

DE 04-052

SMARTSTART ENERGY EFFICIENCY PILOT PROGRAMS

Review of Current Programs

Order Addressing NHPIRG's Request for Intervenor Compensation

ORDER NO. 24,509

September 2, 2005

I. PROCEDURAL HISTORY

This docket involves pilot programs underway with the New Hampshire Electric Cooperative, Inc. (NHEC) and Public Service Company of New Hampshire (PSNH) regarding Pay-As-You-Savetm or PAYS[®], an energy efficiency program. On December 30, 2004, the New Hampshire Public Utilities Commission (Commission) issued Order No. 24,417 (Order) continuing the programs through 2007 but requiring that the programs be titled something other than the proprietary PAYS[®] name, hence the new name, SMARTStart. Granite State Electric Company (Granite State), Unitil Energy Systems, Inc. (Unitil), the Office of Consumer Advocate (OCA) and New Hampshire Public Interest Research Group (NHPIRG) participated in the docket as full parties.

NHPIRG, on April 26, 2004, filed with the Commission a petition to establish a procedure for intervenor funding pursuant to N.H. RSA 365:38-a; on May 28, 2004, NHPIRG withdrew the petition and substituted instead a motion for designation of NHPIRG as eligible for intervenor compensation. OCA, NHEC and Granite State opposed the motion, in pleadings filed June 7, 8, and 11, 2004, respectively. PSNH filed a response on June 7, 2004, that posed questions regarding the mechanics of the statute. Unitil filed a response on June 14, 2004, addressing NHPIRG's motion and the objections and responses filed by other parties.

The Commission, on August 27, 2004, issued a secretarial letter requesting that NHPIRG file additional documents regarding its motion, which it did on September 7, 2004. The Commission heard evidence on the merits of the PAYS® pilot programs on September 21 and October 22, 2004. In the order that followed, the Commission stated it would address the issues under RSA 365:38-a in a separate order.

II. POSITIONS OF THE PARTIES AND STAFF

A. NHPIRG

NHPIRG asserted that it should be entitled to compensation pursuant to RSA 365:38-a, arguing it meets all of the statutory criteria. It is a non-profit organization with “limited funding and endowment” and thus is facing financial hardship. Its members, who are individual ratepayers and retail customers in the state, rely on NHPIRG staff to be their advocates in federal, state and local policy debates, as well as to represent them in consumer and ratepayer matters.

NHPIRG asked the Commission to determine early on, before it undertook the expense of retaining experts, whether the organization would be eligible for funding, and whether “expert, and expert witness fees” qualify for compensation. It stated its contributions in the docket would include the participation of the designers of PAYS®, Harlan Lachman and Paul Cillo.

On September 7, 2004, NHPIRG supplemented its motion, at the Commission’s request, with further details on its financial and organizational circumstances. NHPIRG Executive Director Josh Irwin states that the organization has approximately 1,000 members, scattered throughout the state. Their membership base stretches from Portsmouth west to Keene and from towns along the Massachusetts border north through Concord into Hanover, Lebanon

and Plymouth. According to its Form 990 filed with the Internal Revenue Service for the fiscal year ending June 30, 2002 (the latest available at the time), NHPIRG's mission is to "advocate for the public interest, protect consumers, safeguard the environment and further responsible government." It states a "commitment to developing renewable energy, expanding energy efficiency programs, and protecting consumers" as well as other issues unrelated to energy. According to Mr. Irwin, most members contribute less than \$75, obtained from door to door canvassing. The Form 990 also identifies two grants from public interest research funds totaling \$24,000 and approximately \$15,000 in other contributions. Its expenses for the period covered in the Form 990 were roughly \$26,000¹ leaving net assets of about \$15,000.

B. COMMENTS AND RESPONSES IN OPPOSITION

NHEC opposed NHPIRG's motion, arguing that it had not demonstrated its entitlement under the statute. In NHEC's view, the fact that members are retail customers is immaterial, the test is whether NHPIRG as an entity is a retail customer. Further, NHPIRG has not demonstrated financial hardship. It asked if any expert fees are appropriate and, if so, suggested the Superior Court rules limiting payment for fees directly related to the witness' appearance and testimony in court are sound.² Since submission of the supplemental information, NHEC has been silent.

PSNH argued that NHPIRG had not made an adequate showing in its initial submission. It asked for a membership list, to ascertain in whose franchise territory its members took service and it argues that inasmuch as NHPIRG is representing members who are the actual retail customers, support for intervention in this proceeding ought to be demonstrated, possibly

¹ These expenses were incurred before the Commission's Docket and do not include costs of participating in DE 04-052.

² NHEC, PSNH, OCA, Unitol and Granite State submitted filings prior to NHPIRG's supplemental information and the Commission's ruling in PSNH Restructuring Settlement Agreement, Order No. 24,351 (July 16, 2004) which provides guidance on some of these questions.

by providing a copy of a Board of Directors vote authorizing participation. Additionally, PSNH contends that NHPIRG should offer to submit a budget for its expenses in this proceeding and an income statement in order to demonstrate financial hardship. PSNH also posed a number of questions on the mechanics of recovery, such as whether one should pro rate recovery according to the percentage of issues on which NHPIRG prevails, or assign costs to certain utilities depending on the Commission's ultimate determination of the scope of the program.

The OCA similarly argued the request was premature. OCA also raised the propriety of reimbursement to Mr. Lachman and Mr. Cillo, who may personally benefit if the PAYS® program is expanded. According to OCA, compensation should be for public and not personal benefits. OCA did not respond to NHPIRG's supplemental filing.

Unitil and Granite State agreed with positions of NHEC and the OCA. They asserted that the motion was premature and could not be acted upon at this stage of the proceeding.

III. COMMISSION ANALYSIS

"Other parties" are eligible to obtain approval for compensation under RSA 365:38-a. "Other parties" are "retail customers," not including municipalities, subject to the rates of the utility and who face "financial hardship". Recovery by such a party would be "just and reasonable and in the public interest" if it "substantially contributes to the adoption by the commission, in whole or in part, of a position [it] advocated". Recovery is limited to "\$10,000 from any single utility" and, if approved by the Commission, must then be approved by Governor and Council before payment is authorized. In the event the proceeding involves more than one utility, "the liability of each utility for the award shall be determined by dividing the amount of the award among the utilities in a manner approved by the commission." The utility

or utilities are entitled to prompt recovery of the amounts paid through a rate increase, if it was a rate case involved, or through another recovery mechanism approved by the Commission, if the proceeding was something other than a rate case.

The Commission has twice ruled on requests for intervenor compensation since the statute was enacted in 1999. See *Investigation of the Congestion on the Telephone Network Caused by Internet Traffic*, Order No. 24,294 (March 12, 2004), which denied compensation, and *PSNH Restructuring Settlement Agreement*, Order No. 24,351 (July 16, 2004), which granted compensation. As noted in the above referenced orders, RSA 365:38-a provides little specific guidance in determining eligibility. In legislative hearings on the bill, the sponsors described eligible intervenors to be “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.

The first case filed with the Commission under this statute involved the New Hampshire Internet Service Providers Association, a trade organization of internet service providers that advocated a position that would support its business development in that market. NHISPA requested recovery of up to \$10,000 in attorneys fees. RSA 365:38-a authorizes recovery of *costs*, which are distinguishable in New Hampshire law from *fees*, including attorneys fees. There being no statutory authorization for recovery of attorneys fees, the Commission denied the request. Order No. 24,294 at 11.

The second case before the Commission involved the Campaign for Ratepayers’ Rights, a statewide membership organization focused primarily on residential ratepayers and electric policy. The Commission found that CRR was a “retail customer” as envisioned by the

statute, in that it was made up of ratepayers of PSNH throughout the state. The Commission did not consider the fact that the CRR's office was located in another utility's service territory to alter CRR's status as a retail customer, concluding that to rule otherwise would lead to the inefficient and absurd result that if CRR's members who were ratepayers of the utility were to intervene individually they would be eligible but not if they appeared through their organization. Order No. 24,351 at 8-9. The Commission also found that CRR met the financial hardship test in that it had no regular staff, took in far less in dues and contributions than its expenses, and had limited resources available. Order No. 24,351 at 10.

The Commission also found that recovery of expert witness costs was in the public interest in that CRR had substantially contributed to the Commission's determination, in part. Order No. 24,351 at 16. The order noted that not all of CRR's positions were adopted, and some of its positions were shared by other parties. Nevertheless, the Commission found that CRR's experts provided valuable testimony in the proceeding that otherwise would not have been presented. The Commission authorized recovery of \$7,970, the amount paid to the expert witnesses, which subsequently was approved by the Governor and Executive Council.

NHPIRG is an advocacy organization that maintains a place of business in Concord, New Hampshire. We conclude that NHPIRG satisfies the statute's "retail customer" requirement.

According to NHPIRG's September 7, 2004 submission, most members contribute less than \$75. It obtained two grants from public interest research funds for a total of \$24,000 and approximately \$15,000 in other contributions. Its expenses were roughly \$26,000 for the period reported in the Form 990, which is prior to expenses being incurred in this docket. While NHPIRG does have staff and a positive balance sheet, these are quite limited as evidenced

by its total annual salaries paid of approximately \$15,000 and its end of year balance of about \$15,000. The legislative history makes clear that compensation should go to those who do not “have access to a lot of funds to be able to stay involved in ... proceedings” or are not “well-heeled”. We conclude that NHPIRG has demonstrated that it faces financial hardship, in the context of RSA 365:38-a as it relates to NHPIRG’s ability to participate in a proceeding before this Commission.

Our final determination is whether NHPIRG substantially contributed to the Commission’s determination, in whole or in part, in this case and thus recovery would be in the public interest. There is no question NHPIRG actively participated in the docket, and that the evidence was better developed and issues more fully aired than they would have been had NHPIRG not participated. The statute, however, requires a stricter test: to what extent did the Commission ultimately adopt NHPIRG’s positions? To answer that question, we must evaluate the issues that NHPIRG advanced, on its own or in conjunction with other parties, and the final rulings made in this case.

NHPIRG, along with NHEC and PSNH, advocated that the programs be continued through 2007, and no longer be operated as “pilots”. Both of these are positions we adopted. Order at 20-21. The Commission adopted NHPIRG’s recommendation regarding ongoing reporting by NHEC and PSNH. Order at 22. The Commission also accepted NHPIRG’s recommendation that the programs no longer use the trademarked PAYS name. Order at 22. The Commission adopted NHPIRG’s position opposing Unitil’s on-bill financing program; similarly it adopted NHPIRG’s position to not allow Granite State to expand its on-bill financing for the CORE programs to a PAYS-like program. Order at 23. The Commission adopted NHPIRG’s recommendation, made in conjunction with all parties, to require a minimum project

size of \$1,000 for commercial customers, Order at 23, and that “portable measures” need not be offered through 2007, Order at 23. It granted NHPIRG’s request that the screening criteria for a qualifying measure be relaxed somewhat, over the objection of the electric utilities. Order at 26. The Commission also accepted NHPIRG’s recommendation that the current incentive mechanism which ties the incentive amount to the amount of customer repayments be continued, again over the objection of the electric utilities. Order at 26.

The Commission did not adopt NHPIRG’s position that Granite State and Unutil be required to offer similar programs, though did not oppose the voluntary adoption of such programs if they so chose. Nor did it grant NHPIRG’s request that PSNH expand its municipal program to include all state and federal customers, hospitals, colleges and public housing authorities, finding instead that the programs should gain more experience, particularly as to potential defaults that could shift costs to other ratepayers, before the Commission mandates such an expansion. Order at 24. The Commission rejected NHPIRG’s recommendation that certain systems benefits charges be designated for PAYS® projects. Order at 26. It also rejected NHPIRG’s recommendation that third party vendors be trained in marketing of PAYS®, Order at 28, as well as the request that a guarantee fund be created to pay up-front costs for PAYS® products, though the Commission required a report on this issue by June 1, 2005 with possible program revision to follow. Order at 31. Finally, the Commission rejected, for the time being, NHPIRG’s proposal that CORE program subsidies be made available to PAYS® program customers, though stated this was another issue that may be revisited after greater experience has been attained. Order at 35.

Based on this review, we conclude that NHPIRG substantially contributed to the positions adopted in this case. Having determined, therefore, that NHPIRG is a retail customer

subject to the rates of a New Hampshire utility, has demonstrated financial hardship and has substantially contributed to the positions adopted in this case, we find recovery of costs to be in the public interest. However, in order to allow recovery of costs associated with this proceeding, NHPIRG must provide a delineation of its actual costs. Accordingly, we direct NHPIRG to file by September 30, 2005, an accounting of its costs associated with this proceeding. After review, the Commission will issue a subsequent order determining the level of the award of costs and specifying the allocation of responsibilities for payment of the award.

Based upon the foregoing, it is hereby

ORDERED, the motion of New Hampshire Public Interest Research Group is **GRANTED**, as detailed herein.

By order of the Public Utilities Commission of New Hampshire this second day of September, 2005.

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Michael D. Harrington
Commissioner

Attested by:

Michelle A. Caraway
Assistant Executive Director & Secretary