project. The Existing Wood-Fired Plants complain that in one possible scenario discussed at hearing, the cumulative risk to ratepayers is approximately $19.4 million. In the view of the Existing Wood-Fired Plants, the range of amounts for which customers are at risk is inflated further "insofar as it reflects an increase in capital costs driven by an independent decision [by PSNH] to include an escalation clause in the boiler construction contract triggered by delays in obtaining necessary approvals when the project was known to be contested." Motion at 21. In the view of the Existing Wood-Fired Plants, Order No. 24,327 insulates PSNH from responsibility for an imprudent decision to include price escalation clauses in the construction contracts. Additionally, the Existing Wood-Fired Plants complain that Order No. 24,327 does not specify what costs must be incurred before commercial operation begins. Thus, according to the Existing Wood-Fired Plants, because PSNH controls when costs are incurred, customers bear the risk that PSNH could defer some capital costs past the date of commercial operations so as to stay within the $72-$75 million range and avoid sharing responsibility for capital costs in excess of $75 million.

The next issue raised by the Existing Wood-Fired Plants concerns Renewable Energy Credits (RECs). *See* Order No. 24,327, slip op. at 14 (noting that PSNH expects RECs to be a "key source" of project revenue). According to the Existing Wood-Fired Plants, there is no rational basis upon which the Commission could determine how much REC-related risk customers should bear. They contend that, under Order No. 24,327, "PSNH ratepayers become passive investors in a new commodities market, about which no reliable forecasts have been

made." Motion at 22. According to the Existing Wood-Fired Plants, this stands in contrast to the conservative strategy state agencies are required to adopt when investing public funds. The Existing Wood-Fired Plants contend that Order No. 24,327, in effect, "forces ratepayers to commit to a joint investment with PSNH in a speculative futures market," something that "cannot possibly be in the public interest" within the meaning of RSA 369-B:3-a. Motion at 22.

According to the Existing Wood-Fired Plants, there is insufficient record evidence to support the Commission's determination that the PSNH proposal would produce benefits in the form of a sustainable market for low-grade wood, lowered air emissions, greater fuel diversity and improved reliability. Thus, according to the Existing Wood-Fired Plants, the Commission's RSA 369-B:3-a public interest determination is fatally flawed because it relies on these four alleged benefits.

On the issue of the wood market, the Existing Wood-Fired Plants point out that PSNH would not be obligated to buy wood from the New Hampshire market if the project moves forward. According to the Existing Wood-Fired Plants, the possibility of PSNH purchasing wood from New Hampshire loggers does not afford a basis for determining that project benefits outweigh project risks.

Concerning air emissions, the Existing Wood-Fired Plants contend that PSNH submitted no evidence of the geographic area currently affected by emissions from Schiller Station, no scientific evidence to quantify project-related air quality improvements and no evidence that such improvements would have positive health effects. This, too, is insufficient with respect to evaluating project benefits to be weighed against project costs, according to the Existing Wood-Fired Plants.

On the issue of fuel diversity, the Existing Wood-Fired Plants complain that PSNH produced no evidence regarding the present state of fuel diversity, why the status quo is deficient, what quantifiable benefit would accrue to PSNH customers or whether the objective of fuel diversity justifies the additional use by PSNH of wood when PSNH is already purchasing electricity generated from wood from the Existing Wood-Fired Plants. According to the Existing Wood-Fired Plants, the lack of such evidence, and the absence of evidence of whether the incremental benefits in this area is worth the project cost, mean the record is legally insufficient.

With respect to reliability, the Existing Wood-Fired Plants complain that PSNH produced no evidence to show that its system is currently in need of reliability improvements, nor did it demonstrate what increment of reliability the Schiller project would add or whether some other reliability measures would have been more cost-efficient.

According to the Existing Wood-Fired Plants, evidence to support the revised risk-sharing methodology in Order No. 24,327 is lacking. Specifically, the Existing Wood-Fired Plants complain that the benchmarking range of $72 to $75 million in capital costs is nothing more than an arbitrary sum agreed to by the proponents of the mechanism approved in the order. Thus, according to the Existing Wood-Fired Plants, there is insufficient evidence to support the Commission's determination that this range is reasonable.

Similarly, the Existing Wood-Fired Plants complain that evidence is lacking to support PSNH's assertion that delays in obtaining necessary approvals triggered an escalation clause in its boiler contract. In these circumstances, according to the Existing Wood-Fired Plants, the Commission has made a de facto prudence determination as to PSNH's decision to include such a clause in the contract when approvals had not been obtained and the project was

contested. According to the Existing Wood-Fired Plants, no evidence was presented on this issue because the Commission barred most discovery prior to the hearing that preceded Order No. 24,327.

The Existing Wood-Fired Plants contend that crucial evidence is lacking as to the likely rate effects of the PSNH project. According to the Existing Wood-Fired Plants, there is no evidence in the record relating to (1) the magnitude of potential rate increases or rate relief arising out of the proposal approved in Order No. 24,327 or (2) the relative likelihood of such rate changes.

The last argument made by the Existing Wood-Fired Plants to support their contention about the record is that Order No. 24,327 lacks specific findings to support the Commission's conclusions. According to the Existing Wood-Fired Plants, the Commission improperly relied upon a summary of the evidence presented by the parties and a description of these parties' opposing views. With respect to this argument, the Existing Wood-Fired Plants cite *Petition of Support Enforcement Officers*, 147 N.H. 1 (2001), and *Appeal of Granite State Electric Co*., 121 N.H. 787 (1981).

According to the Existing Wood-Fired Plants, Order No. 24,327 is infirm because the Commission rendered what is in essence an advisory opinion. In the view of the Existing Wood-Fired Plants, this is because the PSNH board of directors had yet to authorize PSNH to undertake the project approved in Order No. 24,327 and the company's president acknowledged at hearing that he did not know whether PSNH will actually move forward with the modification. The Existing Wood-Fired Plants contend that in these circumstances PSNH would not be entitled

to a declaratory judgment in a civil proceeding and that the Commission should adopt a similar approach here.

Next the Existing Wood-Fired Plants reprise the discovery issues we decided prior to hearing in Order No. 24,310 (April 16, 2004). They note that they were denied access to certain documents and information relating to PSNH's contracts for construction of the wood yard and fuel handing equipment at Schiller Station, as well as documents and information related to the negotiations leading to the reconsideration motion filed by PSNH, the Office of Energy and Policy, the Office of Consumer Advocate and the New Hampshire Timberland Owners' Association. According to the Existing Wood-Fired Plants, their thwarted discovery efforts were reasonably calculated to lead to the discovery of admissible evidence as to the reasonableness of the original $69 million capital cost estimate, the revised $72-$75 million benchmark, the proposed PSNH incentive for minimizing capital costs, the proposed revenue targets and the prudence of PSNH having included a price escalation clause in its boiler contract.

According to the Existing Wood-Fired Plants, if information related to contract negotiations was confidential, the appropriate remedy was to issue a protective order rather than to deny the Existing Wood-Fired Plants access to the information. With respect to the information about the settlement negotiations, the Existing Wood-Fired Plants contend they were entitled to the information so as to test the movants' contention that their discussions were, in fact, settlement negotiations. In the view of the Existing Wood-Fired Plants, "these so-called settlement discussions were functionally indistinguishable from a motion to which a moving party has sought and obtained the consent of the other parties." Motion at 31. Moreover, according to the Existing Wood-Fired Plants, even if the discussions were truly settlement

negotiations, they were still entitled to discover the information. In support of this contention, they cite a series of U.S. District Court rulings to the effect that no blanket rule exists specifying that information relating to settlement negotiations are privileged, confidential or otherwise exempt from discovery.

According to the Existing Wood-Fired Plants, PSNH and the other joint movants placed their settlement agreement and the negotiation process leading to the agreement at issue in this proceeding. The Existing Wood-Fired Plants contend that the Commission is obligated to evaluate whether the settlement is the product of arms' length negotiations. They also contend they were entitled to the information because the only justification offered by PSNH for the $72 to $75 million capital cost benchmark was that this range was acceptable to the joint movants. Similarly, according to the Existing Wood-Fired Plants, "the sole reason advanced for replacing the Commission's risk-sharing mechanism with the New Proposal was that the joint movants thought the Commission's mechanism was too complex, administratively burdensome and likely to result in future disagreements." Motion at 33-34. In the view of the Existing Wood-Fired Plants, they were entitled to discover the basis for this contention but were denied the opportunity to do so.

The last discovery issue raised by the Existing Wood-Fired Plants concerns their unsuccessful effort to obtain internal PSNH documents as to which PSNH invoked the work product privilege. According to the Existing Wood-Fired Plants, the Commission should have required PSNH to provide a privilege log. They further contend that because the joint movants were involved in settlement negotiations, PSNH may have waived its privilege by disclosing some or all of this information to other parties during the negotiation process.

III. Opposition of Public Service Company of New Hampshire

PSNH urges the Commission to deny the rehearing motion. According to PSNH, the Commission correctly applied the standard articulated in RSA 369-B:3-a. PSNH further contends that it is apparent from the legislative history of RSA 369-B:3-a that the Legislature discussed the Schiller modification project, and clearly had it in mind, when it enacted this statute.

PSNH invokes the Commission's plenary ratemaking authority in support of its contention that the Commission was authorized to approve the cost recovery mechanism advanced by the joint movants in their request for reconsideration. According to PSNH, whether such cost recovery is included in PSNH's existing Transition Service charge or is added to rates via a new charge specific to the project is of no consequence. Thus, according to PSNH, the Commission should reject the Existing Wood-Fired Plants' arguments about the propriety of allowing PSNH to recover project-related costs through the stranded cost recovery charge (SCRC) mechanism. PSNH further points out that Schiller Station antedates the enactment of RSA 374-F and, therefore, is an "existing commitment" within the meaning of RSA 374-F:2.

According to PSNH, the Commission has already dealt fully with the Existing Wood-Fired Plants' contentions with respect to least-cost planning. Likewise, PSNH contends that the Commission has already dealt with the Existing Wood-Fired Plants' argument with regard to *Eastern Utilities Associates*. PSNH points out that the Schiller modification project is neither a merger nor a financing. Thus, PSNH contends the Commission should reject the Existing Wood-Fired Plants' efforts to apply standards here that normally govern the Commission's review of mergers or financings.

In the view of PSNH, the benefits of the Schiller modification project "go well beyond those capable of mere economic measure." Objection to Motion for Rehearing (Objection) at 10. To advance this argument, PSNH cites certain legislative findings contained in RSA 362-A:1 and 2002 N.H. Laws 268:1 to the effect that the use of indigenous fuels, renewable energy and diverse energy sources in the production of electricity is consistent with the public good because of positive economic, environmental, health and security effects.

PSNH further contends that it is not obligated to demonstrate that its Schiller modification project is superior to alternatives. With regard to the benefits determined by the Commission to arise out of the project, PSNH notes that it has committed to procure as much wood fuel from suppliers and sources within New Hampshire "as long as it is economically feasible and all relevant factors (price, quality, quantity, timeliness and consistency of delivery) are equal." Opposition at 13. PSNH notes that its agreement with the New Hampshire Timberland Owners Association to that effect is part of the record in this proceeding. PSNH also draws the Commission's attention to the fact that the promotion of alternative energy sources is explicitly stated as an objective in the New Hampshire Energy Plan, subject to the proviso that the relevant costs must be carefully weighed against the benefits. According to PSNH, the Schiller modification project is a "clear response" to this objective while overcoming the identified obstacle related to costs. *Id*.

PSNH also refers to the reference in the policy principles of the Restructuring Act to the "significant environmental, economic, and security benefits" from the "increased use of cost-effective renewable energy technologies." *Id*. at 14, quoting RSA 374-F:3, IX. Likewise, PSNH invokes RSA 125-O, concerning the Multiple Pollutant Reduction Program, and refers to

it as a clear mandate to decrease air emissions from facilities within the state such as Schiller Station.

According to PSNH, the rehearing motion suffers from certain "procedural infirmities" that justify its denial. Opposition at 14. PSNH notes that the Existing Wood-Fired Plants have filed an RSA 541:6 appeal of Order No. 24,327 to the extent the order denied their previous rehearing motion. PSNH contends that the instant rehearing motion raises many of the same issues now on appeal and that the Commission should not address these issues in the circumstances.

With respect to the discovery issues raised by the Existing Wood-Fired Plants, PSNH contends that efforts to obtain rehearing of these determinations are untimely because the Commission resolved them on April 16, 2004 in Order No. 24,310. According to PSNH, a party aggrieved by Order No. 24,310 was obliged to seek rehearing of that order within 30 days as specified by RSA 541:3.

On the merits of the Existing Wood Fired Plants' discovery-related contentions, PSNH avers that at the time the Existing Wood-Fired Plants sought information related to the wood fuel yard PSNH was still engaged in confidential, commercially sensitive negotiations and had not yet entered into a contract for construction of this part of the Schiller modification project. According to PSNH, it relied on statements from its boiler vendor, as opposed to any actual or prospective wood yard vendors, with regard to PSNH's assertions as to the effect of delay on project costs. Further, PSNH takes the position that the information about the wood yard sought by the Existing Wood-Fired Plants was not relevant and efforts to obtain this information "appeared to be a tactical approach to delay the Project." Opposition at 17.

Finally, PSNH urges the Commission to reject the Existing Wood Fired Plants' arguments with respect to information about the settlement negotiations, including PSNH's internal discussion of the relevant issues. According to PSNH, the Existing Wood-Fired Plants had the opportunity to review the end-product of those negotiations and to analyze their impact on PSNH customers and the general public. PSNH contends that any proposals considered but rejected by the participants in the negotiations are irrelevant and requiring their disclosure would have a chilling effect on efforts to reach settlement in future Commission proceedings. PSNH also takes the position that, as to documents PSNH contended were covered by the attorney-client and work product privileges, the confidentiality accorded by the Commission to settlement negotiations comprises a separate and independent ground for withholding them from the Existing Wood-Fired Plants.

IV. Commission Analysis

RSA 541:3 authorizes us to grant a motion for rehearing upon a showing of good cause. The Existing Wood-Fired Plants have not made such a showing.

Most of the arguments raised by the Existing Wood-Fired Plants in their pending motion have been previously raised and amply addressed in Order Nos. 24,310 (concerning discovery issues) and 24,327 (addressing reconsideration motion and previous rehearing motion). We elaborate on our previous rulings here only as necessary for purposes of clarity or because the pending motion raises new issues.

As PSNH notes, Order No. 24,327 rejected the Existing Wood-Fired Plants' contention that we are obligated under RSA 369-B:3-a to apply either the "no harm" or "net benefit" tests described in the *Eastern Utilities Associates* case. In response, the Existing Wood-

Fired Plants offer a variation on their original argument. They note that *Eastern Utilities Associates* concerned a proposed utility merger – a transaction between the shareholders of two private companies that was primarily of interest only to them. According to the Existing Wood-Fired Plants, if the Commission scrutinizes such a private transaction for the possibility of harm to utility customers then the Commission is obliged to apply at least such a standard here because PSNH customers are directly implicated as sharing in the risks and rewards of the project.

At issue in *Eastern Utilities Associates* was RSA 374:33, which requires the Commission to scrutinize utility mergers to determine whether they are "lawful, proper and in the public interest." The Commission determined in *Eastern Utilities Associates* that the RSA 374:33 standard is "no different than the analogous public good standard found in other sections of the public utility code." *Eastern Utilities Associates*, 76 NH PUC at 252. The threshold dispute, as framed by the parties to that case, was whether particular formulations of the public good test, namely the "no harm" or "net benefits" tests applied. *See id*. at 241. The Commission opted for the former but, in any event, determined that the proposed merger met neither standard. *Id*. at 253. Significantly for present purposes, the proponents of the "no harm" test based their argument on *Grafton County Electric Light and Power Co. v. State*, 77 N.H. 539 (1915), in which the New Hampshire Supreme Court determined that the "public good" standard in the Commission's enabling legislation "is equivalent to a declaration that the proposed action must be one not forbidden by law and that it must be a thing reasonably to be permitted under all the circumstances of the case." *Eastern Utilities Associates*, 76 NH PUC at 241 (describing petitioner's reliance on *Grafton County*) and 252 (quoting *Grafton County*, 77 N.H. at 540).

To the extent that longstanding New Hampshire Supreme Court precedent on the "public good" standard illuminates what the Legislature meant by "public interest of retail customers," it lies in the phrase "a thing reasonably to be permitted under all the circumstances of the case." In the circumstances of a merger or acquisition case, the Commission must determine whether a new entity may assume the public utility responsibilities of providing safe and reliable service at reasonable rates and the Commission in *Eastern Utilities Associates* determined that the public good standard is satisfied by a finding that a merger causes no harm. Such circumstances do not obtain here, however, and RSA 369 B:3-a does not indicate that the "no harm" formulation of the public good standard should be applied to a plant modification.[1] Thus, we remain convinced that *Eastern Utilities Associates* offers no insight in this proceeding.

For similar reasons, we reject the Existing Wood-Fired Plants ongoing contention that record evidence is lacking as to project benefits. Ultimately, the case rises and falls on the extent to which we find credible the predictions of the parties' experts about how the project will perform in two competitive and uncertain markets – the market for electricity and the market for RECs. The Existing Wood-Fired Plants suggestion that something more concrete is required amounts to an argument that in order to gain approval for the project under RSA 369-B:3-a PSNH is obliged to guarantee the project will produce rate relief and/or other presently quantifiable benefits to customers. We believe that had the Legislature so intended, it would have clearly said so, especially in light of the legislative history of RSA 369-B:3-a which reveals

[1] The standard in connection with a plant modification is "public interest of PSNH retail customers" whereas, earlier in the same provision, we are instructed to authorize asset divestiture if it is in the "*economic* interest of retail customers of PSNH." (Emphasis added.) We must assume the Legislature established two different standards advisedly. The plain meaning of the words is to the effect that the modification standard is broader than the divestiture standard.

that the Legislature had knowledge of the proposed Schiller modification when the statute was under consideration.

According to the Existing Wood-Fired Plants, our previous determinations have confused the public good generally with the public interest of PSNH's retail customers to such an extent that our approval is fatally flawed. As PSNH notes, what this overlooks is the reality that 70 percent of retail electric customers in New Hampshire are, in fact, customers of PSNH. Thus, because the project yields certain overall public policy goods such as economic benefits and environmental improvements, common sense suggests a positive contribution to the RSA 369-B:3-a evaluation of the effect on PSNH's retail customers. This positive contribution, combined with the likelihood of customer-favorable rate effects, are the basis of our determination that the project is in the public interest of retail customers of PSNH.

The Existing Wood-Fired Plants challenge the finding in Order No. 24,327 that the project will make a positive contribution to the public policy goal of additional fuel diversity. In support of this argument, the Existing Wood-Fired Plants note that PSNH is already purchasing electricity generated from wood fuel from the Existing Wood-Fired Plants themselves. As a practical matter, given the 2007 expiration of the rate orders under which PSNH presently purchases energy from these suppliers, this amounts to a statement of the obvious: that PSNH always has the ability to promote fuel diversity by making wholesale purchases from a variety of suppliers, including the four existing wood-energy suppliers in New Hampshire. What this fails to take into account, however, is the possibility that PSNH may retain its portfolio of company-owned generation assets. *See* RSA 369-B:3-a (noting that PSNH may divest these assets after April 30, 2006, but only if the Commission determines "that it is in

the economic interest of retail customers of PSNH to do so"). In these circumstances, the public policy goal of additional fuel diversity is advanced when PSNH makes its generation portfolio more fuel-diverse.

We turn next to procedural issues raised by the Existing Wood-Fired Plants. None justify rehearing.

We are unable to agree with the Existing Wood-Fired Plants that Order No. 24,327 is inadequate with respect to its factual findings. The *Support Enforcement Officers* decision relied upon by the Existing Wood-Fired Plants provides certain admonishments to administrative agencies. Specifically, the New Hampshire Supreme Court cautioned against structuring decisions "solely by summarizing evidence presented by the contending parties and describing the parties' opposing views." *Petition of Support Enforcement Officers*, 147 N.H. at 9. Rather, a decision must contain "specific factual findings in support of its conclusions." *Id*. We do not believe that Order No. 24,327 transgresses this requirement. The recitation of the various positions of the parties about which the Existing Wood-Fired Plants complain is statutorily required. *See* RSA 363:17-b, II (specifying that Commission orders must include "[t]he positions of each party on each issue"). To the extent that Order No. 24,327 does not set forth factual findings in support of our ultimate conclusion that the project in its present form meets the RSA 369-B:3-a standard, it is because the order relies on certain factual findings and legal conclusions made previously. *See* Order No. 24,327, slip op. at 12. In other words, when we considered the reconsideration motion, we took up only those factual issues that related to the project changes offered by the movants and otherwise relied on our original decision in Order No. 24,276.

We are unable to agree with the Existing Wood-Fired Plants that we should not have decided this case in light of PSNH having reserved its right to cancel the project. In circumstances where private parties have sought before-the-fact approval of projects that fall within our regulatory jurisdiction, we have previously applied the standard articulated by the New Hampshire Supreme Court for entitlement to a declaratory judgment. *See Public Service Co. of N.H.*, 87 NH PUC 672, 674, 676-77 (2002) (citing *Delude v. Town of Amherst*, 137 N.H. 361 (1993), *on reh'g*, Order No. 24,137 (March 14, 2003). Contrary to the suggestion of the Existing Wood-Fired Plants, this standard does not require a binding commitment on the part of the petitioner. Rather, the relevant question is "whether the petitioner has demonstrated a present legal or equitable right and an adverse claim that is definite and touching the legal relations of the parties having adverse interests." *Public Service Co. of N.H.*, 87 NH PUC at 674. The extensive record adduced here, which includes a myriad of project particulars, belies the Existing Wood-Fired Plants' contention that the PSNH proposal is insufficiently definite to warrant a Commission adjudication.

Next we turn to the Existing Wood-Fired Plants contentions about the discovery preceding the hearings that led to the entry of Order No. 24,327. We note, at the outset, that we resolved these issues by an order entered on April 16, 2004 and the Existing Wood-Fired Plants did not seek rehearing of this determination. It is unnecessary for us to determine, in these circumstances, whether it was incumbent upon the Existing Wood-Fired Plants to seek RSA 541 rehearing and appeal of this decision (which, obviously, could have led to a stay in the proceedings before the Commission).

Rather, we determine that no basis exists for revisiting our order on the merits of the case based on discovery rulings we made prior to hearing. In the context of civil litigation, the New Hampshire Supreme Court has noted that trial courts enjoy "broad discretion in the management of discovery" and the appellate tribunal will not intervene absent a "clear abuse of that discretion." *YYY Corp. v. Gazda*, 145 N.H. 53, 59 (2000) (citations omitted). We remain convinced that our exercise of discretion embodied in Order No. 24,310 was sound, particularly given the extensive discovery the Existing Wood-Fired Plants had already obtained from PSNH and the Commission's longstanding policy of encouraging settlement negotiations.

Finally we note that PSNH's opposition to the rehearing motion contains certain factual assertions that are not of record, purporting to compare the potential harm the Existing Wood-Fired Plants could suffer here with certain payments PSNH contends these parties have obtained over the years from PSNH's customers pursuant to federal law. Likewise, PSNH makes certain extra-record factual assertions about the Existing Wood-Fired Plants' conduct in this proceeding. We have not considered these assertions in ruling on the rehearing motion and have confined our factual analysis purely to the record adduced at the two rounds of evidentiary hearings in this case.

Based upon the foregoing, it is hereby

ORDERED, that the motion for rehearing filed by Pinetree Power, Inc., Pinetree Power-Tamworth, Inc., Bridgewater Power Company, L.P. and Hemphill Power & Light Company on June 11, 2004 be, and hereby is, DENIED.

By order of the Public Utilities Commission of New Hampshire this twenty-ninth day of June, 2004.

Thomas B. Getz	Susan S. Geiger	Graham J. Morrison
Chairman	Commissioner	Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary