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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

before the  
ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of )

PUBLIC SERVICE COMPANY )  
OF NEW HAMPSHIRE, et al. )

(Seabrook Station, Units 1 )  
and 2) )

Docket Nos. 50-443-OL-1  
50-444-OL-2

(Onsite Emergency  
Planning and Safety  
Issues)

APPLICANTS' RESPONSE TO APPEAL  
BOARD QUESTIONS AT ORAL ARGUMENT

At the oral argument held before this Appeal Board on July 12, 1989, Applicants were directed to file, on or before July 28, 1989, answers to a number of questions posed by this Appeal Board concerning rate regulation in the State of New Hampshire. As permitted by the Board, this response, written by Martin L. Gross, Esquire, a member of the New Hampshire Bar and of the firm of Sulloway, Hollis & Soden of Concord, New Hampshire, is attached hereto and marked "A."

In addition, the Applicants were requested to advise the Appeal Board as to when, what was referred to as "the warranty run" during oral argument, would normally take place. In light of the legal positions set forth in

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Mr. Gross' memorandum, the timing of "the warranty run" does not have the significance Applicants' Counsel suggested it might have during the oral argument. However, to complete the record on this matter, the following information is supplied:

The "warranty run," the formal name of which is the "NSSS Acceptance Test ST-20" is a run of 250 hours duration to be made at a power level of 95% or higher. It is anticipated that this run would be made shortly after the completion of power ascension.

Respectfully submitted,



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Counsel for Applicants

Memorandum to Thomas G. Dignan, Esquire

From: Martin L. Gross

Re: Financial Qualifications of PSNH

You have asked us to prepare a memorandum addressing a question raised by the Appeals Board, regarding how long it would take for revenues to flow to PSNH under New Hampshire regulatory law, once a full power license for Seabrook is issued. You relayed three specific questions through Meg Nelson. We offer the following for your use in preparing a brief.

Question No. 1. As a matter of law, when does the anti-CWIP law cease to preclude PSNH from recovering any or the costs associated with Seabrook Station? Is the issuance of a full power license sufficient or must Seabrook Station produce power at a specified level to satisfy the statute?

**Response:** On its face, the anti-CWIP law, N.H. RSA 378:30-a, prohibits recovery through rates of costs associated with utility plant construction until the plant is "actually providing service to consumers." (See copy of statute attached).

There has been no judicial or regulatory decision applying this statutory language to a set of facts. However, one of New Hampshire's canons of statutory interpretation requires that statutes be applied in accordance with their plain language, where possible. This canon has previously been applied to the anti-CWIP statute itself. Appeal of Public Service Company of New Hampshire, 125 N.H. 46, 480 A.2d 20 (1984).

Applying this canon, the anti-CWIP statute contains no references to licenses or to technical requirements for specified operating levels, as prerequisites for lifting the statutory prohibition. Instead, the statute uses the simple phrase "actually providing service to customers." PSNH takes the position that the statute should be read to mean what it says, without further elaboration. Accordingly, PSNH believes that it is entitled to recovery through rates of costs associated with Seabrook Station when the plant is actually providing such service, i.e., providing net generation to the grid.

Question No. 2. Will there be regulatory delay between the time the legal test has been satisfied and the date when revenues actually begin to flow?

**Response:** Some regulatory delay can be expected, because PSNH is entitled to charge rates only in accord with rate schedules which have been filed and have been permitted to become effective by the New Hampshire Public Utilities Commission (NHPUC). See N.H. RSA 378:1, 14, 21 (copies attached). A procedural rule of the NHPUC requires utilities to give notice of intent to file rate schedules at least 30 days in advance of actual filing. N.H. Code of Adm. R., Puc 1603.02 (copy attached). Furthermore, a statute prevents rate changes from taking effect for 30 days after changes in rate schedules have been filed with the NHPUC. N.H. RSA 378:3 (copy attached). Also, the NHPUC is authorized to suspend the effectiveness of tariff changes during

the pendency of its investigation. N.H. RSA 378:6,I (copy attached). In the case of a Seabrook rate case, such a suspension could last as much as 18 months. N.H. RSA 378:6,II (copy attached).

However, New Hampshire statutes also provide procedures ameliorate such regulatory delay. One such procedure is "bonded rates". Under the bonded rate procedure, even though the NHPUC has suspended a rate schedule for investigation, the utility may place the new rate schedule in effect 6 months after the originally proposed effective date by presenting to the NHPUC a bond to secure repayment to customers of any difference between revenues collected under the rate schedule and revenues that would have been collected under a rate schedule the NHPUC ultimately determines to be just and reasonable. N.H. RSA 378:6,III (copy attached). The NHPUC's authority is limited to approving the form of such a bond. Also, the PUC may require sureties on such a bond, but has never done so in the case of PSNH.

Another procedure available to ameliorate regulatory delay is "temporary rates". Under this procedure, the NHPUC may order temporary rates to be in effect during the pendency of a rate investigation. N.H. RSA 378:27 (copy attached). The NHPUC may provide temporary rates in a case where the utility is seeking a rate increase. Public Service Company of New Hampshire v. State, 102 N.H. 66, 150 A.2d 810 (1959). If final disposition of the case results in a rate level higher than the temporary rate level, the utility is permitted to recoup the difference through a

surcharge. N.H. RSA 378:29 (copy attached). If final disposition produces rates lower than the temporary rates, the utility is required to refund the difference and may be required to post bond to secure such a refund. N.H. RSA 378:30 (copy attached). Thus, the temporary rate procedure would make it possible for PSNH to request a higher temporary rate level to recover some or all of the costs associated with Seabrook operation, from the inception and during the pendency of proceedings in which its filed rate schedule has been suspended for investigation. While the statute does not require the NHPUC to allow temporary rates, where temporary rates are requested to cover costs associated with new plant in service, temporary rates may be required in order to avoid constitutional issues of confiscation. N.H. RSA 378:27; see Public Service Company of N.H. v. State, 102 N.H. 66, 150 A.2d 810 (1959).

Question No. 3. Assuming regulatory delay is likely, does New Hampshire law have a mechanism to allow recoupment of revenues which would have been earned but for the delay caused by the investigation?

**Response:** The temporary rate procedure previously described would permit PSNH to recoup the difference between revenues received under temporary rates and revenues ultimately determined to be just and reasonable by the NHPUC in finally determining the case. N.H. RSA 378:29. In contrast, the bonded rate procedure (previously described) does not provide for

recoupment of revenues that might be lost during the first 6 months of a rate investigation, prior to the point the new rate schedule has been placed in effect under bond.

### **Summary**

Under the anti-CWIP law, N.H. RSA 378:30-a, PSNH is entitled to claim rates to recover costs associated with Seabrook Station once the plant is actually rendering service to customers. In PSNH's view, this point will be reached when Seabrook Station is actually furnishing net generation to the grid. Furthermore, under either the temporary rate or bonded rate procedure, New Hampshire law provides opportunity for PSNH to start recovering such revenues promptly, even though PSNH's new rate schedule might be suspended for a lengthy investigation period.

July 18, 1989

  
Martin L. Gross

## NEW HAMPSHIRE REVISED STATUTES ANNOTATED

378:1 Schedules. Every public utility shall file with the public utilities commission, and shall print and keep open to public inspection, schedules showing the rates, fares, charges and prices for any service rendered or to be rendered in accordance with the rules adopted by the commission pursuant to RSA 541-A; provided, however, that public utilities which serve as seasonal tourist attractions only, as determined in accordance with rules adopted by the commission pursuant to RSA 541-A, shall be exempt from the provisions of this chapter.

378:3 Change. Unless the commission otherwise orders, no change shall be made in any rate, fare, charge or price, which shall have been filed or published by a public utility in compliance with the requirements hereof, except after 30 days' notice to the commission and such notice to the public as the commission shall direct.

### 378:6 Suspension of Schedule.

I. Pending any investigation of a rate schedule and the decision thereon, the commission may, by an order served upon the public utility affected, suspend the taking effect of said schedule and forbid the demanding or collecting of the rates, fares, charges or prices covered by the schedule for such period or periods, not to exceed 12 months in all, as in the judgment of the commission may be necessary for such investigation, except as provided in paragraph II.

II. If a public utility submits a rate schedule which incorporates a newly completed generating facility into the rate base and the capital investment for the new facility exceeds 50 percent of the total capital investment of the public utility, the commission may suspend the schedule as provided in paragraph I, except that such suspension shall not exceed 18 months. The total capital investment of the public utility shall include the capital investment of the new facility. The commission may suspend a schedule under this paragraph only once in relation to each new facility.

III. If for any reason the commission is unable to make its determination prior to the expiration of 6 months from the originally proposed effective date of a rate schedule, the public utility affected may place the filed schedule of rates in effect, pending expiration of such 12 or 18 months' suspension period, as provided in paragraph I or II, upon furnishing the commission with a bond in such form and with such sureties, if any, as the commission may determine. The bond and sureties, if any, shall secure the repayment to the customers of the public utility of the difference, if any, between the amounts collected under said schedule of rates and the schedule of rates determined by the commission to be just and reasonable.

378:14 Free Service, etc. No public utility shall grant any free service, nor charge or receive a greater or lesser or different compensation for any service rendered to any person, firm or corporation than the compensation fixed for such service by the schedules on file with the commission and in effect at the time such service is rendered.

378:21 Rebates, etc. No public utility shall, directly or indirectly or by any special rate, rebate, drawback or other device or method, make any deviation from the rates, fares, charges or prices for any service rendered by it specified in its schedules on file and in effect at the time such service was rendered.

378: 27 Temporary Rates. In any proceeding involving the rates of a public utility brought either upon motion of the commission or upon complaint, the commission may, after reasonable notice and hearing, if it be of the opinion that the public interest so requires, immediately fix, determine, and prescribe for the duration of said proceeding reasonable temporary rates; provided, however, that such temporary rates shall be sufficient to yield not less than a reasonable return on the cost of the property of the utility used and useful in the public service less accrued depreciation, as shown by the reports of the utility filed with the commission, unless there appears to be reasonable ground for questioning the figures in such reports.

378: 29 Adjustment. Temporary rates so fixed, determined, and prescribed under this subdivision shall be effective until the final determination of the rate proceeding, unless terminated sooner by the commission. In every proceeding in which temporary rates are fixed, determined, and prescribed under this subdivision, the commission shall consider the effect of such rates in fixing, determining, and prescribing rates to be thereafter demanded or received by such public utility on final determination of the rate proceeding. If, upon final disposition of the issues involved in such proceeding, the rates as finally determined are in excess of the rates prescribed in such temporary order, then such public utility shall be permitted to amortize and recover, by means of a temporary increase over and above the rates finally determined, such sum as shall represent the difference between the gross income obtained from the rates prescribed in such temporary order and the gross income which would have been obtained under the rates finally determined if applied during the period such temporary order was in effect.

378: 30 Bond. If temporary rates are prescribed under RSA 378: 27 which are higher than those previously in effect, the commission may require the public utility to file a bond in such form and with such sureties, if any, as the commission may determine, to secure the repayment to the customers of the public utility of the difference between the amounts collected under such temporary rates and the rates which the commission finds should have been in effect during the continuance of such temporary rates.

378: 30-a Public Utility Rate Base; Exclusions. Public utility rates or charges shall not in any manner be based on the cost of construction work in progress. At no time shall any rates or charges be based upon any costs associated with construction work if said construction work is not completed. All costs of construction work in progress, including, but not limited to, any costs associated with constructing, owning, maintaining or financing construction work in progress, shall not be included in a utility's rate base nor be allowed as an expense for rate making purposes until, and not before, said construction project is actually providing service to consumers.

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

Puc 1603.02 Notice of Intent to File Rate Schedules. In order to facilitate the scheduling and preparation of rate proceedings, the commission requires that any utility intending to file proposed rate schedule changes pursuant to RSA chapter 378, file with the public utilities commission and the department of the attorney general, a "Notice of Intent to File Rate Schedules" at least 30 days prior to the actual filing of such schedules. Such notice shall indicate the approximate amount of the proposed increase. If no rate schedule changes are received within 60 days of commission receipt of the "Notice of Intent to File Rate Schedules", or the date that the commission approves or disapproves a waiver pursuant to rule Puc 1603.07, such notice shall expire.

CERTIFICATE OF SERVICE

'89 JUL 28 P3:44

I, Thomas G. Dignan, Jr., one of the attorneys for the Applicants herein, hereby certify that on July 25, 1989, I made service of the within document by mailing copies thereof, postage prepaid, to:

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Adjudicatory File  
Atomic Safety and Licensing  
Board Panel Docket (2 copies)  
U.S. Nuclear Regulatory  
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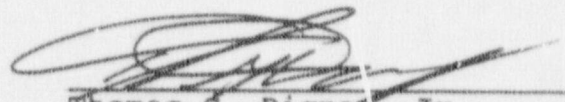
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