

DE 04-052

SMARTSTART ENERGY EFFICIENCY PILOT PROGRAMS

Review of Current Programs

Order Addressing Request for Intervenor Compensation and Motions for Rehearing

ORDER NO. 24,578

January 20, 2006

I. PROCEDURAL HISTORY

On September 2, 2005, the New Hampshire Public Utilities Commission (Commission) issued Order No. 24,509 finding New Hampshire Public Interest Research Group (NHPIRG) eligible for compensation pursuant to RSA 365:38-a. The Commission ruled that under the statute NHPIRG qualified as a retail customer subject to the rates of a New Hampshire utility, had demonstrated financial hardship and had substantially contributed to the adoption of certain positions, all as required by RSA 365:38-a. The Commission, therefore, instructed NHPIRG to file a delineation of its actual costs, no later than September 30, 2005. Finally, the Commission stated that, upon review of the submission, it would determine the level of the award of costs and the allocation of responsibility for payment of the award.

NHPIRG, on September 30, 2005, submitted a report detailing \$53,360.75 “for its expenses to hire expert witnesses” Paul Cillo and Harlan Lachman. The request was for \$40,000, “allocated at \$10,000 for each of the four utilities participating in the docket” – Granite State Electric Company (GSEC), New Hampshire Electric Cooperative (NHEC), Public Service Company of New Hampshire (PSNH) and Unitil Energy Systems (Unitil).

On October 3, 2005, pursuant to RSA 541:3, NHEC and PSNH filed Motions for Rehearing of Order No. 24,509. GSEC submitted a late filed Motion for Rehearing on October

5, 2005; also on that date Unitil filed a letter in support of the two Motions for Rehearing. NHPIRG opposed the Motions for Rehearing in a submission dated October 7, 2005.

II. POSITIONS OF THE PARTIES

A. Motions for Rehearing of Order No. 24,509

According to PSNH, the Commission erred in finding that NHPIRG had substantially contributed to its findings, in that the Commission rejected “the four major issues that were advocated specifically by NHPIRG.” Further, it contends the positions on which NHPIRG prevailed were also asserted by the electric providers. Agreement with proposals put forth by others should not entitle an intervenor to compensation, according to PSNH.

NHEC also argues that NHPIRG did not substantially contribute to the positions adopted by the Commission, for the reasons cited by PSNH, and that the Commission erred in concluding that NHPIRG was a retail customer of NHEC. NHEC also argues that expert fees are not “costs” within RSA 365:38-a or, if they are, there can only be recovery for the actual time spent testifying, as NHEC asserts is the case in Superior Court practice, and that it is not just or reasonable or in the public interest that NHEC members pay NHPIRG’s costs. NHEC notes that Mr. Cillo had testified he and Mr. Lachman were not being paid to participate, and yet are now requesting compensation. Further, as the two experts who designed the PAYS program, they have a financial interest in its success and should not be compensated. Unitil’s letter supports the arguments advanced by PSNH and NHEC.

GSEC argues the Commission erred in its analysis of RSA 365:38-a, and that if read in context of the broader public interest, it would conclude that NHPIRG has not met the test for compensation. According to GSEC, compensation should only be awarded when there is “vindication of an interest of the general public – an interest which by definition could not

otherwise be protected by a private party.” GSEC argues that the interests NHPIRG sought to protect were already being adequately protected by the electric providers in the docket and that ratepayers should not have to pay twice for that protection. GSEC also argues that NHPIRG’s expert witnesses have a financial interest in the outcome which it finds to undermine public confidence in the objectivity of PAYS and NHPIRG, contrary to the public interest and RSA 365:38-a. GSEC also notes PAYS’ statement that its experts were not being compensated to participate in the docket. GSEC argues that forwarding PAYS’ invoice is “an attempt to use the statutory framework to funnel money to PAYS for otherwise unpaid services” and the Commission should not permit such “manipulation of the statute.”

B. NHPIRG’s Response to Motions for Rehearing of Order No. 24,509

NHPIRG’s response notes the role NHPIRG played “to help the Commission find creative and cheaper ways to stretch ratepayer-funded investments in energy efficiency programs.” It reiterates the positions it supported that were adopted by the Commission, some of which were not supported by the parties, and takes issue with the suggestion that to be compensated one must be the sole advocate of a particular position. NHPIRG also disagrees with NHEC’s view that the only witness fees permissible would be for the time spent actually testifying. And it objects to the argument that because the experts said they were not being paid for their participation, NHPIRG is now blocked from seeking compensation. NHPIRG states that the witnesses were not being paid by PAYS America due to lack of funds. Further, NHPIRG states that the witnesses have no more a financial interest in the outcome than any professional expert who makes a living from consulting and testifying would have. The witnesses’ trademark in the name is not to profit from its expansion, according to NHPIRG, but to protect its essential elements. NHPIRG notes that the witnesses suggested the providers name

their programs something other than PAYS or, if they wanted to use the PAYS name, it “could be licensed essentially at cost.” NHPIRG urges the Commission to deny the requests for rehearing.

C. Amount and Allocation of Award

1. NHPIRG Request

NHPIRG reports that it expended \$53,360.75 for over 418 hours of expert services, billed at \$125 per hour, plus mileage to attend Commission proceedings. Timelogs itemizing work done in the docket, as well as travel records, submitted by PAYS America to NHPIRG, were appended to the request.

RSA 365:38-a sets a compensation limit of no more than “\$10,000 from any utility for any single proceeding.” Because there were four electric providers in this docket, NHPIRG asserts it is entitled to the “statutory limit” of \$40,000. It asks that the award be divided equally among the four, as customers in each utility benefited from the expert involvement of its witnesses.

2. Opposition to Amount and Allocation of Award

PSNH notes that RSA 365:38-a provides for an award to be “immediately recovered by the utility through measures approved on a timely basis by the commission.” PSNH concludes that payment to NHPIRG “would have to be satisfied from PSNH’s System Benefits Charge revenues in order for PSNH to recover that expense on a timely basis as required by the statute” which, in turn, would reduce by \$10,000 the available monies for the SmartStart or Core Efficiency programs.

NHEC argues that if an award is made, NHPIRG’s “request for blanket apportionment of the maximum amount of fees against each utility is erroneous.” NHEC

believes that any award should consider the characteristics of the utilities, their interest in the issues in which NHPIRG was a substantial contributor and the “relative importance” of the issues to which NHPIRG substantially contributed. Neither GSEC nor Unitil address the amount of compensation requested or the parties that should be responsible for payment.

3. NHPIRG’s Response to Parties’ Opposition

NHPIRG rejects GSEC’s assertion that the public interest would not support compensation, finding the amount small compared to the benefits. As to NHEC’s argument that the request should be allocated according to the particular circumstances of a utility, NHPIRG argues that work on issues blends from one to another and cannot be allocated according to a particular utility or even a particular issue. That level of scrutiny was not required of Campaign for Ratepayers Rights in Order No. 24,351 (June 16, 2004) and should not be required of NHPIRG.

III. COMMISSION ANALYSIS

We have reviewed the motions for rehearing and find nothing contained therein to constitute good cause to rehear this matter, pursuant to RSA 541:3. *Dumais v. State*, 118 N.H. 309 (1978) (new evidence not previously available constitutes good cause for rehearing). Questions as to whether 1) NHPIRG substantially contributed to the Commission’s decision; 2) NHPIRG is a retail customer; and 3) NHPIRG faces economic hardship were addressed in Order No. 24,509.

We disagree with NHEC’s assertion that compensation to expert consultants can only be for time spent on the witness stand. Our rate case expense awards routinely include the cost of consultants involved in review and development of testimony and discovery, as well as “hearing time.” Further, we do not find the statement of Mr. Cillo, during the hearing on

October 22, 2004, that he and Mr. Lachman were not being paid to participate to preclude in these circumstances compensation under RSA 365:38-a inasmuch as NHPIRG had submitted on April 26, 2004, a request to establish a procedure for intervenor funding. Thus, from the beginning it was clear that NHPIRG would seek compensation and we therefore regard Mr. Cillo's statement as having been true when made, since NHPIRG was not paying him and Mr. Lachman at the time, and reflecting the fact that they were accepting the risk of not being paid.

The motions do assert new interpretations of RSA 365:38-a that the movants argue make an award to NHPIRG improper. They lay out how they would interpret the statute, supplying new tests for eligibility, but fail to cite any statutory language or legislative history that would require adoption of their positions. The legislature could have narrowed the standards for award of compensation, along the lines the parties urge, but did not do so and we are not persuaded that the standards should be interpreted as they argue. The decision to grant NHPIRG intervenor compensation pursuant to RSA 365:38-a, therefore, remains in effect.

As to the amount of compensation, we do not agree with NHPIRG that it is entitled to the statutory maximum of \$10,000 from *each* of the four electric providers, for a total of \$40,000. For example, in a case involving the water industry, with 30 utilities, one could potentially have an award of \$300,000. We find no support that the legislature intended a \$10,000 *per utility* maximum award. Rather, we follow the language of RSA 365:38-a that states:

If the commission 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.

We read "the amount of the award" to refer to the previously stated \$10,000 maximum and we will allow recovery of that amount.

There being no statutory mandate on how to allocate responsibility for the award, in this case, given the small size of the obligation in relationship to the revenues of GSEC, NHEC, PSNH and Unitil, we will divide it equally among them, each being responsible for \$2,500 to NHPIRG. Inasmuch as this docket concerns energy efficiency programs funded by the System Benefits Charge, and in order to comply with the statutory requirement that the utility be allowed to “immediately recover” the award, we will allow PSNH, Unitil, GSEC and NHEC to recover the award amount from their System Benefits Charge funds.

Finally, we instruct our Executive Director to prepare a letter to the Governor and Executive Council requesting approval of the award, pursuant to RSA 365:38-a. We will notify GSEC, NHEC, PSNH and Unitil of the action taken by the Executive Council.

Based upon the foregoing, it is hereby

ORDERED, that the Motions for Rehearing of Order No. 24,509 filed by Public Service Company of New Hampshire, New Hampshire Electric Cooperative and Granite State Electric Company are DENIED; and it is

FURTHER ORDERED, that NHPIRG’s request for payment of \$40,000 is DENIED; and it is

FURTHER ORDERED, that NHPIRG is awarded at total of \$10,000 in intervenor compensation, pursuant to RSA 365:38-a, allocated equally among Granite State Electric Company, New Hampshire Electric Cooperative, Public Service Company of New Hampshire and Unitil Energy Systems; and it is

FURTHER ORDERED, that the Executive Director shall submit a letter to the Governor and Executive Council requesting approval of this award; and it is

FURTHER ORDERED, that, upon approval of the Governor and Executive Council, Granite State Electric Company, New Hampshire Electric Cooperative Public Service Company of New Hampshire and Unitil Energy Systems shall each pay NHPIRG \$2,500 and recover those funds from their System Benefits Charge funds.

By order of the Public Utilities Commission of New Hampshire this twentieth day of January, 2006.

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Attested by:

ChristiAne G. Mason
Assistant Executive Director & Secretary