

DE 04-177

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Petition for Approval of Transition Service Rate as of February 1, 2005

Order Following Hearing

ORDER NO. 24,427

January 28, 2005

APPEARANCES: Gerald M. Eaton, Esq. for Public Service Company of New Hampshire; Michael S. Giaimo, Esq. for the Business and Industry Association of New Hampshire; McLane, Graf, Raulerson & Middleton, P.A. by Steven V. Camerino, Esq. for Constellation Power Source, Inc. and Constellation New Energy, Inc.; Office of Consumer Advocate by F. Anne Ross, Esq. on behalf of residential ratepayers and Donald M. Kreis, Esq. of the Staff of the New Hampshire Public Utilities Commission.

I. PROCEDURAL HISTORY

On September 24, 2004, Public Service Company of New Hampshire (PSNH) filed with the New Hampshire Public Utilities Commission (Commission) a petition seeking the establishment of new Transition and Default Service rates to be effective for bills rendered on or after February 1, 2005. Pursuant to the relevant provision of the Electric Industry Restructuring Act, RSA 374-F:2, V, Transition Service is “electricity supply that is available to existing retail customers prior to each customer’s first choice of a competitive electricity supplier, and to others, as deemed appropriate by the commission.” The current Transition Service rate, 5.79 cents per kilowatt-hour, is applicable to all PSNH retail customers and was approved in Order No. 24,358 (August 2, 2004).

The initial PSNH filing did not specify a proposed new Transition Service rate, proposing to calculate such a rate prior to hearing in light of then-current forecasts of the cost of wholesale energy and fuel. However, at the time of the filing PSNH estimated that its reasonable and prudent cost of providing Transition Service from February 1, 2005 through January 1, 2006

would be 6.14 cents per kilowatt-hour. Ultimately, using forecasts of energy and fuel prices updated just prior to the hearing, PSNH recommended a new Transition Service rate of 6.49 cents per kilowatt-hour. The petition also requested a determination that PSNH continue to offer Transition Service for all customers through April 30, 2006. *See* RSA 374-F:3, V(b), RSA 369-B:3, IV(b)(1)(B)(i) and RSA 369-B:3, IV(b)(1)(C).¹

The Commission entered an Order of Notice on October 8, 2004, that scheduled a Pre-Hearing Conference for October 27, 2004 and established a deadline for intervention petitions of October 24, 2004. Constellation Power Source, Inc. and Constellation New Energy, Inc. (collectively, Constellation) and the Business and Industry Association of New Hampshire (BIA) filed timely intervention requests. The Office of Consumer Advocate (OCA) entered an appearance on behalf of residential ratepayers. On October 25, 2004, PSNH filed a motion for confidential treatment of a document furnished to the Commission Staff outlining the schedule of planned maintenance outages at PSNH generation facilities during the Transition Service period covered by the petition. There were no objections to the motion filed.

The Pre-Hearing Conference took place as scheduled and the pending intervention requests of Constellation and the BIA were granted. With the assent of the parties, the Commission adopted the tentative procedural schedule set forth in the Order of Notice, providing for a merits hearing on December 21, 2004. Freedom Energy Partners LLC d/b/a Freedom Energy filed an intervention request on November 1, 2004.

¹ The PSNH service territory was opened to retail competition in retail energy supply on May 1, 2001 and on that date the Commission certified pursuant to RSA 38:36 that such competition existed in at least 70 percent of the state. RSA 374-F:3, V(b) provides that Transition Service should be available for at least one year but not more than five years from that certification date for customers who have not yet chosen a competitive electricity supplier. RSA 369-B:3, IV(b)(1)(B)(i) required, as a condition of guaranteeing the recovery by PSNH of certain stranded costs, that PSNH continue to offer Transition Service to residential, street lighting and general delivery service rate customers through at least February 1, 2004. Similarly, RSA 369-B:3, IV(b)(1)(C) required PSNH to make Transition Service available for all other customers until at least February 1, 2005. In both instances the Commission has the authority to extend PSNH Transition Service, but only through April 30, 2006.

Pursuant to the procedural schedule, the OCA submitted pre-filed direct testimony on December 6, 2004. As scheduled, Staff convened a settlement conference on December 13, 2004. PSNH filed updated exhibits to its petition on December 20, 2004, indicating that PSNH's requested Transition Service rate was 6.49 cents per kilowatt-hour. The merits hearing took place as scheduled on December 21, 2004 with all parties except Freedom Energy appearing.

II. POSITIONS OF THE PARTIES AND STAFF

A. Public Service Company of New Hampshire

RSA 369-B:3, IV(b)(1)(B) requires the price of PSNH's Transition Service to reflect the Company's "actual, prudent and, reasonable costs" of providing such power as approved by the Commission. As with previous Transition Service filings, PSNH bases its proposed rate on projections of such actual, prudent and reasonable costs for the coming year. The reliability of these projections is significant because, to the extent PSNH's actual, prudent and reasonable costs exceed Transition Service revenue, the balance is recovered through the Stranded Cost Recovery Charge (SCRC) also paid by PSNH customers. (Likewise, to the extent Transition Service revenues exceed costs, the stranded cost balance is credited accordingly.)

PSNH noted that included in its Transition Service costs are the fuel costs associated with the Company's generation facilities as well as costs and revenues arising out of wholesale energy transactions and expenses assessed by the regional grid operator, ISO New England. PSNH further noted that it recovers via Transition Service rates the overall revenue requirements associated with its generation facilities; these revenue requirements are intended to cover the non-fuel costs of generation, including operation and maintenance expenses, allocated administrative and general costs, depreciation expenses, property and payroll taxes and a return on the Company's net investment in the generation facilities. Also recovered via Transition

Service rates, according to PSNH, are costs associated with purchased power obligations. With respect to PSNH's mandated power purchases from Qualifying Facilities pursuant to long term contracts and rate orders, PSNH noted that it recovers these costs via Transition Service only to the extent of their market value, with the remainder of these expenses recovered via the SCRC.

With respect to the coming year, PSNH attributes the projected increase in Transition Service costs to a combination of higher commodity prices and higher overall market costs. At the time of its petition, PSNH noted that energy markets were experiencing price volatility and uncertainty.

PSNH proposes that the 6.49 cent rate remain in effect through January 31, 2006, with the same possibility for a mid-year adjustment that the Commission adopted a year ago. At that time, the Commission determined that to minimize deferrals (i.e., Transition Service costs to be subsequently recovered via the SCRC), it would entertain requests by any of the parties or Staff for a one-time adjustment to the Transition Service rate of up to 20 percent. *See* Order No. 24,252 (December 19, 2003), slip op. at 29. The Commission directed that any such filing be made in July of 2004 and that any adjustment would be effective on August 1, 2004. *Id.* at 29-310 (noting expectation that any such proceeding would be limited, in the manner of "cost of gas" adjustment proceedings conducted regarding gas utilities). This is precisely what occurred, culminating in the adjusted rate set forth in Order No. 24,358 on August 2, 2004. Here, PSNH proposes a filing deadline of July 1, 2005 with an effective date of August 1, 2005.

As the result of planned maintenance outages at PSNH generation facilities, variations in demand for Transition Service and expected market conditions generally, the revised figures submitted by PSNH on December 20, 2004 indicate that projected monthly Transition Service costs will vary from a high of 7.00 cents per kilowatt-hour in May 2005 to a

low of 6.14 cents in December 2005. PSNH applied an 11 percent return on equity to its generation rate base in order to derive its projection of Transition Service costs. Eleven percent is the rate of return that has applied to PSNH assets since the implementation in 2001 of the PSNH Restructuring Settlement Agreement. PSNH noted that this rate is not explicitly stated in the Restructuring Agreement but was, rather, the basis for rate calculations included in that agreement. PSNH's expert on cost-of-capital indicated that he had not done a thorough analysis for this proceeding of the Company's generation-related cost of capital. But he testified that, in general, generation is a riskier line of business than distribution. He further testified that he calculated an average allowed rate of return of 10.97 percent for electric utility rate proceedings in 2004², a figure he characterized as conservative because the average includes both distribution and generation businesses.

PSNH proposes that the Commission determine in this proceeding that Transition Service will be available to all customers through April 30, 2006, the statutory end date. According to PSNH, this will align the duration of PSNH's Transition Service with that of New Hampshire's other electric utilities and also avoid confusion in terminology. PSNH indicated that it expects to make a filing in late 2005 with respect to a proposed Transition Service rate for February, March and April of 2006.

² In the record as Exhibit 3 is PSNH's response to a Staff request for information supporting the Company's requested return on equity. Exhibit 3 references a Texas case in which the witness for OCA's counterpart agency there acknowledged that generation is riskier than transmission and distribution, a similar concession by the OCA's counterpart in Pennsylvania, the fact that the Wisconsin Public Service Corporation has been allowed a 12 percent return on equity for a new gas-fired generation facility in a 2004 decision, the fact that Detroit Edison was allowed an 11 percent return on equity in a 2004 decision and, that in making this decision, the Michigan Public Service Commission referenced a report by Regulatory Research Associates (RRA) indicating that in 2003 a group of 22 electric utilities was allowed, on average, a return on equity of 10.97 percent. According to PSNH, RRA's comparable figure for the last quarter of 2004 is 11.07 percent.

Exhibit 3 further recites that PSNH's sibling company Connecticut Light & Power has been given an opportunity to earn a return of 11 percent on equity, that that Minnesota Public Utilities Commission had recently authorized an 11.25 percent return on equity for an electric utility in that state and that in New York, a recent settlement agreement between Consolidated Edison and the Staff of the Public Service Commission involved the utility retaining all earnings up to a return on equity of 11.4 percent, with returns in excess of that rate shared with customers.

B. Office of Consumer Advocate

The OCA urges the Commission to conclude that Transition Service should end for large commercial customers (i.e., non-residential customers not taking street-lighting service or service under Rate G) on January 31, 2005, with any such customers not taking energy from a competitive supplier placed on Default Service as originally contemplated by the applicable statutes.³ According to the OCA, only 1,300 of PSNH's customers fit into this category.

Although PSNH's Default Service is currently equal in price to Transition Service and PSNH proposes to maintain this parity, the OCA proposes a different methodology to be applicable henceforth. Specifically, the OCA asks the Commission to direct PSNH to allocate its generation output to its Transition Service customers first, with any surplus being used to provide Default Service. Since the PSNH generation portfolio generally produces energy at a low cost relative to the regional market, the OCA expects that such an allocation methodology would yield Transition Service rates that are lower than Default Service rates. As an example, the OCA testified that PSNH-supplied figures suggesting that, for a 6.14 cent Transition Service rate calculated under PSNH's proposal, if the OCA's plan were adopted the Transition Service rate would be 5.82 cents and the Default Service rate would be 6.64 cents. At hearing, the OCA's witness revised its proposed Transition Service rate to 6.17 cents per kilowatt-hour and its proposed Default Service rate to 6.99 cents. According to the OCA, this differential is justified by the fact that residential and small commercial customers pay a larger per-kilowatt-hour stranded cost charge than the big industrial customers do. The OCA also noted that residential and small commercial customers of other New Hampshire utilities pay Transition

³ Default Service is "electricity supply that is available to retail customers who are otherwise without an electricity supplier and are ineligible for transition service." RSA 374-F:1, I-a. It is roughly equivalent to what is referred to in neighboring jurisdictions as Standard Offer service.

Service rates that are lower than those of other customers, a fact the OCA attributes to the relatively lower likelihood of the small customers leaving Transition Service.

OCA separately urges the Commission to take action to prevent what the OCA characterizes as the potential for “gaming” Transition Service. According to OCA, because PSNH’s proposed Transition Service rate is actually an average of costs that vary by month to a significant extent, and because in some months the market price of power could be sufficiently low to allow competitive suppliers to under-price PSNH’s Transition Service for large customers, such a customer could take power from PSNH only during those months when the Transition Service rate is lower than that available in the competitive market. This, according to the OCA, would allow such customers to avoid their statutory obligation to cover PSNH’s actual cost of providing Transition Service. The OCA notes that any resulting under-recovery would ultimately be paid by all PSNH customers via the SCRC.

The OCA’s anti-gaming proposal would involve restricting the ability of large customers to return to Transition Service after migrating to a competitive supplier. Specifically, the OCA proposes the Commission determine that

if a large customer goes to a competitive supplier they cannot return to [Transition Service] (if available to their customer class) for a pre-established period of time if ever and instead would go to a [Default Service] alternative, priced monthly along the line previously proposed by the OCA. And consistent with the Unital filing in DE 04-197 (Petition page 5) during the period the customer was on a fixed [Transition Service] or [Default Service] rate the billings would be recomputed as though the customer had been billed monthly, and any difference would be charged to the customer on their next PSNH bill.⁴

⁴ At hearing, the OCA’s witness elaborated as follows:

In Unital’s case, the utility is proposing addressing gaming by putting their largest customers on monthly Default pricing, and giving their other large customers a choice between monthly and average pricing. Then, if a customer on monthly pricing chooses a competitive supplier, gaming or cost shifting is minimized as an issue. And, since the customer who had average prices also could choose a competitive supplier, to avoid shifting costs to others, their billings from Unital would be recalculated as though they had been on monthly pricing.

Tr. at 79-80.

Exh. 5 at 7.

Finally, the OCA disagreed with the 11 percent return on equity used by PSNH to calculate its proposed Transition Service rate. The OCA acknowledged that its witness, Assistant Consumer Advocate Kenneth Traum, is not an expert on this subject. However, Mr. Traum asked the Commission to bear in mind that (1) PSNH's regulated affiliate in Connecticut was allowed a 9.85 return on equity in a 2003 proceeding, (2) the Commission calculated an allowed return on equity for Verizon of 9.82 percent in January 2004 and a return on equity of 9.48 percent for Kearsarge Telephone Company in February 2004; (3) Staff's prefiled testimony in the recently concluded PSNH Delivery Service rate proceeding sought a return on equity of 9.3 percent for PSNH's regulated assets, and (4) PSNH earns 8 percent on equity in connection with its recoverable stranded costs,⁵ including Transition Service costs not recovered via Transition Service charges. According to OCA, the average of these various examples produces the OCA's requested return on equity of 9.17 percent.⁶ OCA calculated that this would reduce PSNH's Transition Service revenue requirement by approximately \$3.25 million for the 12 month period in question.

At hearing, the OCA took exception to PSNH's contention that it should earn a higher rate of return on generation assets because this investment is more risky than that of the Company's transmission and distribution assets. According to the OCA, PSNH's risk is not comparable to companies selling energy competitively because the only disallowances PSNH risks in connection with Transition Service are related to imprudence.

⁵ This 8 percent return on equity is applicable to the unamortized balance of PSNH's non-securitized stranded costs.

⁶ At hearing, the OCA also referenced two settlements involving PSNH affiliates Western Massachusetts Electric Company (WMECO) and Yankee Gas, which the OCA said involved returns on equity in the range of 9.85 to 9.9 percent.

The OCA took exception to the examples of returns allowed other utilities contained in Exhibit 3 as proffered by PSNH. According to the OCA, the Texas decision referenced there is from 2000 rather than 2003, i.e., prior to the restructuring of electric utilities in that state and the attendant change in risk profiles. OCA further suggested that PSNH has taken the comments of the Texas and Pennsylvania consumer advocates out of context, and that the 12 percent return on equity allowed in Wisconsin covers a vertically integrated gas and electric utility with nuclear generation assets as well as ownership in coal mining facilities. OCA further points out that the 12 percent return from that case actually falls within a range of permissible returns, that Detroit Edison's relatively high rate of return is in part a function of that company's nuclear power assets, that Connecticut Power & Light's rates were set based on an 9.85 rate of return notwithstanding a permissible earnings band that includes the 11 percent cited by PSNH, and that the New York Public Service Commission had not yet approved the Consolidated Edison settlement agreement invoked by PSNH. Finally, according to OCA, the Minnesota utility invoked by PSNH is too different from PSNH to warrant comparison.

C. Business and Industry Association of New Hampshire

The BIA supported PSNH's proposed Transition Service rate and opposed the OCA's proposal of bifurcating rates between large industrial customers and other customers. According to the BIA, PSNH's proposal is equitable, good economic and public policy, consistent with both the law and recent decisions of the Commission in other proceedings, appropriate because it provides a year for the competitive electricity market to mature and a fair allocation of Transition Service costs across the various customer classes.

According to the BIA, commercial and industrial customers deserve the same treatment as residential customers when it comes to the setting of Transition Service rates. To do

otherwise, the BIA contends, would be to have business customers subsidize residential users. The BIA also suggested that businesses might leave New Hampshire if they faced Transition Service rates that were set according to the OCA proposal.

The BIA further indicated that it did not disagree with Constellation's proposal to eliminate the distinction between Transition and Default Service for purposes of PSNH's customers. But, in the view of the BIA, adopting the OCA's approach would be to increase rates for commercial customers with no guarantee that it would stimulate retail competition

D. Constellation Power Source, Inc. and Constellation New Energy, Inc.

Constellation proposes that PSNH implement a single tariff that would eliminate the distinction between Transition Service and Default Service. According to Constellation, the only distinction between the two kinds of service is that Default Service customers are advised that they may not take Transition Service and that, at some point in the future, Default Service rates may exceed those for Transition Service. According to Constellation, this results in an unnecessary barrier to the migration of customers, who are concerned about suffering unforeseen consequences of purchasing energy on the competitive market. Constellation contends that the confusion implicit in maintaining two separate services with the same price outweighs the confusion PSNH fears will arise if Transition Service ends in the PSNH service territory before it ends elsewhere in New Hampshire.

According to Constellation, PSNH need not call the combined service either "Transition Service" or "Default Service" – or the Company could designate it as "Transition/Default Service." In the alternative, Constellation suggested the termination of Transition Service altogether, with all customers receiving Default Service if purchasing energy from PSNH.

In the opinion of Constellation, such a change would be consistent with applicable law. Constellation expressed the view that the overall goal of electric industry restructuring as enacted by the Legislature is the creation of competition – and that, in the face of potentially competing statutory directives and a changing industry, the Commission should adopt Constellation’s proposal because it is consistent with the overall purpose of the Electric Industry Restructuring Act, RSA 374-F.

According to Constellation, to the extent that RSA 374-F contemplated that Default and Transition Service would differ from one another, the statute's description of those services continues to have relevance for the state's other electric utilities but not for PSNH. Constellation contends that when it enacted RSA 374-F the Legislature contemplated that each utility might need to be treated on an individual basis in this regard. Thus, according to Constellation, RSA 374-F:3, V(d) explicitly provides the Commission with broad authority to shape Transition and Default Service as the Commission determines to be "appropriate to the particular circumstances of each jurisdictional utility."

Similarly, according to Constellation, RSA 374-F:3, V(e) provides that notwithstanding the descriptions of Transition and Default Service earlier in subsection V, “as competitive markets develop, the Commission may approve alternative means of providing Transition or Default Services, if the Commission determines such means to be in the public interest.” Therefore, Constellation contends, the Commission should infer that the Legislature intended to give it very broad authority to shape these services as the Commission deems appropriate and as would best fit each utility's circumstances.

In the view of Constellation, the relevant circumstances as to PSNH include the fact that, through subsequent legislation, the pricing distinction between Default and Transition

Service was eliminated. Constellation also pointed out that when the Commission approved the PSNH Restructuring Settlement Agreement, it expressly retained continuing jurisdiction to modify any of the terms of that agreement. Thus, Constellation rejected any suggestion by PSNH that the terms of the Restructuring Agreement create a barrier to implementing Constellation's proposal for a single form of energy service offered by PSNH.

According to Constellation, should the Commission determine in the future that customer or supplier behavior warrants different treatment for customers who leave PSNH's energy service for a competitive supplier, the Commission can apply new rules on a forward looking basis at that time, with due notice. What Constellation characterized as the current situation – “leaving a looming threat of disparate treatment for a customer who takes service from a competitive supplier” -- does not promote any rational public policy and creates an unnecessary barrier to creation of a competitive market. Constellation contends that, under the current situation, a customer venturing into the competitive market and returning after a year would forever thereafter bear a “scarlet letter” identifying the customer as being singled out for different treatment from customers who stayed on PSNH's energy service. It is Constellation's position that there has been no activity on the part of customers or suppliers that would warrant such a distinction, and there is no reason that the Commission could not address such a problem if it were to arise in the future.

Constellation additionally reminded the Commission that it already has the authority simply to let Transition Service for large customers expire on January 31, 2005. Thus, according to Constellation, creating a single form of service for all customers purchasing their electric supply would not violate any legislative directive. In Constellation's view, the Commission could simply decide to authorize PSNH to continue Transition Service on the basis

that Constellation is proposing. Constellation would be willing to allow PSNH to determine the exact name for such a service itself.

Constellation indicated that it did not oppose anti-gaming measures, but it suggested that the Commission and the parties give more thought to what measures might be appropriate. According to Constellation, there has been no evidence to date of any such gaming by PSNH customers. It also argued that comparison to Unutil's rates is unavailing because that company, unlike PSNH, has a fully market-based Transition Service rate and thus a greater inducement to the sort of gaming about which OCA is concerned.

E. Staff

Staff disagreed with Constellation's characterization of the central policy goal of the Restructuring Act, drawing the Commission's attention to the second sentence of RSA 374-F:1, I: "The overall public policy goal of restructuring is to develop a more efficient industry structure and regulatory framework that results in a more productive economy by reducing costs to customers while maintaining safe and reliable electric service with minimum adverse impacts on the environment." Thus, according to Staff, competition is not an end in itself. Staff also argued that, regardless of how events at PSNH have unfolded in unforeseen ways, the situation in the Company's service territory is close to the scenario laid out by the Legislature as the overall public policy goal of restructuring.

Staff expressed agreement with Constellation's suggestion that the transition the Legislature envisioned when it invented "Transition Service" has not taken place. Staff suggested that this is a question the Commission should confront, but not here. According to Staff, rather than undertake small efforts to reform Transition Service so as to encourage competition, it should take up the broad questions of whether PSNH should ultimately retain its

generation portfolio, in essence remaining a vertically integrated utility, and whether the state should be placed back on the course toward the transition originally envisioned when the Restructuring Act became law in 1996.

Staff rejected Constellation's "scarlet letter" theory. Rather, according to Staff, a decision to migrate to a competitive supplier is the sort of business risk that private sector firms take all the time.

Finally, Staff disagreed with OCA's proposal with respect to PSNH's return on equity. Staff noted both the OCA and PSNH have admitted they did not undertake a thorough, expert analysis of the issue. In such a situation, according to Staff, the Commission must simply continue to employ the return on equity derived in the most recent applicable proceeding which, in this instance, was the Commission's approval of the PSNH Restructuring Settlement Agreement. Staff indicated that, overall, it agreed with PSNH's forecasts of its Transition Service costs for the applicable period.

III. COMMISSION ANALYSIS

This proceeding requires us to set Transition Service and Default Service rates for PSNH that reflect the company's "actual, prudent and reasonable costs" of providing the power. RSA 369-B:3, IV(b)(1)(B)(ii) (as to residential, street lighting and general delivery service Rate G customers) and RSA 369-B:3, IV(b)(1)(C) (as to all other customers). We make such a determination in the context of our overall obligation to assure that rates are just and reasonable pursuant to RSA 378:7 as well as our obligation to use the RSA 374-F:3 "interdependent policy principles" to guide us in regulating the electric industry as restructured under RSA 374-F.

There are essentially no facts in dispute here. All parties appear to have concluded that PSNH's forecast of Transition Service and Default Service costs are reasonable,

with the exception being the return on equity PSNH applies to its generation assets. As to that issue, both PSNH and the OCA invite comparison of PSNH's risk profile with that of other utilities, some in other lines of business and in other states.

a. Return on Equity

We agree with Staff that the record here is inadequate for us to make new findings with respect to the cost of equity embedded in the PSNH generation portfolio. No party has performed a thorough, expert analysis of the sort customarily relied upon in such proceedings, and both OCA and PSNH have amply demonstrated why the rate proceedings invoked by the other are inapposite. In these circumstances, there is no evidentiary support in the record for revising the relevant determinations the Commission has previously made concerning PSNH.⁷ *See Appeal of Public Service Co. of New Hampshire*, 130 N.H. 748, 756 (1988) (noting that, in determining cost of equity for ratemaking purposes, "regulators must at least consider restriking old balances between the competing interests *as conditions change*") (emphasis added). Certainly, market conditions have changed since PSNH was restructured, but no record evidence supports a determination as to the effect of such changes on risk to PSNH's shareholders.

Therefore, we are obliged at this time to allow PSNH to use an 11 percent cost of equity in calculating Transition Service rates.⁸ However, by allowing PSNH to use the 11 percent cost of equity for rates effective February 1, 2005, we make no determination as to the appropriate return on equity that might later be determined. Indeed, we share the concern of OCA that it may no longer be appropriate to apply a return on equity established in connection

⁷ The Commission set PSNH's allowed return on equity at 11 percent when approving temporary rates for the Company in 1997. *See Public Service Co. of New Hampshire*, 82 NH PUC 787, 798 (1997). Permanent rates were never established. Rather, in 1999, PSNH entered into a Restructuring Settlement Agreement, ultimately approved by the Commission, that changed PSNH's rates significantly but without altering the underlying assumptions about the Company's cost of equity.

⁸ The record suggests that a 100 basis point change in the return on equity could change revenues annually by approximately \$1.8 million and change rates by .02 cents per kWh.

with a traditional, vertically integrated electric utility, and which was allowed at a time when it was anticipated that PSNH would soon be divesting its assets, to the generation-related financial risks faced by the hybrid, partially restructured company that PSNH is today. Accordingly, a technical session will be held at 10:00 a.m. on February 8, 2005, in order to allow the parties the opportunity to reach agreement on a proposed procedural schedule that will lead to a Commission decision on the appropriate return on equity by June 1, 2005. The return on equity resulting from this supplemental phase of the proceeding will apply either as a mid-term adjustment or as part of the rates approved in the next Transition Service proceeding as the Commission determines is appropriate.

b. Terms of Transition and Default Service

Pursuant to 369-B:3, IV(b)(1)(C), Transition Service for large commercial and industrial customers terminates on January 31, 2005, unless extended by the Commission. PSNH seeks an extension until April 30, 2006, in order to avoid potential customer confusion. We decline to take this step and find PSNH's arguments for doing so to be unpersuasive. Essentially, PSNH contends that ending Transition Service for some but not all PSNH customers at this time would sow confusion. We find such confusion unlikely because large commercial and industrial customers tend to be sophisticated businesses that are likely to track this key cost of doing business closely. They are also the customers for which the transition to competitive alternatives envisioned by RSA 369-B and RSA 374-F could still become a reality because they are the customers that are most attractive to competitive energy suppliers. And, because the Transition and Default Service rates are not diverging at this time, as discussed *infra*, there are no financial consequences to these customers associated with ending Transition Service on the schedule contemplated by currently applicable legislation. Accordingly, in these circumstances,

there is no compelling reason for extending the timeline nor is there any discernible harm in adhering to the timeline.

This determination obviates in part Constellation's "scarlet letter" assertion. As to the large customers covered by RSA 369-B:3, IV(b)(1)(C), there will no longer be any potential for divergent outcomes in the realm of energy costs based on whether the customer has tested the competitive market or not. Thus, to the extent there is any basis to Constellation's assertion, when marketing their products to these customers, competitive suppliers will no longer have to ask the customers to assume some undefined risk in the future by migrating from PSNH now.

With respect to the RSA 369-B:3, IV(b)(1)(B) customers – i.e., residential customers, street lighting customers and customers taking service under general delivery service Rate G - adoption of a combined Transition and Default Service option would be inconsistent with RSA 374-F:3, V(b), which states that "transition service should be separate and distinct from default service." At the same time, we agree with PSNH that it is reasonable to extend the availability of Transition Service to these customers for three months, i.e., through April 30, 2006. The statute requires that Transition Service be available to eligible customers in these rate classes through at least February 1, 2006, or as extended by the Commission. Pursuant to RSA 374-F:3, V(b), Transition Service remains available in all other service territories through April 30 of that year. We find that a short extension of Transition Service for eligible PSNH customers to harmonize the Transition Service end date with other utilities is reasonable.

c. Cost Allocation

We cannot adopt OCA's proposal to give residential customers first call on the economic advantage provided by PSNH's hydro and fossil assets to the disadvantage of large

commercial and industrial customers. As presently constituted, there is no statutory basis for favoring residential customers over business customers or favoring transition customers over default customers. The Legislature used precisely the same phrase – “actual, prudent and reasonable costs of providing such power” – as instructions to the Commission with respect to the currently applicable rate-setting methodology for Default Service, RSA 369-B:3, IV(b)(1)(A), Transition Service for residential and small commercial and industrial customers, RSA 369-B:3, IV(b)(1)(B)(ii) and Transition Service for large commercial and industrial customers, RSA 369-B:3, IV(b)(1)(C). The Legislature also spoke directly to the question of how to allocate the benefits (and the costs) of the generation portfolio by specifying that as long as PSNH retains the portfolio, “PSNH shall supply *all* . . . transition service and default service offered in its retail electric service territory from its generation assets and, if necessary, through supplemental power purchases in a manner approved by the commission.” RSA 369-B:3, IV(1)(A) (emphasis added). We read these legislative prescriptions as a directive to require PSNH to use its generation assets to serve all PSNH energy customers equably.

Even if this were not so, we would not take the step urged by the OCA because its preferred justification for such an action – what OCA perceives to have been an unfair allocation of stranded costs in the PSNH Restructuring Settlement Agreement – is unpersuasive. Whether one agrees or disagrees with the apportionment of recoverable stranded costs and/or rate relief in the 1999 and 2000 proceedings that led to the approval of the Restructuring Agreement, the decision has long since become final. In essence, the OCA invites us here to revisit that determination. We decline to do so.

d. The “Gaming” Problem

We share the conceptual concern that in the present Transition Service paradigm the potential exists for some PSNH customers to take advantage of their ability to leave and return from the Company’s energy service in a manner that allows them to avoid paying a fair share of PSNH’s actual, prudent and reasonable costs. However, there is agreement among the parties that no practical evidence exists to date of such behavior. Consequently, we concur in the view of Constellation that it would be premature to require PSNH to implement any measures designed to thwart such customer activity. Should PSNH or any other party become aware of any customer activity that might reasonably be regarded as “gaming” we will expect that party to bring it to the attention of the Commission promptly. We reserve the right to take up this issue again in the next Transition and Default Service proceeding as well as any that ensue thereafter.

e. Midyear Correction

No party objected to the perpetuation of a reform instituted a year ago that provides for a potential mid-year correction in the Transition Service price so as to minimize under- or over-recoveries that must be reconciled through the SCRC. It appears that the provision we made last year, allowing any party or Staff to seek a change in the rate for effect on August 1 by making a filing on or before July 1, and providing thereafter for an expedited proceeding in the manner of a “cost of gas” adjustment case, was both logistically feasible and helpful in achieving the desired objective. Accordingly, we make the same provision here for a potential correction in the Transition Service rate effective on August 1, 2005.

f. Motion for Confidential Treatment

The only other issue that remains pending is the motion for confidential treatment under RSA 91-A:5 and Puc 204.06 made by PSNH in connection with discovery. The motion,

which concerns the dates on which PSNH plans outages at its generation facilities, was filed on October 25, 2004 and did not engender any pleadings in opposition.

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 contends that if the dates of planned generation outages were disclosed publicly, other suppliers of generation would use this information to alter their own bids in the regional wholesale electricity market overseen by ISO New England in a manner that would give those bidders an unfair strategic advantage. PSNH avers that it has provided these dates to ISO New England but that the ISO maintains their confidentiality. PSNH further notes that, by reviewing other data made public in this case (information about the months in which PSNH intends to make higher-than-usual market purchases), it would be possible for its competitors in the wholesale market to discern *approximately* when these outages are planned. But, according to PSNH, this still leaves confidential details of the model PSNH uses to derive estimates of its generation needs as well as the fuel and energy market projections PSNH uses to make its maintenance outage plans.

We find this reasoning persuasive. The precise dates of planned maintenance outages would be of great interest to wholesale market participants that would acquire a bidding advantage over PSNH if they had access to this information, which would ultimately raise costs to PSNH customers. Conversely, the precise dates shed little if any light on the extent to which PSNH has reasonably projected its actual, prudent and reasonable costs. In these circumstances, the harm of disclosure clearly outweighs the benefits of allowing this information to be public.

g. Conclusion

The 6.49 cent-per-kilowatt-hour Transition Service and Default Service rates we approve today for PSNH marks the second rate increase imposed on this utility's customers in four months, albeit to different portions of PSNH's unbundled rates and for differing reasons.

See Order No. 24,369 (September 2, 2004, granting increase to PSNH Delivery Service rates as of October 1, 2004). We are mindful that such increases have real consequences, both for businesses helping New Hampshire's economy to thrive and residential customers simply striving to make ends meet.

However, the record here reflects that the forces behind this increase are not of PSNH's making but, rather, are a function of larger forces creating volatility in fuel prices and the market for wholesale energy. The record shows that the market for fossil fuels and forward markets for electricity have been volatile and, subsequent to the hearings conducted in this proceeding there have been both upward and downward pressure in energy markets. However, there is no basis for concluding that adoption of further updated forecasts would yield a lower rate, because PSNH has locked in much of its fuel and energy costs, thus shielding energy customers from the volatility. Furthermore, to the extent wholesale price changes impact PSNH's actual, prudent and reasonable costs, appropriate mechanisms are in place to make a mid-term adjustment in rates if necessary and to reconcile any potential overcollection by reducing stranded costs. Beyond that, the record reflects that, by virtue of its owned portfolio of non-nuclear generation assets, PSNH is able to provide energy to its customers on more favorable terms than other suppliers can. Thus, the increase is justified and consistent with applicable law.

Based upon the foregoing, it is hereby

ORDERED, that the petition of Public Service Company of New Hampshire, providing for Transition Service and Default Service rates of 6.49 cents per kilowatt-hour effective on February 1, 2005, is **GRANTED**; and it is

FURTHER ORDERED, that Transition Service shall continue to be available to eligible residential, street lighting and general delivery service Rate G customers of Public Service Company through April 30, 2006 and shall otherwise end as of January 31, 2005; and it is

FURTHER ORDERED, that Public Service Company of New Hampshire shall submit a compliance tariff within three business days of the entry of this Order; and it is

FURTHER ORDERED, that a technical session be held on February 8, 2005 at 10:00 a.m., to allow the parties the opportunity to reach agreement on a procedural schedule for a supplemental phase of this proceeding regarding return on equity; and it is

FURTHER ORDERED, that the motion of Public Service Company of New Hampshire for confidential treatment of the documents revealing the dates of planned maintenance outages at the Company's generation facilities is hereby GRANTED; and it is

FURTHER ORDERED, that the determination as to confidential treatment of documents is subject to the ongoing authority of the Commission, on its own motion or on the motion of Staff or any member of the public to reconsider such determination in light of RSA 91-A, should circumstances so warrant.

By order of the Public Utilities Commission of New Hampshire this twenty-
eighth day of January, 2005.

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Michael D. Harrington
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary