DE 99-099

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Restructuring Settlement Agreement

Order on Request for Intervenor Compensation

O R D E R N O. 24,351

July 16, 2004

I. BACKGROUND

In this proceeding, the New Hampshire Public Utilities Commission approved the Agreement to Settle PSNH Restructuring (Restructuring Agreement) in which the service territory of Public Service Company of New Hampshire (PSNH) was opened to retail competition pursuant to RSA 374-F and outstanding issues related to PSNH's recovery of its restructuring-related stranded costs were fully resolved. *See PSNH Proposed Restructuring Settlement*, 95 NH PUC 154, 85 NH PUC 536, 85 NH PUC 567, 85 BH PYC 645 (2000). Now pending is the request of intervenor Campaign for Ratepayers Rights (CRR) for recovery of its costs pursuant to RSA 365:38-a.

On January 27, 2000, before the merits of the case had been decided finally by the Commission, CRR submitted a letter indicating an intent to seek recovery of costs under RSA 365:38-a. CRR filed a formal application on September 12, 2000. By letter from the general counsel on October 20, 2000, the Commission advised CRR that it would hold the RSA 365:38-a motion in abeyance pending the outcome of appellate proceedings on the merits of the case.

On October 25, 2001, by letter from the secretary, the Commission advised CRR that appellate proceedings had concluded and the RSA 365:38-a motion was in order for determination. The letter gave CRR 30 days to submit additional information on the issue of

financial hardship. In response, CRR submitted a memorandum on November 26, 2001. PSNH filed an objection to CRR's motion on November 28, 2001. On December 11, 2001, the OCA submitted a pleading in support of the motion, to which CRR filed a written response one week later.

The Commission issued a secretarial letter on April 5, 2004 with respect to the pending RSA 365:38-a motion. The letter indicated that two of the three commissioners – Chairman Getz and Commissioner Morrison – had prior involvement in aspects of the docket. Specifically, the letter noted that Chairman Getz, while serving as Executive Director and Secretary of the Commission, participated on behalf of the Commission Staff in the negotiations that led to the Restructuring Agreement and supported the Restructuring Agreement in the proceedings in this docket. The letter noted that Commissioner Morrison had participated in strategy discussions concerning this docket while employed by intervenor Cabletron Systems. The Commission noted the possibility that these facts may implicate RSA 363:12, VII and RSA 363:19, which recite the standards for disqualification of commissioners on conflict-of-interest grounds.

In the letter, the Commission placed the parties on notice that both Chairman Getz and Commissioner Morrison believed themselves indifferent to the outcome of the CRR motion but acknowledged the possibility that a party might reasonably question their impartiality in the circumstances. The letter requested the views of the parties with respect to the potential disqualification of the two commissioners. Thereafter, PSNH and CRR both indicated they did not object to either commissioner participating in the proceedings on the CRR motion.

II. POSITIONS OF THE PARTIES

A. Campaign for Ratepayers' Rights

In the September 13, 2000 letter accompanying its request for intervenor reimbursement, CRR stated that "unlike other participants, [CRR] cannot recover its costs either from its ratepayers, taxpayers or from other business operations. CRR must depend entirely on a small, but dedicated, base of donors, and its resources are not at all equal to the costs of participation in a vast and multiparty proceeding such as this." According to CRR, the organization had

> been a responsible intervenor in this docket and has made a contribution to the development of the record of decision. This was certainly our intent. [CRR] also hope[s] the fact that [it] still believes the settlement does not provide sufficient ratepayer benefits will not detract from the fact the settlement is, as a result of the Commission's action in this docket, very substantially improved over the agreement announced in June of 1999, and that CRR made a contribution to some of those improvements.

In its Application CRR described itself as "the only statewide non-profit organization whose sole purpose has been, and is, advocacy of the interests of residential and small commercial ratepayers in regard to matters concerning regulated electric utilities" in New Hampshire. CRR referred to its long history of participation in Commission proceedings and noted that in addition to furnishing statements of position, and a post trial brief, it also engaged in discovery and extensive examination of witnesses sponsored by the settling parties and other intervenors. CRR further noted that it sponsored direct testimony of a panel consisting of its president, attorney Robert Backus, and a retained expert, Tim Woolf of Tellus Institute and later Synapse Energy Economics.

CRR averred that a major focus of its intervention was "the issue of the possible future collection of substantial deferrals from ratepayers as a result of the underpricing of transition service as originally proposed in the agreement." According to CRR, the principal focus of Mr. Woolf's testimony was the issue of transition service pricing, and whether it was consistent with the statutory restructuring principles set forth in RSA 374-F. CRR stated that the Commission approved a substantially changed proposal for transition service in its decision on the merits. In particular, CRR pointed to the Commission's approval of "an upward adjustment to the transition service, while offsetting the adverse rate impact by requiring a greater write off by PSNH/NU than proposed in the originally announced agreement." According to CRR, the Commission also required the transition service to be "tied for an initial period to the output of the PSNH generating plants before those plants are to be divested," thus reducing or eliminating the prospect of large transition service deferrals, again a result advocated by the citizens' group. CRR contended that the Commission's decision on the contested issue of transition service pricing and acquisition pricing constitutes "the adoption in whole or in part of a position advocated" by CRR and thus satisfies the "public interest" standard of RSA 365:38-a. In further support of that position, CRR contended that the Commission accepted the position advocated by CRR as to the amount of securitization,[1] declined to order PSNH to utilize the full amount of securitization urged by the Governor's Office of Energy and Community Services, and required that the amount securitized be subject to a prudency review.

[1] "Securitization" refers to paying off recoverable stranded costs through the issuance of rate reduction bonds that are financed through irrevocable obligations that are recoverable from PSNH customers. *See Public Service Co. of N.H.*, Order No. 24,137 (March 14, 2003) at 5 n. 1 (describing securitization process and legal authority for it).

CRR attached to its request copies of certain bills submitted to it by Mr. Woolf for $7,970.00 and by Mr. Backus' law firm for $8,649.36. RSA 365:38-a limits recovery by CRR to $10,000 and CRR said this amount would represent only about three-quarters of the cost of the full intervention. CRR requested cost reimbursement in the maximum amount of $10,000.

In response to the Commission's October 2001 request for information on the issue of financial hardship, CRR submitted a memorandum stating that it was a non-profit organization registered in New Hampshire, with 422 individuals on its active mailing list. CRR stated that it maintained an office in Concord but currently had no staff. According to CRR, its paid executive director left the organization "due to financial circumstances."

A CRR treasurer's report indicated that year-to-date total income through November 21, 2001 was $7,931.05, total expenses were $11,266.42, and cash on hand was $4,083.37. CRR's general source of income was said to be donations from individuals and businesses. According to CRR, there were few charitable foundation resources to fund its mission although it had received some contributions in the past. CRR said it has several debts which were unlikely to be paid in full, including $17,000 for loans and employee compensation and $22,000 in legal fees. The CRR pleading concluded by stating that the full cost of its intervention in this docket was "considerably" in excess of $30,000.

B. Public Service Company of New Hampshire

PSNH objected to CRR's request for intervenor compensation. PSNH, noted that RSA 365:38-a became effective on January 1, 2000, after CRR's intervention in this proceeding. Therefore, according to PSNH, granting CRR intervenor compensation would amount to retroactive application of the statute in violation of the provision in Part I, Article 23 of the New

Hampshire Constitution prohibiting retrospective laws.

PSNH noted that CRR was not a retail customer of PSNH because its Concord offices were located in the service territory of another electric utility. Therefore, according to PSNH, CRR could not demonstrate entitlement to compensation as a retail customer. According to PSNH, CRR's status as a membership organization advocating the interests of residential and small commercial electric customers did not otherwise satisfy the statutory requirements for intervenors entitled to recovery under RSA 365:38-a.

According to PSNH, CRR did not sufficiently demonstrate financial hardship because the organization's filing lacks accurate numbers reflecting its costs and information about CRR's membership; whether dues are assessed; the frequency and amount of such dues and whether it sought funding from other public or private sources in connection with its work in the proceeding. PSNH also contended that CRR fails to meet the public interest standard set forth in the statute because the organization's participation in the docket resulted in additional costs to PSNH's customers of at least $8 million. As the basis for this allegation, PSNH pointed to additional costs and expenses allegedly caused by CRR's petition for writ of certiorari to the United States Supreme Court, including an alleged 4 basis point penalty in the pricing of PSNH's rate reduction bonds (RRBs) issued as part of the settlement, additional expenses for legal opinions concerning the lack of merit of CRR's petition, creation of additional security documents, and costs associated with the delay of competition day, i.e., the date on which the PSNH service territory was opened to retail competition in energy supply. PSNH further contended that because CRR sought to overturn on appeal the decisions to which it believes it substantially contributed, the organization did not in fact "substantially contribute" to the

adoption by the Commission of a position for which intervenor compensation is appropriate pursuant to the statute.

C. Office of Consumer Advocate

According to the OCA, the arguments made by itself and CRR to the public and the Legislature shortly before the New Hampshire Supreme Court decided the appeal aided in engendering Legislative proceedings in which PSNH agreed to changes in the Restructuring Agreement. Examples cited by OCA are, lengthening the transition service period and making PSNH generation assets more available for transition service than previously. OCA said these changes reduced the potential for adverse rate increases during the extended transition service period. OCA asserted the CRR appeal performed a service to ratepayers that no other party provided. For these reasons, OCA took the position that the Commission should grant CRR the pro rata share of its bill relating to the appeal.

PSNH objected to the OCA's position. According to PSNH, assuming without conceding the truth of OCA's allegations, CRR's efforts before the Legislature amounted to lobbying for which cost recovery is not authorized.

III. COMMISSION ANALYSIS

A. Preliminary Matters

We begin by noting that no commissioners have disqualified themselves from ruling upon the CRR motion for intervenor compensation. Chairman Getz and Commissioner Morrison have relied upon the affirmative representations of CRR and PSNH that they do not object to their participation. In these circumstances, and given their indifference to the outcome of the CRR motion, each commissioner believes that his impartiality is not subject to reasonable

question and, accordingly, disqualification pursuant to RSA 363:12, VII is not required. Nor is either commissioner subject to disqualification under the standard set forth in RSA 363:19.

At the July 9, 2004 Commission Meeting, the Commissioners unanimously voted to authorize compensation to CRR for its contribution to this docket. See Deliberations Statement of Commissioner Susan S. Geiger, Commission Minutes of July 9, 2004, pp. 3-5.

B. CRR's Eligibility for Recovery of Intervenor Costs

RSA 365:38-a authorizes the Commission to allow recovery of costs associated with utility proceedings before the Commission if such recovery is just and reasonable as well as in the public interest. The subject utility is the source of such recovery.

The statute limits such recovery to utilities and "other parties," the latter specifically defined as "retail customers that are subject to the rates of the utility and who demonstrate financial hardship," with municipalities specifically excluded from the definition. Further, according to the statute, recovery by "other parties" is in the public interest "when, in any commission proceeding, the other party substantially contributed to the adoption by the commission, in whole or in part, of a position advocated by the other party in that proceeding, or in a judicial review of that proceeding." Recovery is limited to $10,000.

The first issue we must decide is whether CRR is eligible to obtain intervenor compensation under the statute. For CRR to be eligible, it must meet the "retail customers" and "financial hardship" requirements of the statute. We conclude that it does.

CRR includes among its members customers of PSNH who are subject to the retail rates of PSNH. In these circumstances, we are unable to agree with PSNH that CRR is ineligible for RSA 365:38-a cost recovery because the organization is itself not a customer of the

subject utility. In construing RSA 365:38-a, we are obliged to ascribe to the statute the plain and ordinary meaning of the words used, in a manner that effects the overall purpose of the statute and avoids absurd or unjust results. *Monahan-Fortin Properties, LLC v. Town of Hudson*, 148 N.H. 769, 771 (2002). It would be plainly at variance with the purpose of RSA 365:38-a to deny a group of utility customers cost recovery under the statute solely because (1) they created an organization for the purpose of conducting ratepayer advocacy rather than intervening individually, and (2) maintained an office for that purpose outside of the service territory of the utility in question.

We reach that view based on the plain meaning of the words in the statute. However, even if we found the statute to be ambiguous on this score, thus justifying recourse to the relevant legislative history, *see In re Ann Miles Builder, Inc*., 150 N.H. ___, ___, 837 A.2d 335, 337 (2003), our conclusion would be the same. On May 29, 1999, the chief sponsor of the bill that led to RSA 365:38-a, Representative Bradley, addressed the Senate Committee on Executive Departments and Administration in connection with the legislation. He told the senators that "the point that I am trying to make is that it is very costly for regular citizens or perhaps *small customer groups* that don't have access to a lot of funds to be able to stay involved in these proceedings." Transcript of Hearing before Senate Committee on Executive Departments and Administration, May 25, 1999, at 2 (emphasis added). Nothing in the legislative history suggests an intention to exclude customer groups from the definition of retail customers.

C. Financial Hardship

We regard the question of financial hardship as requiring a fact-specific inquiry. To the extent there is any ambiguity as to what the Legislature meant by "financial hardship," the question is resolved with recourse to the legislative history. As Representative Bradley explained to his Senate colleagues, "[w]ell-heeled intervenors would not be able to demonstrate financial hardship" within the meaning of the statute. *Id*. Here, it is uncontested that, among other things, CRR had no regular staff due to its financial circumstances, its income in 2001, approximately $8,000 was both insubstantial and exceeded by its expenses of approximately $11,000. Its cash on hand, approximately $4,000, was insignificant. CRR was not well-heeled and, clearly, a group of ratepayers with such a modest amount of resources falls well within the Legislature's concept of an organization experiencing financial hardship.

D. CRR's Contribution to the Commission Decision

We therefore turn next to the question of whether CRR has met the "public interest" standard set forth in the statute. For an award to be found to be in the public interest pursuant to RSA 365:38-a, we must find that CRR "substantially contributed" to the Commission's adoption, in whole or in part, of a position advocated by CRR in this docket or in the judicial review of the docket.

As an initial matter, we note our disagreement with PSNH as to the Company's contention that CRR does not meet the "public interest" standard because its involvement in the case actually cost PSNH customers some $8 million. This is a factual premise that has not been demonstrated on the present record. Indeed, if one were to attempt an assessment of the extent to which delays in the restructuring of PSNH have increased costs to customers, one would have to

place CRR's involvement in the context of other parties' conduct. Such an inquiry would reopen longstanding disputes that the Restructuring Agreement was intended to lay to rest. Furthermore, there was no indication that CRR's actions were in any way improper.

CRR submitted pre-filed testimony on November 29, 1999 and supplemental testimony on December 30, 1999. In this testimony, CRR asked the Commission to reject the proposed Restructuring Agreement because (a) there was insufficient "benchmarking" evidence to provide any confidence that the rate path projected from the settlement was sufficiently better than the "business as usual" rate path, (b) the rate reductions provided by the Restructuring Agreement were both insufficient and to a large extent not provided through proper cost savings, securitization and under-pricing of transition service being particular concerns, (c) the generation asset auction process should not be left to PSNH and its parent company under Commission oversight but should be administered directly by the Commission or an independent third party, (d) an affiliate of PSNH should not be permitted to bid on the auctioned assets, (e) the return on the interest in the Seabrook nuclear power plant held by PSNH affiliate North Atlantic Energy Corporation should not be increased from 7 percent to 11 percent in the event of a failed auction of this interest, and (f) the early divestiture of the NAEC Seabrook interest was desirable.

The CRR testimony argued that the minimum conditions for Commission approval of the Settlement Agreement included: achieving a larger portion of the necessary rate reductions through true savings or through a greater write-off by PSNH, and in particular through PSNH agreeing to reduce its stranded cost claim to the extent the cost of transition service was not recovered through the revenues it provides; eliminating the transition service deferral unless it could be demonstrated that the deferral would not burden future ratepayers;

insisting that PSNH leave the generation business whether through an affiliate or otherwise; eliminating the stepped-up return on Seabrook if there is no divestiture by 2003; and the inclusion of a provision for compensation of those parties who have made contributions to a resolution found to be in the public interest.

CRR's supplemental testimony expanded on the issue of the transition service cost deferral and was intended to demonstrate that the deferral was potentially very large and could not be assumed to be offset by gains from higher wholesale prices or assumed higher auction prices as projected by Commission staff witness Michael Cannata in late filed Exhibit 107. Testifying on behalf of CRR, Mr. Backus incorporated information provided in a memorandum written by its consultant, Synapse Energy Economics. Based on this information, Mr. Backus testified that (a) Exhibit 107 improperly dealt with the issue in terms of net present value, not in terms of the nominal dollars ratepayers would have to repay a deferral, (b) that the deferred sums failed to account for a "retail adder" which customers or suppliers would have to pay in addition to the cost of wholesale power in order to serve the transition service market[2];and (c) the retail adder costs would not be offset by projected higher revenues from pre-divestiture PSNH generation facilities or from assumed higher auction values for these facilities. Mr. Backus concluded his testimony by urging that any deferred transition service costs be removed from the stranded cost recovery charge or be agreed to be a basis for reducing the distribution rate.

CRR also submitted a post hearing brief on March 3, 2000. In this brief, CRR again criticized the likely transition service deferral and securitization. In its brief, CRR urged

[2] "Retail adder" costs not accounted for in Exhibit 107 were said to include expenses associated with billing, customer service, reporting, marketing, personnel, overhead, taxes and profits.

the Commission to reject the Restructuring Agreement unless a number of conditions were imposed. These proposed conditions included: (a) eliminating the Transition Service deferral without eliminating the advertised rate reductions; (b) limiting the securitization to no more than $500 million; (c) establishing a "claw back" mechanism to provide a vehicle for ratepayer sharing in the gain from a proposed merger between PSNH's parent company and another utility, Consolidated Edison, (d) ensuring that the Seabrook rate of return not be increased above 7 percent; (e) imposing a bidder requirement for environmental improvement to new source performance standards in the auction of fossil assets; (f) precluding PSNH and its affiliates (including Consolidated Edison and its affiliates) from re-entering the generation market by bidding on the PSNH generating assets, and (g) addressing the concerns of the municipal intervenors by providing them a reasonable opportunity to acquire PSNH's hydroelectric facilities.

Although the Commission did not adopt these positions in whole, it did adopt some of them in part. Specifically, the Commission found that the transition prices included in the Restructuring Agreement were so low that it was likely the price of providing transition service would exceed the prices included in the Restructuring Agreement and thus produce deferred costs that would be recovered from ratepayers by extending the time for recovering Part 3 stranded costs. This finding was consistent with the position of CRR and a number of other intervenors and led the Commission to adjust the prices for transition service upward. The Commission recognized the possibility that deferrals would still be produced, but said this change should significantly reduce them.

CRR had wanted the Commission to limit the amount of securitization to no more than $500 million. Because the net book balances of the four securitized assets were less as of July 1, 2000 than they were on January 1, 2000, the Commission reduced the total level of securitization by $37 million, approving a level of $688 million rather than the $725 million sought by PSNH. At the same time, the Commission indicated it would consider allowing an additional $37 million in securitization if PSNH were able to negotiate reductions in its existing small power producer rate order obligations.

In the Commission's order of September 8, 2000, addressing motions for clarification and rehearing, the terms of the amended Restructuring Agreement and financing issues, the Commission noted that in a post-hearing submission CRR supported PSNH's argument for giving PSNH latitude in determining the amount of securitization, though for different reasons. In the analysis of this issue the Commission expressly referred to a point made by CRR and Representative Bradley to the effect that a trade-off existed between lowering rates through securitization and shifting cost recovery from PSNH to the customer. In other words, the Commission agreed with CRR that with a greater amount being securitized, the rates might be lower but at the same time the risk of recovery would tend to shift from PSNH to the ratepayer.

On the issue of the adequacy of benchmarking, the Commission determined that the rate decrease benefits achieved under the Restructuring Agreement were greater than those likely to be achieved under the so-called business as usual scenarios. Recognizing the certainty that the future would be diverge from predictions, the Commission did not perform the analysis as a means to predict future rate paths with certainty but rather to provide a means to compare

various models of the future operating under real-world assumptions, and to indicate whether the benefits asserted under the Settlement Agreement are as significant as claimed by the settling parties when compared with the other likely and plausible path of events. The Commission accepted CRR's recommendation that affiliates of PSNH should not be allowed to bid on PSNH's generating assets in connection with their divestiture. CRR also argued that the auction process be administered directly by the Commission. The Commission did not go that far, but did recognize that that under the Settlement Agreement the Commission had ample authority to be as involved with the divestiture process as it deemed appropriate. Thereafter, the Legislature specified a more direct role for the Commission in administering the auction process.

In rejecting the Staff's argument for PSNH retaining its Seabrook entitlement for an extended period of time, the Commission accepted CRR's position regarding the desirability of the early divestiture of Seabrook. Regarding giving municipalities a reasonable opportunity to acquire hydro facilities, the Commission addressed certain time and flexibility concerns while insisting that the goal was still the highest possible price for the hydro assets in order that the proceeds can be used to offset stranded costs. The Commission either rejected outright or did not adopt other positions taken by CRR.

CRR, along with several other intervenors, sought rehearing of the Commission's initial approval of the Restructuring Agreement. This motion focused on issues relating to the stranded cost recovery charge. Several grounds were set forth, including (i) the stranded cost recovery authorized by the Commission was greater than that allowed by RSA 374-F:3,XII, and (ii) the stranded cost recovery charge was unconstitutional, and unfair and discriminatory. The Commission rejected these arguments.

On September 19, 2000, CRR moved for rehearing or reconsideration of the Commission's September 8, 2000 order (85 NH PUC 536) rehearing and clarifying its determination. CRR complained that the Commission had improperly altered its original determination by granting the request of PSNH for clarification of the treatment of Seabrook nuclear decommissioning costs, and appeared to have endorsed a legislative change to permit the owners of Seabrook to retain any excess in the decommissioning funds over the costs of decommissioning. In response, the Commission determined that good cause existed to provide further clarification on this matter. We said that our initial decision on this reflected the Commission's interpretation of the requirements of RSA 162-F:20,II in its then-present form. The Commission concluded that in circumstances where there was no change to RSA 162-F:20,II, the Commission's interpretation of those requirements as stated in its initial decision would apply to any proposal. The Commission also stressed that it was not endorsing, supporting or opposing any particular change to the decommissioning statutes.

The foregoing review of CRR's contribution to the substantive discussion of issues in this docket makes clear that the Commission found CRR's testimony and analysis regarding certain of the issues to be persuasive. It is true that with respect to a number of CRR's positions which the Commission adopted, the positions advocated by CRR were not necessarily unique. For example, CRR was not the only intervenor to object to the creation of deferrals resulting from transition service pricing. However, in each instance CRR provided both expert testimony and forceful advocacy that would otherwise have been missing from the proceedings. Thus, we conclude that CRR's participation satisfies the public interest standard set forth in RSA 365:38-a because it substantially contributed, in whole or in part, to the adoption by the

Commission of positions advocated by CRR.

E. Amount of Compensation

In *Investigation of the Congestion on the Telephone Network Caused by Internet Traffic*, Order No. 24,294 (March 12, 2004), the Commission concluded that it lacked the authority to include legal expenses in costs to be awarded an intervenor pursuant to RSA 365:38-a. This determination, which we apply for the reasons stated in Order No. 24,294, simplifies our task here. Of the costs CRR has documented here, $7,970.00 relates to its expert consultants and the remainder was billed by the law firm that represented CRR. Therefore, the recoverable sum is $7,970.00.[3]

Based upon the foregoing, it is hereby

ORDERED, that the request of Campaign for Ratepayers Rights for intervenor compensation pursuant to RSA 365:38-a is allowed in the amount of $7,970 and, consistent with the requirements of the statute, the Commission's Executive Director and Secretary shall transmit a request for such an award to the Governor and Council for its consideration.

[3] In so determining, we reject the argument of OCA that CRR should receive any compensation for its advocacy before the Legislature. RSA 365:38-a clearly limits recovery to costs associated with proceedings "before the commission."

By order of the Public Utilities Commission of New Hampshire this sixteenth day of July, 2004.

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary