DE 01-088

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Petition of 5 Way Realty Trust for Declaratory Ruling

Order on Motion for Reconsideration

O R D E R N O. 24,137

March 14, 2003

APPEARANCES: James T. Rodier, Esq. for 5 Way Realty Trust; Gerald M. Eaton, Esq. for Public Service Company of New Hampshire; Devine, Millimet & Branch, P.A. by Frederick T. Coolbroth, Esq. for Brascan Energy Marketing, Inc.; Office of Consumer Advocate by F. Anne Ross, Esq. on behalf of residential ratepayers; General Counsel Gary M. Epler and Donald M. Kreis, Esq. of the Staff of the New Hampshire Public Utilities Commission.

The petitioner, Peter Horne, in his capacity as Trustee of 5 Way Realty Trust (Trust) moves for rehearing pursuant to RSA 541:3 with respect to Order No. 24,065, entered in this docket on October 11, 2002. For the reasons that follow, we grant the Trust's rehearing motion and clarify Order No. 24,065.

I. BACKGROUND AND PROCEDURAL HISTORY

Mr. Horne instituted this proceeding on April 14, 2001, by filing a petition with the Commission requesting a declaratory ruling with regard to certain aspects of the Trust's business plan. The Trust averred that it was the owner of a certain parcel of land in the service territory of Public Service Company of New Hampshire (PSNH), that it wished to develop a commercial subdivision on this land, located in Hudson, and that it desired to generate electricity on site so that it could offer electric

service directly to businesses within the subdivision without using the services of PSNH. As originally framed, the petition sought a declaratory ruling by the Commission (1) that the trustee would not thereby become a public utility within the meaning of RSA 362:2; (2) that if the Trust were to interconnect with the PSNH transmission and distribution system, then backup delivery service from PSNH under the Company's Rate B would be available to a tenants' association in the subdivision, if such were created, and (3) that in the event the Trust connected its generation facilities only to the PSNH transmission system, then backup service pursuant to Rate B would not be applicable but that electricity users in the subdivision would be subject to PSNH's stranded cost recovery charges.

PSNH submitted an objection to the petition on May 18, 2001. The Company's position was that (1) the Commission did not have the authority to issue a declaratory ruling as requested by the Trust, and (2) that the petition did not describe the Trust's plans in sufficient detail to permit a determination of whether any entity arising out of the Trust's development plans would be a public utility in light of the applicable case law, specifically, *Appeal of Zimmerman*, 141 N.H. 605 (1997).

The Trust filed a written reply to PSNH's objection on May 25, 2001. The reply contended that (1) the references to declaratory rulings in RSA 541-A:16 make clear the Commission's

authority to provide the requested determination, (2) the Trust simply sought a Commission ruling that "the abstract legal rulings articulated in *Appeal of Zimmerman* are good law with respect to the electric utility industry" as well as the telephone industry that was at issue in the *Zimmerman* case, and (3) that the Commission should provide the requested ruling because the Trust would otherwise face risk and uncertainty with regard to its development plans.

By secretarial letter issued on June 21, 2001, the Commission determined that it would be in the public interest for an effort to be made to mediate the dispute between the Trust and PSNH. Accordingly, the Commission appointed its General Counsel, Gary M. Epler, to serve as mediator in the case. Mr. Epler was instructed to meet with the parties and, thereafter, to report his findings and recommendations to the Commission.

Mr. Epler submitted his report on June 12, 2002. He noted that the Trust and PSNH were in direct contact through early September of 2001 and that, on September 21, 2001, the Trust advised him that those discussions, including written correspondence, no longer served any useful purpose. Thus, the Trust requested, on September 21, 2001, that Mr. Epler commence active mediation. Mr. Epler thereafter conducted discussions with the parties, ultimately deciding to submit his findings and recommendations without their concurrence.

II. GENERAL COUNSEL'S RECOMMENDATIONS

It was Mr. Epler's recommendation that the Commission reach the merits of the petition, but only in part. According to Mr. Epler, RSA 541-A:16 contemplates that state agencies may issue a declaratory ruling on the applicability of any statutory provision, rule or order. Citing *Delude v. Town of Amherst*, 137 N.H. 361 (1993), Mr. Epler noted that the relevant question was whether the petitioner had demonstrated a present legal or equitable right and an adverse claim that is definite and touching the legal relations of the parties having adverse interests. He further noted that *Delude* makes clear that the action cannot be based on a set of hypothetical facts.

According to Mr. Epler, the Trust had not set forth a sufficient set of facts on which the Commission could issue a declaratory ruling with regard to whether the Trust's development plans would create a public utility within the meaning of RSA 362:2. Mr. Epler noted that the petition consists of unattested claims with regard to several possible development plans, each sketched out in barely more than one paragraph. In Mr. Epler's opinion, these assertions were inadequate to allow an investigation of the central inquiry required by *Zimmerman*: whether the service provider would be offering its services to the general public, and whether the provider would enjoy an underlying relationship with users of the services that would be

sufficiently discrete so as to differentiate them from other members of the relevant public.

However, Mr. Epler determined that the Trust had raised an important and discrete question of statutory interpretation that he believed the Commission should resolve, with regard to electric rate reduction financing.[1] Specifically, the question pertained to whether the Rate Reduction Bond (RRB) charge paid by PSNH's customers must also be collected from retail customers of an electric service provider that is not a public utility within the meaning of New Hampshire law. According to Mr. Epler, the answer to this question could have a significant impact on the development of transition or default service options, (*See* RSA 374-F:2, I-a and V (defining default and transition service, respectively)), as well as the recovery and amortization of the Rate Reduction Bonds themselves.

Mr. Epler recommended that the Commission conclude that such customers would be subject to the RRB charge. In so doing,

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[1] Electric rate reduction financing was a key provision of the PSNH Restructuring Settlement Agreement (Restructuring Agreement) approved by the Commission in Docket No. DE 99-099. Under the Restructuring Agreement, certain of PSNH's otherwise unrecoverable costs (sometimes referred to as stranded costs) associated with generation facilities or power purchase obligations were securitized, i.e., financed through Rate Reduction Bonds comprising irrevocable obligations recoverable from PSNH retail delivery customers. *See Public Service Co. of N.H.*, 85 NH PUC 154 (approving Restructuring Agreement), *on reh'g*, 85 NH PUC 536 and 85 NH PUC 645 (2000); *see also Public Service Co. of N.H.*, 85 NH PUC 567 (2000) (ruling on financing issues) and RSA 369-B:3 (legislative approval of Rate Reduction Bond financing). But for the Restructuring Agreement, these costs would be unrecoverable because PSNH's customers are now free to choose energy suppliers other than PSNH. Securitizing these stranded costs has the effect of guaranteeing their recovery, thus reducing the risk associated with them and, thus, their carrying costs.

he rejected the Trust's interpretation of RSA 369-B:2, XII in conjunction with RSA 369-B:2, IV.

These two statutes are part of RSA Chapter 369-B, enacted by the Legislature in 2000 subsequent to the Commission's approval of the PSNH Restructuring Agreement. A key purpose of RSA 369-B is to provide a legislative endorsement of the Restructuring Agreement, including the so-called securitization provisions whereby certain of PSNH's stranded costs were financed through RRBs, thereby reducing them but making them binding on PSNH's customers. *See generally* RSA 369-B:1 (legislative declarations and findings) and Footnote 1, *supra*.

Section 2 of RSA 369-B defines certain terms appearing throughout the chapter. "Retail electric servicer" is defined in relevant part as "the delivery of electric power through the provision of transmission and/or distribution service *by an electric utility* to a retail customer, regardless of such retail customer's source of electric power." RSA 369-B:2, XII (emphasis added). "Electric utility," in turn, is defined as "a public utility as defined in RSA 362:2 that provides retail electric service."[2]

As Mr. Epler noted in his mediator's report, the Trust's position was that an entity not meeting the RSA 362:2

[2] RSA 362:2 recites the general definition of a public utility that is subject to the Commission's rate regulation and plenary jurisdiction.

definition of a public utility would not be required to assess RRB charges to its customers because it would not be providing retail electric service as that term is defined in RSA 369-B:2, XII. *See* RSA 369-B:4, I (requiring Commission to establish an RRB charge "that shall provide for the collection of revenues from *retail customers of electric utilities*") (emphasis added). Mr. Epler disagreed with this view, relying on RSA 369-B:4, IV, which reads in relevant part as follows:

> If a retail customer purchases or otherwise obtains retail electric service from any *person* other than the electric utility in whose service territory the retail customer is located . . . the service or such new electricity service provider or successor shall collect all such charges, including, without limitation, such RRB charge, from the retail customer by or on behalf of the first electric utility with revenues from such RRB charge remitted solely for the benefit and repayment of rate reduction bonds as a condition to the provision of retail electric service to such retail customer.

RSA 369-B:4, IV (emphasis added). According to the mediator's report, the use of the word "person" in RSA 369-B:4, IV evidences a legislative intent to make the RRB charge payable not simply by customers of public utilities but also by customers taking electric service from entities that are not utilities within the meaning of RSA 362:2 in circumstances where the customer obtains back-up, maintenance, emergency or other delivery service from its former public utility provider.

According to Mr. Epler, the interpretation of these provisions offered by the Trust omitted consideration of a key

phrase (the reference to "any person" in RSA 369-B:4, IV), would result in an interpretation of RSA 369-B:4 that fails to give meaning to the section in its entirety, and is contrary to the clear directive of Chapter 369-B to establish an RRB charge that is non-bypassable.

In his written report, Mr. Epler noted the Trust's express agreement that if its own generation and distribution system were interconnected directly to PSNH's transmission system under the Open Access Tariff of PSNH's parent company, then the Trust's end-use retail customers would be required to pay "applicable stranded cost recovery charges, RRB charges, system[] benefits charges, and taxes" pursuant to RSA 369-B:3, IV(b)(8). Mr. Epler concluded that it would be contrary to the purpose of the statute to determine that the RRB charge is non-bypassable for retail end-users of non-public utility providers with connections to the transmission system, but by-passable for retail end-users of non-public utility service providers with connections only to the distribution system.

The Trust submitted its objections to the General Counsel's recommendations on July 29, 2002. As of that date, the Trust's statement of the issue before the Commission was as follows: "whether Petitioner, a real estate developer, would be required to collect the RRB charge and remit it to PSNH if Petitioner were to sell electric generation service through a

private distribution system to one customer."

Beyond that, the Trust indicated its disagreement with Mr. Epler's recommendations to the extent they would embrace the conclusion that RSA 369-B:4, IV requires "any person," as opposed simply to any electric utility, to collect the RRB charge and remit it to PSNH.

The Trust's written objection to the General Counsel's recommendations complained that Mr. Epler did not address the issue of whether a person providing transmission and distribution service to only one customer would be a public utility within the meaning of RSA 362:2 as analyzed in *Zimmerman*. The Trust requested that, in the event the Commission agrees with its view of RSA 369-B:4, IV, it further issue a declaratory ruling that providing distribution service only to one customer would not render the provider a public utility under RSA 362:2.

PSNH did not submit any objections to or comments on the General Counsel's recommendations.

In Order No. 24,065, we adopted the views of the General Counsel. Specifically, we (1) agreed with Mr. Epler's threshold determinations that the question, as posed, was ripe for adjudication, within the Commission's jurisdiction and at least among the issues raised by the Trust's petition, and (2) we agreed with the General Counsel's analysis of the issue he deemed

appropriate for resolution in this proceeding. It is this latter aspect of Order No. 24,065 to which the Trust objects.

III. THE TRUST'S WRITTEN MOTION

In its written rehearing motion, the Trust took the position that Order No. 24,065 ignored certain language contained in RSA 369-B:4, IV, which concerns "[a]ll charges established in a finance order for an electric utility, including, without limitation, the non-bypassable RRB charge." Specifically, the Trust invokes the provision setting forth what must occur when a retail customer purchases or otherwise obtains electric service from any person other than the electric utility in whose service territory the retail customer is located. In such circumstances, the statute requires "the servicer of such new electricity service provider or successor" to collect all such charges from the customer "by or on behalf of the first electric utility . . . as a condition to the provision of retail electric service to such retail customer." According to the Trust, the use of the word "first" in this provision suggests that it is applicable only when there is a second electric utility. Thus, according to the Trust, because it is not an electric utility it is not required to collect the RRB charges even though the Trust is a "person" under the General Counsel's analysis.

The Trust further relied on RSA 369-B:4, VII, which precludes the imposition of an "exit fee" notwithstanding any

"statutory or regulatory language to the contrary." The Trust noted that an "exit fee" is defined in this provision as

> any rate or charge that is based in whole or in part on the amount of electric power and/or retail electric service a customer might have purchased from or through an electric utility but does not purchase due to conservation efforts, use of alternative non-electric energy sources, or the consumption of electricity by such customer from generation connected directly to such customer's electrical load with no intervening facilities of a regulated utility.

This provision explicitly excepts from the definition of "exit fee" any "just and reasonable capacity or demand charge for backup service." According to the Trust, requiring it to collect RRB charges in connection with the service the Trust seeks to provide would amount to such a prohibited exit fee.

IV. THE JANUARY 15, 2003 HEARING

There were no filings either in support of or in opposition to the Trust's motion. On December 6, 2002, the Commission advised the parties by secretarial letter that it would conduct a hearing on the Trust's motion on January 15, 2003. The Office of Consumer Advocate (OCA), which had not previously entered an appearance, advised the Commission in writing on January 3, 2003 that it would be fully participating in the case pursuant to RSA 363:28.

The hearing took place as scheduled on January 15, 2003. The Trust, PSNH and OCA appeared and made oral arguments. Also appearing, although not requesting formal intervenor status,

was Brascan Energy Marketing, Inc. (Brascan), the entity that purchases the wholesale energy output of six hydroelectric plants owned by its affiliates in northern New Hampshire and sells this output to another affiliate, Fraser N.H., LLC, which operates the pulp mill facilities in Berlin and Gorham. Mr. Epler made certain arguments in his capacity as mediator, as did the Commission Staff. Although the Business and Industry Association (BIA) did not appear, the Commission accepted into the record of the hearing an article from the November 2002 BIA newsletter about the instant case entitled "PUC Ruling Threatens Self-Generation Options for Electric Customers" and written by Attorney Steven V. Camerino and BIA government relations advisor Tim Fortin.

A. 5 Way Realty Trust

Through counsel, the Trust explained on January 15, 2003, that it owns 88 acres of property in a heavily developed area of Hudson. According to the Trust, adjacent to the property are 115 kV and 34 kV lines owned by PSNH. The Trust averred that it has a "letter of understanding" with an existing and nearby industrial electric customer, and that the Trust wished to install generation capacity on its land and sell the electric output to its neighbor via distribution facilities that the Trust would construct and own. Tr. 12. The Trust averred that it has

set aside five acres of its land for the generation facilities and has obtained approval from the Hudson Planning Board.

The Trust represented that it would "eventually" like to sell its generation output to more than one customer, but that its present request for declaratory judgment concerns only the one customer with which it has the letter of understanding. Tr. 17. According to the Trust, the potential customer would not be a tenant of the Trust, nor would it have any other relationship with the Trust. The Trust stated that the potential customer would remain connected to the PSNH system, taking backup service from PSNH under its Rate B, while receiving electric service from the Trust. Tr. 18. The Trust stressed that, to the extent the customer receives energy from PSNH via Rate B, the customer would be amenable to paying PSNH's Stranded Cost Recovery Charge, including the RRB Charge.

Thus, the Trust framed the question to which it seeks an answer as to whether the Trust would be obligated to remit to PSNH stranded cost charges and RRB charges that PSNH would have recovered from this customer had the energy been purchased from PSNH instead of from the Trust. Tr. 19. Specifically, counsel for the Trust asked: "(g)enerator, private line, one customer, do you have to remit the RRB charges to PSNH?" *Id.* According to the Trust, the possibility of such arrangements occurs regularly

in New Hampshire and, thus, the state's business community would benefit from having the question resolved.

It was the Trust's argument at hearing that in enacting RSA 369-B:4, IV, the "loophole" the Legislature was addressing concerned the situation in which a utility at the edge of PSNH's service territory would seek to avoid PSNH's stranded cost charges by connecting to the system of the electric utility in the adjoining service territory. Tr. 23. Thus, in the view of the Trust, the Legislature intended a successor electric utility to assess PSNH stranded cost charges and duly remit them, whereas a non-utility entity such as the trust would not have to collect such charges on PSNH's behalf under RSA 369-B:4, IV.

The Trust conceded that if it sought to market energy to a second customer, it could arguably become a public utility within the meaning of RSA 369-B and the Commission's other enabling statutes. In such a situation, according to the Trust, further guidance from the Commission would be necessary regarding the necessity of collecting PSNH stranded cost charges.

Further, at hearing, the Trust reiterated its argument that requiring collection of PSNH stranded cost charges would comprise a prohibited exit fee in the circumstances. In that regard, the Trust stressed that it would not be using PSNH facilities to deliver power from the Trust to its customer, and thus there would be "no intervening facilities of a regulated

facility" within the meaning of RSA 369-B:4, VII. The Trust also stressed that its proposal is consistent with the language in RSA 369-B:3, IV(b)(7) specifying that "[a]ll currently existing opportunities shall be continued for retail customers to generate or acquire electricity for their own use, other than through retail electric service." In the view of the Trust, what it proposes is such an existing opportunity – i.e., an option that would have been available and legal prior to the PSNH stranded cost securitization legislation codified as RSA 369-B.

B. Public Service Company of New Hampshire

PSNH took the position at hearing that adopting the Trust's view of the statute – i.e., concluding in the circumstances that the Trust would not have to collect RRB charges because the Trust is not a public utility – would violate the policy underlying the statute. PSNH described that policy as an intention to achieve the greatest possible rating (and thus the lowest possible interest rate ultimately to be recovered from PSNH customers) for the Rate Reduction Bonds by which certain of PSNH's recoverable stranded costs were securitized in 2001. PSNH disagreed with the Trust's allegation that its proposal was an "existing opportunity" within the meaning of RSA 369-B:3, IV(b)(7), noting that the building of redundant electric lines has historically been inconsistent with New Hampshire utility law.

PSNH further invoked certain language from the Commission's 2000 finance order in connection with the securitization of recoverable stranded costs. This language finds that "the procedures and methodologies set forth in this finance order for ensuring that the RRB Charge is collected from all retail customers that obtain retail electric service from other electric service providers . . . is just and reasonable." Tr. 44, Order No. 23,550 (Sept. 8, 2000), 85 NH PUC 567, slip op. at 56.

C. Brascan Energy Marketing, Inc.

Noting that the question described by the Trust at hearing was not the same question contained in the Trust's original petition, describing the question as "poorly formed," and pointing out that other parties had not received copies of the letter from the Trust's potential electric customer, Brascan suggested that the Commission withdraw its previous order and dismiss the petition without prejudice. Brascan also indicated confusion over whether the present docket involves stranded cost charges associated with power actually delivered by PSNH or also includes stranded cost charges for power delivered by others.

Brascan indicated that it reads the language in question from RSA 369-B:IV, 4 to cover only the situation in which a customer takes bundled electric service from a competitive supplier, with that supplier presumably procuring

delivery services from PSNH. According to Brascan, in such a situation, RSA 369-B:IV, 4 requires the competitive supplier to collect stranded cost charges and remit them to PSNH.

D. Office of Consumer Advocate

OCA indicated that its concern is that residential ratepayers not be burdened by an increased financial obligation relative to the Rate Reduction Bonds caused by an exodus of large industrial users from the base of customers paying stranded cost charges to PSNH. OCA stated that RSA 369-B:4, IV should be interpreted so as to allow residential ratepayers and other customers to self-generate without incurring RRB charges beyond those associated with taking back-up service from PSNH. According to OCA, the exceptions to stranded cost payment obligations contained in RSA 369-B:4, IV and RSA 369-B:3, IV(b)(7) should be narrowly construed in light of the need to protect residential ratepayers while assuring the revenue stream associated with the RRBs.

E. Staff

Staff suggested that the Commission adopt the proposal advanced by Brascan to withdraw its previous order and dismiss the petition without prejudice. In the alternative, Staff suggested that the Commission clarify whether the instant proceeding concerns only the payment of RRB charges or stranded cost charges generally.

F. The Mediator

In his capacity as the mediator whose recommendations were at issue in Order No. 24,065, Mr. Epler began his presentation at hearing by noting that his recommendations related only to charges associated with the Rate Reduction Bonds. He advised that he expressed no view as to the applicability of stranded cost recovery charges generally, and that he viewed RRB charges as arising out of special circumstances – i.e., the objective of making RRB charges non-bypassable so as to achieve favorable interest rates and other financing conditions for the PSNH securitization plan.

Mr. Epler stressed that he viewed the use of the word "person" in RSA 369-B:4, IV as furthering this objective of non-bypassability, even in circumstances where the customer was obtaining retail electric service from an entity that is not a public utility within the meaning of New Hampshire law. Mr. Epler indicated that he did not agree with Brascan's view of the statute, given that the statutory definition of "retail electric service" in RSA 369-B:2, XII refers to the delivery of electric power. In Mr. Epler's view, this reference to delivery means that retail electric service under RSA 369-B cannot be equated with unbundled electric service as Brascan suggested.

Mr. Epler characterized the scenario outlined by the Trust at hearing, a retail sale to an end-user located *outside* of

the developer/generator's parcel, as "new information" that was not made available to him as he was formulating his mediator's recommendations. According to Mr. Epler, there were numerous occasions when he requested specific information of that sort from the Trust, to little or no avail.

According to Mr. Epler, when there is no connection between the customer and the facilities of the customer's former utility, RSA 369-B:4 makes clear that RRB charges need not be collected. In those circumstances, he indicated, the user is not a "retail customer" within the meaning of the statute. But he made clear that his recommendation was that RRB charges be collected in connection with all electricity used by a customer maintaining a backup connection to the PSNH system. He conceded that, in order to adopt such an interpretation, one would have to read broadly the phrase "intervening facilities" in the statutory definition of exit fees.

Mr. Epler then provided the Commission with an excerpt from the Senate Journal of May 31, 2000, which includes a colloquy between Senator King and Senator Below about the bill that was ultimately enacted and codified as RSA 369-B. Senator King asked whether New Hampshire businesses would still be able "to generate their own power and work together and not pay any exit fees" under RSA 369-B, and Senator Below responded affirmatively:

> Yes, that is correct, Senator King. Exit fees have never been allowed in New Hampshire. Also, we have not allowed assessment of an exit fee on joint users of generated electricity, provided that the joint users do not constitute a public utility. Imposition of exit fees or de facto exit fees through punitive back-up rates would stifle competition and impede technological innovation. This legislation makes it clear that customers continue to have the rights to generate their own electricity, share that electricity, and not be subject to stranded costs payments to the utility, provided that the arrangement of the customers does not constitute a public utility under historical public utility law, or make use [of] regulated portions of utility distribution or transmission system.

Senate Journal, May 31, 2000, at 1159. Next Senator King queried Senator Below about the use of the word "person" in RSA 369-B:4, IV, which apparently replaced the phrase "electric utility" in earlier drafts of the measure. Senator King asked whether use of the word "person" would not adversely affect the rights of customers to self-generate. Senator Below's reply was that it would not:

> The use of the word "person," coupled with the reference to "retail electric service" in that section, is only intended to provide a mechanism for the collection of rate reduction bonds, in the event PSNH or another electric utility no longer bills and collects for those bonds. Any customer may generate and share power, and not pay any stranded cost charges, so long as they are not using any intervening electric utility facilities, namely the regulated distribution or transmission grid. The electricity market must be allowed to flourish under competition, including the continued historic right of customers to choose to self generate electricity, without penalty.

Id. at 1160.[3]

Mr. Epler conceded that RSA 369-B contains conflicting provisions, but that his recommendations were grounded in his understanding of the intent of the provisions related to the revenue stream supporting the Rate Reduction Bonds. Mr. Epler expressed the concern that if the Trust's view were adopted by the Commission, it could allow a significant portion of PSNH's current customer base to avoid paying RRB charges. Such a situation, according to Mr. Epler, could trigger the imposition of additional charges in order to provide additional security to the holders of the Rate Reduction Bonds.

G. Business and Industry Association

The BIA did not appear at the hearing or otherwise present a position on the motion. However, as noted, *supra*, an article written by Messrs. Camerino and Fortin, published in the BIA's newsletter, was introduced into the record at the hearing and therefore a summary of the article is included here.

According to the BIA, the effect of Order No. 24,065 is that "customers who opt to finance self-generation by using a third party to install and own the generator for them will be obligated to pay PSNH's stranded costs merely because they elect

[3] In rebuttal to Mr. Epler's argument, the Trust took the position that this discussion on the Senate floor really relates to RSA 369-B:8, which refers to the obligation of any successor to an electric utility with regard to collecting the revenues necessary to service the Rate Reduction Bonds.

to remain connected to PSNH's system as a form of back-up supply." The BIA characterized Order No. 24,065 as being in conflict with RSA 369-B – specifically, the provisions precluding exit fees. According to the BIA, the Commission erred by focusing on the back-up connection between the customer and PSNH, instead of on the question of whether the Trust is a public utility.

V. COMMISSION ANALYSIS

RSA 541:3 authorizes us to grant a rehearing motion if in our opinion "good reason for the rehearing is stated in the motion." In our opinion, the arguments presented on January 15, 2003, comprise sufficiently good reason to reconsider our decision. Accordingly, we clarify Order No. 24,065 as follows.

In Order No. 24,065, we sought to express the understanding that, when one gives meaning to the entirety of the language in RSA 369-B: 4, IV, the determination that a particular scenario involves a transaction with a non-utility does not necessarily lead to the conclusion that RRB charges do not apply. In other words, a generator may be a non-utility and yet still may have RRB obligations under the Statute, in certain circumstances, although as a practical matter the most probable scenarios would not trigger RRB charges. It is clear, and the Trust concedes, that if a public utility, whether or not PSNH, provides primary delivery service, as opposed to secondary or

back-up service, then RRB charges would still be collected. The inverse, that is, what happens when delivery service is provided by a non-utility, is less definitive. We recognize that at least part of the economic incentive for the transaction would come from bypassing the RRB charges. However, it is conceivable that some shared delivery arrangement between a non-utility and a public utility involving intervening facilities could occur, in which case RRB charges would apply because of the pre-eminence of the non-bypassability principle. Our previous decision was admittedly unclear on this point.

We also take this opportunity to clarify a second point. Although it was not expressly raised in the Trust's Motion for Reconsideration, at hearing the Trust introduced a conclusion drawn in an article in the November 2002, BIA Report to the effect that, in Order No. 24,065, the Commission ruled that a company that builds an electric generating facility to supply a single customer must collect certain stranded cost charges "if the electric customer remains connected to PSNH's system for purposes of receiving back-up service." That conclusion, along with the authors' conclusion that third party financing by itself would trigger the collection of RRB charges is erroneous.

The mere use of PSNH back-up service, or the mere reliance on third-party financing, does not trigger the

collection of RRB charges other than those that would properly be collected through Rate B. If a particular scenario is otherwise a transaction contemplated by RSA 369-B: 3, IV,(b)(7) and RSA 369-B: 4, VII, the collection of RRB charges for service pursuant to that transaction, beyond those RRB charges applicable through Rate B, would be prohibited as an invalid exit fee, a concept discussed further below. Furthermore, the election to take service under Rate B does not per se invoke the "intervening facilities" exception to the general rule disfavoring exit fees.

The question on which declaratory judgment was sought in the Motion for Reconsideration involves the Trust selling electricity to one customer using the Trust's own generation and a private distribution line, which the Trust implicitly presumes constitutes a non-utility scenario. The purchaser of this energy would still be connected to the PSNH system, presumably through a separate delivery point, and would obtain backup service from PSNH under Rate B. The Trust asks us to determine whether RSA 369-B would obligate it to collect certain stranded cost charges from its customer and remit those charges to PSNH. The charges in question relate only to energy purchased from the Trust (as opposed to energy purchased from PSNH under Rate B), and comprise only the portion of PSNH's Stranded Cost Recovery Charge that services the Rate Reduction Bonds – the so-called Part 1 stranded

costs under the rubric of the Agreement to Settle PSNH Restructuring.

We observe that this specific question only truly crystallized at the January 15, 2003 hearing. Notwithstanding the assertions to the contrary by the Trust at hearing that the single-customer proposal had been introduced more than a year earlier, documents filed in this proceeding indicate that the proposal morphed somewhere between July 29, 2002, and October 16, 2002, which is the first documented mention of the single customer scenario. Moreover, until January 16, 2003, it was not clear that the prospective electric customer would not occupy premises that are part of the Trust's realty.

As we noted in Order No. 24,065, a declaratory judgment is appropriate only in circumstances where the controversy is sufficiently "definite," "concrete" and not "based on a set of hypothetical facts." *See Delude v. Town of Amherst*, 137 N.H. 361, 363 (1993). A shifting and imprecise set of facts is insufficient to meet these standards.

In this case, the applicable factual scenario was never laid out by the petitioner in a written pleading and, in fact, was only extracted at hearing via questions posed to the Trust's counsel. At the very least, this situation had the effect of needlessly prolonging the case.

Were there not considerable public confusion about the rights of self-generators, with the cloud such confusion might cast over consumer efforts to adopt innovative self-generation technologies, we might conceivably adopt the suggestion of Brascan and, relying on the Trust's written pleadings, simply withdraw Order No. 24,065 and deny the petition without prejudice. However, due to the importance of reliable expectations for development of energy alternatives, we have sought to clarify the statutory parameters.

As noted above, we conclude that RSA 369-B does not require the collection of RRB charges in connection with energy sold to a customer by an entity that is not a public utility, if there are no intervening regulated utility facilities used to provide such energy, even if the customer remains physically connected to the PSNH system and takes backup service from PSNH under Rate B. PSNH, however, is entitled to recover stranded costs (including the RRB) as set out in Rate B, in connection with its provision of back-up service to that customer. We base our decision on RSA 369-B:4, VII, the prohibition on exit fees that operates "[n]otwithstanding any statutory or regulatory language to the contrary."

We read this 'notwithstanding' clause in RSA 369-B:4, VII as rendering it unnecessary for us to resolve the ambiguity in RSA 369-B:4, IV arising out of the use of the word "person" in

that provision. By its terms, RSA 369-B:4, VII precludes anything that meets the definition of "exit fee," regardless of whether RSA 369-B:4, VI or any other statute would suggest that persons other than public utilities must collect RRB charges and remit them to PSNH. Under RSA 369-B:4, VII, a charge is prohibited as an exit fee if it is

> based in whole or in part on the amount of electric power and/or retail electric service a customer might have purchased from or through an electric utility but does not purchase due to conservation efforts, use of alternative non-electric energy sources, or the consumption of electricity by such customer from generation connected directly to such customer's electrical load with *no intervening facilities of a regulated utility*.

RSA 369-B:4, VII (emphasis added) (excepting capacity or demand charges associated with backup service). The key here is that the customer would have to be connected via non-utility facilities directly to the generator, with no intervening facilities of PSNH or any other public utility.[4] In such circumstances, requiring RRB charges based on all the energy sold to the customer, including that provided by the competitive supplier, would be an exit fee, which is prohibited by the above-referenced statute.

As for determining the applicability of RRB charges to the Trust, we find that the facts of this case are insufficiently

[4] Although the term "regulated utility" appears in RSA 369-B:4,VII, it is not defined. A resort to legislative history reveals that the term "regulated utility" used in the aforementioned statute is synonymous with the term

clear to render a decision as to whether the petitioner qualifies for the exemption from RRB charges created by RSA 369-B:4, VII. As we indicated in Order No. 24,065, the Commission's authority to issue declaratory rulings derives from RSA 541-A:16. In exercising this authority, we find it appropriate to apply case law concerning the Superior Court's declaratory judgment authority, RSA 491:22, which is analogous to our own. As *Delude*, supra, and its antecedents make clear, a petitioner seeking a declaratory ruling must clearly set out the facts of the case "(i)n order to avoid the consideration of any case which might be termed hypothetical." *Merchants Mutual Casualty Company v. Kennett*, 90 N.H. 253, 254 (1939). The petitioner must demonstrate "that the facts are sufficiently complete, mature, proximate, and ripe to place him in gear with his adversary, and thus to warrant…relief." *Id.* at 255. "The action cannot be based on a hypothetical set of facts…and it cannot constitute a request for advice as to future cases." *Salem Coalition for Caution v. Town of Salem*, 121 N.H. 694, 696 (1981).

Turning to the record in this proceeding, we find that no sworn testimony or concrete information has been produced that would inform a reasonable decision maker of the salient facts that are necessary to decide the question posed by the petitioner. The answer to whether RRB charges are triggered

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"public utility." *See*, Senate Journal, 31 May 2000, pp. 1159-1160.

depends upon whether the Trust would be a public utility within the meaning of New Hampshire law. As the relevant case law reveals, such an inquiry would of necessity be fact-specific. See generally *Appeal of Zimmerman*, 141 N.H. 605, 609 (1997) (noting that distinguishing characteristic of public utility is "[s]ervice to the public without discrimination" and focusing on the underlying landlord-tenant relationship between Zimmerman and his utility customers).

In the instant case the record is devoid of specific information concerning the relationship between the petitioner and its proposed customer(s). There is no written business plan or contractual agreement which could shed light about petitioner's plans for selling electricity. There is no information about the precise nature of the petitioner's proposed generating plant (i.e., generating capacity/size, fuel type, exact location, status as a Limited Electrical Energy Producer under RSA 362-A, status as an Exempt Wholesale Generator under RSA 362:4-c, points of interconnection, if any, with the New England electric transmission system or another distribution company, etc.). There is no specific information about the precise location, voltage, ownership or usage of the distribution line between the generating facility and the potential customer(s). Nor is there any information as to how the PSNH backup service would be supplied to the end-user(s), i.e., would

it reach those end-user(s) via the Trust's facilities or would it be provided through a direct connection between the end-user(s) and PSNH's distribution facilities? We do not know how many customers the Trust ultimately would propose to serve and under what circumstances. All of this information is of the type which could prove helpful in determining whether the Trust would be a public utility (in which case RRB charges must be collected pursuant to RSA 369-B:4, IV.), or whether an exemption from such charges exists by virtue of RSA 369-B:4, VII.

What little information exists on this record has been adduced through statements made by the petitioner's attorney. At hearing, petitioner's attorney orally represented the facts and legal question as simply: "(g)enerator, private line, one customer, do you have to remit the RRB charges to PSNH?" Tr. 19. In the absence of the specific information listed above and in light of statements made by petitioner's counsel that suggest that petitioner intends to serve more than one customer (e.g., petitioner will "eventually" hold himself out as interested in selling to more than one customer, Tr. 17), we find that rendering a declaratory ruling in this instance would be tantamount to deciding a hypothetical case. As the applicable case law makes clear, we are unable to provide the relief requested.

The Commission ruled on an analogous situation of lack

of specificity in, *Re Pinetree Power-North*, Docket No. DR 86-100, 71 NHPUC 638 (1986). In that case, Pinetree Power sought Commission rate orders for several proposed small power producer projects under RSA 362-A. Among other things, the Commission noted that Pinetree "generally presented the Commission with a concept of the development of wood electric projects in New Hampshire but not with specifications of well-defined, developed individual projects." 71 NHPUC at 644. Accordingly, the Commission rejected the filings as premature, which had the effect of preventing the bulk of ratepayers from incurring an economic obligation based simply on a developer's concept. In this case we take the similar approach in that we will not impose on the bulk of ratepayers the economic obligation to pay bypassed RRB charges in the absence of a well-defined, concrete project that would permissibly bypass such charges.

It would be improvident to render a decision on utility status based on supposition and conjecture in view of the potentially competing public policy considerations at stake here. On the one hand, the ratepayer-delivered revenue stream that services the RRBs is something that the legislature clearly sought to protect, because it was the certainty of this payment stream that reduced the bonds' riskiness thereby reducing interest costs to ratepayers. On the other hand, successful restructuring of the electric industry depends in part on the

encouragement of self-generation, conservation and other innovative approaches to the supply, delivery and usage of electricity. While we understand petitioner's interest in obtaining a response to a question that may assist it in assessing the economic feasibility of its future business plans, the absence of critical information at this juncture makes it impossible for us to issue the requested declaratory ruling, both as a matter of law and sound public policy.

Based upon the foregoing, it is hereby

ORDERED, that the motion of Peter Horne, Trustee of 5 Way Realty Trust, for rehearing of Order No. 24,065 is hereby GRANTED.

By order of the Public Utilities Commission of New Hampshire this fourteenth day of March, 2003.

Thomas B. Getz	Susan S. Geiger	Nancy Brockway
Chairman	Commissioner	Commissioner

Attested by:

Claire D. DiCicco
Assistant Secretary