

THE STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

Public Service Company of New Hampshire
Petition for Alternative Default Energy Service Rate

Docket DE 11-216

Public Service Company of New Hampshire's Objection to Freedom Logistics, LLC
d/b/a Freedom Energy Logistics Motion to Dismiss

Public Service Company of New Hampshire ("PSNH" or the "Company") hereby objects to the Motion to Dismiss filed by Freedom Logistics, LLC d/b/a Freedom Energy Logistics ("FEL") in this proceeding. In support of this objection, PSNH states as follows:

1. This case arises out of the Commission's order in the migration docket, DE 10-160, in which it directed PSNH to file a proposed alternative rate option for default service that was cost-based, non-discriminatory, and would not have an adverse impact on competition. Order 25,256 at 32. On September 23, 2011, PSNH filed a petition for approval of an Alternate Default Service Rate ADE, and as a result, this docket was opened. FEL intervened in this docket in part on the basis that "PSNH's proposal will have an adverse impact on competitive electricity markets." FEL Petition to Intervene at 2. The Commission, finding that the Company's proposed rate ADE required further development, denied the petition and directed the Company to file a redesigned Rate ADE that is "cost-based and non-discriminatory and should not have an adverse effect on competition." Order 25,320 at 18.

2. On April 27, 2011, PSNH filed its redesigned Rate ADE. FEL now asks the Commission to dismiss the Company's request to implement this redesigned rate on the

basis that PSNH's proposal is unlawful. The Commission should deny FEL's request because the Company has stated facts demonstrating that proposed Rate ADE meets the legal standards annunciated by Commission Order 25,320.

3. Further, FEL has waived any right to object to the legal basis for such a rate. FEL participated actively in both the migration docket, DE 10-160, and the earlier phase of this docket. In the migration docket, the Commission clearly approved in concept the development of an alternate default service rate. Order 25,256 at 31-33. Yet FEL never moved for rehearing of that order. More recently, in the earlier phase of this docket, FEL raised the very issues it does here arguing that "Implementation of Proposed Rate ADE would be Unlawful" under RSA 362-F:2. *See* Closing Statement of FEL and HAEC p. 1. The Commission again announced the construct for such a rate, directing the Company to submit a redesigned rate. Order 25,320 at 17. Yet again FEL did not move for rehearing. FEL is now barred from doing so. *Cumberland Farms Northern, Inc. v. New Hampshire Milk Control Bd.*, 104 N.H. 364, 366 (1963) (appeal raising issues that were not subject to motion for rehearing was barred absent satisfactory excuse for failing to move for rehearing).

4. The Commission has most recently articulated the standard for a motion to dismiss as follows: "In ruling on a motion to dismiss, we, like the New Hampshire Supreme Court, ascertain whether the allegations pleaded in the plaintiff's petition are reasonably susceptible of a construction that would permit recovery. *Pesaturo v. Kinne*, 161 N.H. 550, 552 (2011)....we assume that all facts pleaded by... [the petitioner] are true, and we construe all reasonable inferences drawn from those facts in its favor. *Id.* We then engage in a threshold inquiry that tests the facts in the petition against the

applicable law and if the facts fail to constitute a basis for legal relief, granting the motion is proper. *Id.*” *Freedom Ring Communications, LLC d/b/a BayRing Communications*, DT 06-067, Order No. 25,327 at 8.

5. In this case, PSNH has provided sufficient facts in its filing to demonstrate that its proposed Rate ADE is cost-based and non-discriminatory and should not have an adverse effect on competition, as required by Order 25,320. The pre-filed direct testimony of Messieurs Hall and White states that Rate ADE will be cost-based:

The price will be a forecast of the marginal cost to provide full requirements service to the New Hampshire load zone, plus an adder.

The forecast of the marginal cost will include forward energy market prices, forward capacity market prices, forecasted ancillary service costs, forecasted ISO-NE market administration costs, and forecasted renewable portfolio standard compliance costs, all of which will be determined in a manner consistent with that utilized in filings for Rate DE. In practice, the marginal cost to provide full requirements service to the New Hampshire load zone will be calculated as the change in cost to serve energy service load divided by the change in energy service sales resulting from the removal of migration from the energy service rate forecast.

The adder will be equal to the non-operating costs of the wet flue gas desulfurization system (scrubber) divided by forecasted Energy Service sales under Rate DE. Non-operating costs include depreciation, return on rate base including income taxes and any incremental property taxes.

Direct Testimony of Stephen R. Hall and Frederick B. White at 9-10. The testimony also demonstrates that Rate ADE is non-discriminatory as it would be made available to “all customers who take delivery service from PSNH.” *Id.* at 4. Finally, Rate ADE will not have an adverse impact on competition. Not only is Rate ADE cost-based, but it adds an additional energy option for customers to consider, providing increased customer choice.

6. As described in the Hall/White testimony, the Company has provided a mechanism to address fluctuations in its marginal cost to serve. Specifically, “PSNH will monitor its forecasted marginal costs on a monthly basis and compare those prices to the prices used to calculate the annual rate. If new projections of average marginal costs for the remaining months of the annual period have increased by at least 75% of the amount of adder as compared to the marginal costs for the those same months that were used to determine the annual rate, PSNH will file a request with the Commission to increase the rate under Rate ADE for the last six months of the annual period.” *Id.* at 12. The Company has also protected against the likelihood that under-recoveries will occur during any time period until the rate is increased by proposing to close the availability of Rate ADE if projected marginal costs increase by more than 75% of the adder. The effect of this would be to prevent enrollment at prices that could be close to marginal cost. *Id.* at 13.

7. FEL also argues that the rate is not based on PSNH’s actual costs because it includes scrubber costs, which in FEL’s words “have nothing to do with the cost of [sic] the marginal cost of service...” FEL Motion at 3. As explained in the Hall/White testimony, the Company is *required* to include the costs of the scrubber in its default service rates, and the amount of scrubber costs to be included is based on an actual rate set by the Commission. *Id.* at 10; RSA 125-O:18. Thus, FEL’s argument is without merit.

8. Despite the fact that PSNH has clearly stated a basis for establishment of an alternate default service rate, FEL argues that under no circumstances is such a rate legally permissible. In essence, FEL moves for summary judgment, not to dismiss. *See*

Freedom Ring Communications, LLC d/b/a BayRing Communications, DT 06-067, Order No. 25,327 at 9. (“In ruling upon a motion for summary judgment, we consider the evidence presented, and inferences properly drawn from it, in the light most favorable to the non-moving party. *Sabinson v. Trustees of Dartmouth College*, 160 N.H. 452, 455 (2010). If this review does not reveal any genuine issues of material fact, *i.e.*, facts that would affect the outcome of the litigation, and if the moving party is entitled to judgment as a matter of law, the motion will be granted. *Id.*”).

9. Regardless, the Commission should deny the FEL Petition because its claims that such a rate is unlawful are unfounded. The Commission has already determined that the development of an alternate default service rate is in the public interest. Order 25,256 at 32-33. To claim that RSA 374-F:2,I-a prohibits such a rate because default service is only available to those customers who have no other choice is an absurd interpretation of the statute. Default service exists for those customers who choose to receive service from their local distribution company. That default service is also a safety net for those customers who do not find available options in the market does not mean that default service cannot be a competitive option available to customers.

10. Even if one were to accept FEL’s strained interpretation of the law, that interpretation fails the test of logic. First, FEL suggests that a default energy service rate must be designed in a specific manner. Nothing in the law suggests anything about the design of the default energy service rate, other than the requirement that it be cost based. The Hall/White testimony plainly states that the rate will be cost-based. Direct Testimony of Stephen R. Hall and Frederick B. White at 9-13. Second, FEL asserts that only one default service rate can be made available to customers, suggesting that the

mere offering of Rate ADE is unlawful. PSNH is proposing that Rate ADE be the *only* default energy service rate available to customers who have migrated. Rate DE will be unavailable to such customers. Therefore, Rate ADE will be the default energy service rate that is available to customers who are “otherwise without” an electricity supplier.

11. Further, RSA 374-F:3,V clearly states that the Commission has discretion in whether to implement measures to discourage long-term use of default service: “...*if the commission determines it to be in the public interest*, the commission may implement measures to discourage misuse or long-term use, of default service.” (emphasis added). Here, the Commission has already determined that an alternate default service rate is desirable in order to mitigate the deleterious effects that customer migration have had on those customers who remain on default service. Order 25,256, p. 31-33.¹

12. This is not the first time the Commission has encouraged such an alternative rate. In 2003, the Commission approved a Retail Energy Service Program which created a rate designed to stimulate the migration of certain large commercial and industrial customers from PSNH’s energy service to competitive supply. Ironically, FEL not only participated in that docket but supported PSNH’s proposal. *See* Order 24,240. Here, where the proposed rate may result in customer migration in the other direction, not surprisingly, FEL objects.²

¹ PNE Energy Supply LLC (PNE), an affiliate of FEL per its “Joint Petition for Intervention” of September 6, 2010, in DE 11-184, recently noted that under applicable law, “It is well-settled that the Commission’s authority to establish just and reasonable rates and charges for utilities is plenary.” Petition of PNE, April 12, 2012, Docket DE 12-093.

² Similarly, the Commission has previously recognized the beneficial results of offering service at rates above marginal costs in appropriate situations. *See, e.g., Re PSNH*, 69 NH PUC 67, 91 (1984), where the Commission accepted a settlement based in part on the following:

13. Moreover, the development of an alternate rate is consistent with one of the fundamental principles of restructuring, which is to reduce costs for *all* consumers. In the legislature's words:

The most compelling reason to restructure the New Hampshire electric utility industry is to reduce costs for all consumers of electricity by harnessing the power of competitive markets. 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 consumers while maintaining safe and reliable electric service with minimum adverse impacts on the environment. Increased customer choice and the development of competitive markets for wholesale and retail electricity services are key elements in a restructured industry that will require unbundling of prices and services and at least functional separation of centralized generation services from transmission and distribution services.

RSA 374-F:1, I.

14. The Hall/White testimony speaks to this point, explaining that Rate ADE is intended to be beneficial to all customers by providing another rate to choose from while crediting the benefit to all customers served under Rate DE. Direct Testimony of Stephen R. Hall and Frederick B. White, p. 16-17. As they explain, "If PSNH does not have an alternative available to offer to customers who have migrated, the cost incurred by customers served under Rate DE will continue to increase if migration continues to

In support of SICP, PSNH presented the testimony of Mr. Rodier, Mr. Ambrose and Mr. Brown (Exhibit 29). The BIA also favored the adoption of SICP and presented the testimony of Mr. King in support of its position.

The PSNH witnesses stressed the benefits of the SICP policy to the Company and its ratepayers. The benefits will occur because the policy will allow the Company to increase sales to incremental customers at a price which will lower the costs for the remaining customers. The cause of this benefit can be traced to the cost of service for the Company once Seabrook becomes operational. As noted above, the Company's average total costs, which form the basis of its rates, will exceed its marginal costs. This is because the average total costs include recovery for fixed capital costs while the marginal costs are those costs which vary by output. To the extent that an incremental customer pays a price that is above marginal cost, he is sharing the fixed costs with the Company's non-incremental customers, thus reducing the responsibility of the non-incremental customer to pay those fixed costs.

increase. Therefore, the risk of doing nothing is that the rate under Rate DE will continue to either remain high or will even increase for customers remaining on Rate DE as long as market prices remain low.” *Id.* at 17. The Commission should heed the Restructuring principles and implement the proposed rates so that all customers can reap these benefits.

15. In a last ditch effort to convince the Commission to deny Rate ADE, FEL argues that implementation of the rate would result in discrimination between Rate DE and Rate ADE customers. FEL’s application of the non-discrimination law is misplaced. The intent of the law is that a rate be applied uniformly to eligible customers. Under the proposal, Rate ADE is non-discriminatory because it is available to all customer classes. That the amount of Rate ADE will differ from the amount of Rate DE does not make it discriminatory. RSA 378:11 could not be clearer that the non-discrimination law (RSA 378:10) does not require absolute uniformity in utility charges “...when the circumstances render any lack of uniformity reasonable...” Here, the Commission has determined that having such a different rate would be beneficial.

16. For all of the reasons stated above, PSNH requests that the Commission deny FEL’s Motion to Dismiss.

WHEREFORE, PSNH respectfully requests that the Commission:

- A. Deny FEL's Motion to Dismiss, and;
- B. Grant such other relief as is just and equitable.

Respectfully submitted,

Public Service Company of New Hampshire

By Its Attorney

Dated: May 14, 2012

By: 

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Certificate of Service

I hereby certify that a copy of this Objection to FEL's Motion to Dismiss has been served electronically on the persons on the Commission's service list this 14th day of May, 2012.


Sarah B. Knowlton