

DE 00-009

**PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, NORTH ATLANTIC
ENERGY CORPORATION, NORTH ATLANTIC ENERGY SERVICE
CORPORATION, NORTHEAST UTILITIES AND CONSOLIDATED EDISON,
INC.**

Joint Petition for Approval of Merger

Order Denying Motion for Rehearing

O R D E R N O. 23,621

January 19, 2001

Intervenor Save Our Homes Organization (SOHO) seeks rehearing pursuant to RSA 541:3 following our recent order in this docket (No. 23,594, December 6, 2000) approving the proposed acquisition of Northeast Utilities (NU) by Consolidated Edison, Inc. (CEI). NU is the parent company of Public Service Company of New Hampshire (PSNH), New Hampshire's largest electric utility, and is also the parent of North Atlantic Energy Corporation (NAEC), owner of a 36 percent share of the Seabrook Nuclear Power Plant (Seabrook), as well as North Atlantic Energy Service Corporation (NAESCO), which operates Seabrook.

Order No. 23,594 did not approve the proposed merger outright. Rather, we imposed significant conditions on the transaction. Specifically, we endorsed an agreement entered into by the Staff of the Commission and the Joint Petitioners, comprised of NU, PSNH, NAEC, NAESCO and CEI. This Merger

Settlement Agreement involves several concessions by the Joint Petitioners, chief among them a guarantee that PSNH ratepayers would receive at least \$74.8 million in rate relief over a seven-year period beginning 33 months after consummation of the merger, under a plan designed to guarantee customers a share of estimated merger-related cost savings. Other conditions in the Merger Settlement Agreement related to non-recovery of Acquisition Premium; the provision of certain information to the Commission; the review of certain merger-related expenditures for prudence; the commissioning of a CEI-funded market power study two years after the merger; continuing Commission jurisdiction over all aspects of PSNH; benchmarks for service reliability and service quality; assistance to large commercial or industrial customers; and employee location decisions by CEI post-merger. In addition to endorsing the Merger Settlement Agreement, we imposed certain additional conditions on the proposed transaction. Those additional conditions related to the method for effectuating the guaranteed rate relief; non-recovery of executive severance costs; the possibility of additional market power studies and the Commission's authority to order market power mitigation measures as necessary; the existence of separate service companies for CEI's regulated and

unregulated operations; federally determined allocations of acquisition premium or other merger-related determinations as not binding on the Commission; the placement of a New Hampshire resident on the CEI Board of Directors; PSNH's expenditures in connection with renewable energy and other similar public initiatives; and the Commission's continuing access to the books and records of CEI, NU, PSNH and their affiliates. Commissioner Brockway dissented from the order approving the Merger Settlement Agreement with these additional conditions. On December 15, 2000, the Joint Petitioners notified the Commission that they would accept the additional merger approval conditions specified in Order No. 23,594.

In its rehearing motion, SOHO contends that the Commission erred as a matter of law by (1) failing to delineate relevant markets and determining the impact of the merger on each such market pursuant to *Brown Shoe v. United States*, 370 U.S. 294 (1962), (2) determining that such market analyses are relevant only in antitrust cases, (3) disregarding the un rebutted evidence submitted by SOHO demonstrating that low-income customers constitute a separate and distinct market or submarket for purposes of evaluating the proposed merger, (4) disregarding substantial evidence

demonstrating that the merger will have an adverse impact on services provided by PSNH to low-income customers, (5) failing to credit unrebutted evidence submitted by SOHO that the adoption of a uniform data processing platform for all CEI-owned regulated utilities post-merger would adversely affect PSNH's low-income customers by limiting their rights under the Commission's Chapter 1200 rules, (6) failing to determine that under the Merger Settlement Agreement low-income customers would receive a disproportionately small share of merger benefits, (7) determining that distribution of merger-related savings on a per-kilowatt-hour basis is "just and reasonable" under the applicable law governing this transaction, RSA 369-B:3, IV(b)(4)(B), (8) failing to determine that the share of merger-related savings to be distributed to low-income customers is not "just and reasonable" under the same provision, (9) determining that applicable New Hampshire law, specifically RSA 369-B:3, IV(b)(4)(B), RSA 369-B:3, IV(b)(4)(A), RSA 369:8, II(b), RSA 374:3, RSA 365:5 and RSA 365:29, does not require that any merger approved by the Commission include benefits that flow to an adversely affected market, and (10) determining that when the Legislature enacted RSA 374-F:3, V(a) and RSA 369-B:3, IV(b)(6) it precluded the Commission from ordering merger-related relief targeted to a

particular group of customers.

Additionally, SOHO contends that the Commission erred in finding that vigorous enforcement of service quality standards will address the concern that, as PSNH's parent company becomes bigger and more remote from New Hampshire, PSNH's level of responsiveness to low-income customers and others who require the Company's particular assistance may suffer. According to SOHO, in making this determination the Commission failed to apprehend that (1) the service quality provision of the Merger Settlement Agreement do not address the constraints on local discretion that will be the result of CEI adopting a uniform data processing platform, (2) plans to reduce customer service positions throughout the post-merger CEI system will inevitably result in less individual attention to customers who must work with PSNH to resolve payment difficulties, and (3) Commission Staff acknowledged that service degradation cannot be easily measured or monitored and that it will not be possible to track the impacts of service degradation on low-income customers.

SOHO therefore asks the Commission to grant rehearing and determine that low-income customers constitute a separate market for merger evaluation, that low-income customers will be adversely affected by the merger, that low-

income customers would receive a disproportionately small share of merger-related savings under the terms of the Merger Settlement Agreement, that such a method for sharing merger-related savings is not just and reasonable, that the adverse effect on low-income customers is not in the public interest and that approval of the merger be conditioned on the additional relief previously requested by SOHO. Specifically, SOHO recommended the adoption of a three-year set of programmatic remedies that it describes as a "Community Energy Partnership Program." See Order No. 23,594, slip op. at 82-84 (describing remedies and proposals for their financing by PSNH and CEI).

The Joint Petitioners have filed a timely objection to the Rehearing Motion. According to the Joint Petitioners, the rehearing motion is without merit because all of SOHO's arguments were fully and adequately addressed in the underlying Order. The Joint Petitioners further contend that (1) *Brown Shoe* is a federal antitrust case and any standard set forth therein is inapplicable to the instant proceeding, which arises under New Hampshire utility law, (2) SOHO's allegations of harm to low-income customers are speculative, and (3) nothing in the Merger Settlement Agreement requires that any sharing of merger-related savings be passed through

to customers on a cents-per-kilowatt-hour basis.

COMMISSION ANALYSIS

We find no good reason for rehearing. See RSA 541:3. SOHO's central legal arguments, concerning market definition and the extent to which the Commission is obliged to consider the specific impacts of the merger on low-income customers, comprise matters that were raised prior to, and were fully discussed in, Order No. 23,594. SOHO raises no new bases here for us to depart from our previous determinations that we are required under applicable law to consider low-income customers as a distinct market or sub-market for purposes of assessing merger impacts, that the statutory requirement for "just and reasonable" sharing of merger-related savings requires the targeting of merger-related relief to specific classes of customers, and that low-income customers will not receive a disproportionately small share of merger-related savings under the terms of the Merger Settlement Agreement.

Likewise, we fully addressed SOHO's contentions that the merger is not in the public interest because it will make management more remote from low-income customers, reduce the number of employees providing customer assistance functions for low-income customers and will circumscribe these

employees' discretion in dealing with such customers. As noted by SOHO, our Chapter 1200 rules authorize but do not require utilities to take certain actions in appropriate circumstances, such as requiring security deposits, making payment arrangements and imposing disconnections. As we stated in Order No. 23,594, the appropriate remedy for all of the potential problems identified by SOHO is vigorous enforcement of service quality standards. Should the Chapter 1200 rules, including the discretion they implicitly vest in PSNH and the state's other electric utilities, prove inadequate to protect any unique interests of low-income customers, we have the authority to revise the rules as necessary.

Concerning the subject of distributing merger-related rate relief on a per-kilowatt-hour basis, SOHO criticizes as "irrelevant" the testimony of a Staff witness to the effect that, at a fixed level of consumption, the benefit of such a rate reduction increases as income decreases. SOHO Motion for Rehearing at 3. According to SOHO, "[t]he determinative factor is that the aggregate amount of savings to be distributed to the low income market is significantly lower than it would be because it is being distributed on a usage basis rather than on a per customer basis." *Id.* It is

true that a different methodology might result in more rate relief flowing to low-income customers. But this argument provides no basis for us to depart from our previous determination that, "to the extent that ensuing PSNH rate cases result in merger-related rate relief on a per-kilowatt-hour basis, the requirement for 'just and reasonable' savings sharing is met notwithstanding any unique characteristics of low-income customers." Order No. 23,594, slip op. at 95.

Finally, we point out that SOHO has mischaracterized one aspect of our previous decision in its rehearing motion. According to SOHO, "[t]he Commission erred as a matter of law in ruling that through enactment of RSA 374-F:3, V(a) and RSA 369-B:3, IV(b)(6) the legislature precluded the Commission from ordering merger related relief to a particular group of customers, such as low income customers." SOHO Motion for Rehearing at 3. This was not our ruling. Rather, we cited RSA 369-B:3, IV(b)(6) (setting PSNH system benefits charge and requiring that at least some of it be targeted to low-income assistance) and RSA 374-F:3, V(a) (advising that assistance to low-income customers should be part of industry restructuring) simply to point out that when the Legislature wishes to require us to provide special consideration or relief for low-income customers it is fully capable of doing so. See Order

No. 23,594, slip op. at 95. We made that observation by way of concluding that nothing in the applicable New Hampshire law requires us to target special merger-related relief to low-income customers in the manner suggested by SOHO, and that the requirement of "just and reasonable" sharing of merger-related savings is met notwithstanding the absence of such targeted relief.

In view of the foregoing, we find that SOHO has failed to demonstrate that the order complained of is unlawful or unreasonable. See RSA 541:4.

Based upon the foregoing, it is hereby

ORDERED, that the motion for rehearing submitted by the Save Our Homes Organization is DENIED.

By order of the Public Utilities Commission of New Hampshire this nineteenth day of January, 2001.

Douglas L. Patch
Chairman

Susan S. Geiger
Commissioner

Attested by:

Claire D. DiCicco
Assistant Secretary

**SEPARATE OPINION OF COMMISSIONER BROCKWAY,
CONCURRING IN PART AND DISSENTING IN PART**

I concur with my colleagues that SOHO has presented no new facts or arguments that would require the Commission to revisit the determinations previously made. In addition, in my view some of SOHO's concerns are well-founded, while others do not rise to the level that they would, in and of themselves, require a rejection of the merger or the establishment of particular merger conditions. However, because I was unable to conclude that approval of the merger is in the public interest, I am unable to join with my colleagues in concluding that the merger order is reasonable, a necessary finding to the denial of the motion for rehearing.

Nancy Brockway
Commissioner

January 19, 2001

Attested by:

Claire D. DiCicco
Assistant Secretary