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**NEW HAMPSHIRE ELECTRIC COOPERATIVE AND  
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE**

**Pilot Pay-As-You-Save (PAYS) Energy Efficiency Program**

**Order Implementing Pilot Program**

**O R D E R    N O.    23,851**

**November 29, 2001**

**APPEARANCES:** Gerald M. Eaton, Esq. for Public Service Company of New Hampshire; William Gabler for New Hampshire Electric Cooperative, Inc.; Senior Assistant Attorney General Wynn E. Arnold for the Governor's Office of Energy and Community Services; Office of Consumer Advocate by F. Anne Ross, Esq. and Kenneth Traum on behalf of residential ratepayers; and Donald M. Kreis, Esq. for the Staff of the New Hampshire Public Utilities Commission.

**I.    BACKGROUND AND PROCEDURAL HISTORY**

In Order No. 23,574 (November 1, 2000), the New Hampshire Public Utilities Commission (Commission) directed the New Hampshire Electric Cooperative (NHEC) and Public Service Company of New Hampshire (PSNH) to develop a proposed pilot energy efficiency products program based on a concept known as "Pay As You Save" (PAYS). Complying with that directive, NHEC and PSNH submitted their joint PAYS proposal on April 12, 2001, and the Commission opened this docket to consider it.

PAYS was first described in a paper presented in 1999 to the National Association of Regulatory Utility Commissioners (NARUC) by the Energy Efficiency Institute (EEI). As summarized in the NARUC paper, PAYS is an effort to overcome certain market barriers to consumer investment in energy efficiency measures.

The NARUC paper notes that "individuals typically do not use societal criteria when making personal or business decisions" and, thus, often choose not to invest in energy efficient technologies. P. A. Cillo and H. Lachman, *Pay-As-You-Save Energy Efficiency Products: Restructuring Energy Efficiency* (Energy Efficiency Institute, December 1, 1999) (NARUC Paper) at 1.<sup>1</sup> Some of the reasons for the lack of investment in energy efficient technologies cited in the NARUC paper include uncertainty about continued occupancy at a given location and the "split incentive" whereby "energy using equipment is purchased by someone other than the end user." *Id.* Another "significant barrier" identified by the EEI is that "rational, well-informed consumers with access to capital and an understanding of the life-cycle value of efficiency investments often do not make such investments because the up-front cost is more real to them than the theoretical future savings." *Id.*

PAYS, as proposed in the NARUC paper, seeks to address these problems by offering energy efficiency measures to consumers and then permitting them to pay for them over time through their monthly utility bills. The premise is that the reduced energy costs triggered by the PAYS efficiency measures

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<sup>1</sup> At least as of the date of this Order, the NARUC Paper was available electronically at [[www.naruc.org/News/pays.pdf](http://www.naruc.org/News/pays.pdf)]. A description of PAYS, and similar programs previously implemented in Vermont and Texas, appears in *Public Service Company of New Hampshire*, 84 NH PUC 185, 191 (1999).

will exceed the monthly PAYS charges and, therefore, PAYS customers will literally be paying as they save money on their utility bills.

Following a duly noticed Pre-Hearing Conference on June 4, 2001, the Commission entered Order No. 23,736 (June 14, 2001) in which it approved intervention petitions submitted by the Governor's Office of Energy and Community Services (ECS), EnergyNorth Natural Gas, Inc. d/b/a KeySpan Energy Delivery New England (KeySpan) and Granite State Electric Company (GSEC). The Commission also noted that the Office of Consumer Advocate (OCA) had entered an appearance on behalf of residential ratepayers pursuant to RSA 363:28, II.

In Order No. 23,736, the Commission requested briefs from the parties concerning two threshold issues: (1) whether the Commission has the authority to permit a utility to disconnect the service of a customer for non-payment of PAYS charges and (2) whether the Commission has the authority to permit a utility to cause PAYS charges to "run with the meter," i.e., to require a new customer to assume remaining PAYS charges when a previous customer has left a PAYS measure behind when vacating the premises. Upon briefs submitted by PSNH, ECS and OCA, the Commission ruled on these issues in Order No. 23,758 (August 7, 2001).

The Commission concluded that it has the authority to

permit disconnection for non-payment of PAYS charges "as long as this is clearly indicated in the utility's tariff." *Id.* at 8. The Order stressed that "the key is clear tariff language - and, by extension, appropriate affirmative disclosures to PAYS customers about the consequences of non-payment." *Id.* However, the Commission deferred consideration of whether it would actually endorse such an aspect of the PAYS pilot.

On the question of whether PAYS charges can lawfully "run with the meter," the Commission indicated that it preferred to define the relevant issue as "whether we may permit or require a utility to deny service to a new customer unless the customer agrees to assume any unsatisfied PAYS obligations relating to PAYS measures left on the premises by a predecessor customer." *Id.* at 14 (noting that the "run with the meter" concept is borrowed from law of covenants and equitable servitudes, and Commission lacks jurisdiction over real estate matters). The Commission concluded that it is within the agency's statutory authority to permit or require service denials in such circumstances, particularly in light of the energy efficiency objective contained in the Electric Industry Restructuring Act, RSA 374-F:3, X, and the Act's explicit investiture in the Commission of authority to implement its objectives, RSA 374-F:4, VII. The Commission reserved judgment on the ultimate question of whether it would exercise its authority to permit a new

customer to assume payment obligations for PAYS measures<sup>2</sup> that antedated the customer's occupancy of the premises, and, if so, what disclosure obligations would be imposed.

PSNH, NHEC, ECS, OCA and Staff submitted a Settlement Agreement on October 11, 2001. As described more fully, *infra*, the Settlement Agreement purported to resolve all issues in the docket except for the method of collecting certain shareholder incentive payments proposed by PSNH. The Commission conducted a merits hearing on October 17, 2001 at which Gilbert E. Gelineau, Jr., PSNH's marketing support manager, William Gabler, NHEC's energy services supervisor, Meredith Hatfield, energy policy analyst with ECS, and Paul A. Cillo of EEI testified. No party appeared in opposition to the Settlement Agreement, and the Commission heard cross-examination and argument on the shareholder incentive issue.

## II. POSITIONS OF THE PARTIES AND STAFF

### A. Settlement Agreement

The settling parties agreed that NHEC and PSNH should conduct the PAYS pilot program described in the petitioners' April 12 filing, except as modified by the Settlement Agreement.

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<sup>2</sup> Order No. 23,758 stressed that references to new customers assuming payment obligations for previously installed PAYS measures referred to "responsibility for *future* payments as they accrue," not payments that became due during the previous customers' occupancy. Order No. 23,758, slip op. at 17 n.2.

Under the terms of the Settlement Agreement, the PAYS pilot would last for at least two years, but not longer than 30 months.

The companies' April 12 proposal, as endorsed by the Settlement Agreement, calls for NHEC to offer PAYS initiatives to all residential and commercial customers, with PSNH focusing on municipalities and schools. PSNH also agreed to offer PAYS participation to other commercial and industrial customers if municipal participation is not sufficient, a change that would require an amendment to the proposed tariff PSNH has submitted. At hearing, Mr. Gelineau of PSNH explained that the company wished to focus first on municipal customers because this would allow the company to avoid significant costs associated with modifying additional billing systems, which would be necessary if the program were to include other customer groups.

The Settlement Agreement provides that PAYS measures installed on customer premises as part of the pilot program should produce sufficient savings so that the cost of the installed products or measures can be paid off through a monthly PAYS Delivery Charge (PDC). Under the Settlement Agreement, the PDC would be calculated so that the measure's total cost is equal to no more than two thirds of the estimated savings, allocated over no more than three quarters of the estimated useful life of the measure, unless the customer agrees otherwise. The Settlement Agreement makes clear that customer savings would not

be guaranteed, but that if a customer notifies the utility that a PAYS measure has failed the utility will either have the measure repaired or permit the customer to discontinue remitting the PDC. Under these provisions, the utility may increase the duration of the PDC to permit recovery of any repairs not covered by product warranties.

The Settlement Agreement distinguishes between "portable" and "permanent" PAYS measures, acknowledging the existence of a "grey area" between the two that includes energy efficiency measures that "could be removed from the premises but may not be, depending upon the particular situation of each consumer and landlord/tenant relationship." Settlement Agreement at 3. In the instance of measures falling into this "grey area," the utility's Energy Service Representative would make a determination as to the appropriate classification.

The distinction between portable and permanent measures is significant because, with regard to the former, under the program envisioned by the Settlement Agreement landlords would be contractually bound to inform subsequent tenants that a PAYS measure had been installed in the rental space and the tenant will incur a PDC. Likewise, sellers of premises containing a PAYS measure would be obligated to inform purchasers of the existence of a PAYS measure and an unsatisfied PAYS obligation. In each such instance, the notice requirement applies only to the

extent that the previous owner/tenant left before the PAYS obligation had been satisfied, and in each instance the new owner/tenant's obligation would be limited to PDCs that were not incurred by the previous owner/tenant. The Settlement Agreement contains the recommendation that the Commission "authorize the binding of subsequent customers to payment of unbilled PDC's only when adequate and timely notice is provided by the Utility, landlords, owners or sellers" pursuant to a series of proposed forms that are appended to the Settlement Agreement.<sup>3</sup>

The settling parties and Staff recommend that the Commission grant the NHEC and PSNH the authority to disconnect customers for non-payment of PDCs. Citing the Commission's ruling in Order No. 23,758, the settling parties and Staff also point out that the PAYS program as proposed requires the utilities to mail a Customer Responsibilities form, fully disclosing the PAYS obligation, to each customer occupying a premises and taking service at a location where unaccrued PDCs

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<sup>3</sup> These forms include: a Purchase Agreement (for signature by the utility and the customer prior to installation of the PAYS measure), a Landlord Agreement (for signature by a landlord and the utility at the time of installation of a PAYS measure in a tenant's premises), a Customer Responsibilities form (outlining customer responsibilities with regard to PAYS measures, to be provided by utilities to successor PAYS customers), a Contractor Installation Agreement (for signature by the utility and the contractor installing a PAYS measure) and a New Electric Customer Disclosure form (to be provided to purchasers or lessors of property at which a PAYS measure has been installed for which an ongoing PDC obligation applies).



remain.

Similarly, the Settlement Agreement recommends that the Commission exercise its authority to permit utilities to make PAYS obligations binding on subsequent customers, to the extent that unbilled PDCs remain after the departure of the previous customer. The Settlement Agreement points out that landlords will be contractually bound to inform new tenants of this obligation, with a failure to provide this disclosure triggering a right of the tenant either to pay the PAYS charges, terminate the lease or pursue any other available remedies. According to the Settlement Agreement, the same remedies would also be available for purchasers who are not informed by their sellers of an ongoing PAYS obligation.

The utilities' initial proposal called for an evaluation of the PAYS pilot after 18 months of operation. The Settlement Agreement adopts this approach, but also provides for the filing by the NHEC and PSNH of quarterly reports to the parties and Staff with regard to program participation and expenditures. The Settlement Agreement also calls for the two utilities to meet with the parties and Staff twice yearly to review the reports and discuss the progress of the program.

In addition to the forms described above, attached to the Settlement Agreement are proposed tariff pages that would implement the pilot. Both companies' proposed tariffs make clear

that customer PDC obligations may continue beyond the termination of the PAYS pilot itself.

**B. Public Service Company of New Hampshire**

In addition to urging the Commission to approve the Settlement Agreement as proposed, PSNH also asks the Commission to approve a shareholder incentive mechanism as part of the PAYS pilot. According to the utilities' April 12, 2001 filing:

Delivery Service companies are allowed to earn an incentive on the funds used for Energy Efficiency Projects. Because PSNH wants to do all they can to make sure the PAYS Pilot Program is a success, PSNH proposes that the incentive be based on 6% of the funds loaned out in any given year. This will encourage the company to certify and provide financing for as many PAYS projects as possible. It will also encourage PSNH to keep administration costs low so that more of the funds are used for loans.

In support of this proposal, and, in particular, in support of the proposition that any shareholder incentive should be recovered at the time program funds are disbursed, PSNH pointed out at hearing that program marketing is key to its success and that the bulk of PSNH's PAYS-related effort will involve getting the PAYS funds into the community. PSNH further pointed out that less than one quarter of one percent of its receivables in any given year are written off, thus attenuating the need to peg any shareholder incentives to the repayment (as opposed to the disbursement) of PAYS funds. PSNH also notes that its proposed six percent incentive only relates to approximately one third of the overall PAYS budget, because the incentives are recovered only on loans actually made.

PSNH additionally took the position that its proposed shareholder incentive mechanism here is consistent with the approach taken by the Commission in Order No. 23,574 with regard to shareholder incentives in the energy efficiency context generally. In Order No. 23,574, the Commission accepted the shareholder incentive proposal advanced by the Energy Efficiency Working Group. As summarized in the Order, the Working Group's shareholder incentive approach was "based on the performance of the programs measured in terms of their actual-cost effectiveness and energy savings relative to the projected cost-effectiveness and energy . . . savings, respectively." Order No. 23,574, slip

op. at 6. Eschewing prior approaches based on compensating shareholders based on lost fixed-cost revenues, the Working Group recommended shareholder incentive payments of 8 percent of individual program budgets, with "[s]uperior performance" possibly rewarded with an incentive of up to 12 percent. *Id.*

PSNH indicated its non-agreement with proposals to allow the recovery of shareholder incentive payments only upon customer repayment of PAYS funds. According to PSNH, some of those repayments may not occur until 2013 and it would be inappropriate to require shareholders to wait that long.

**C. Governor's Office of Energy and Community Services**

In addition to supporting the Settlement Agreement, ECS indicated that it advocates a "middle ground" with regard to the PSNH shareholder incentive issue. This would involve permitting PSNH to recover half of its shareholder incentive at the time of loan disbursement and the remainder at repayment.

**D. Office of Consumer Advocate**

OCA also urged the Commission to approve the Settlement Agreement. With regard to the shareholder issue, OCA indicated that it could support an incentive of between 0 and 6 percent, based on a determination of what portion of the program budget PSNH had spent prudently. OCA stated that it supported a mechanism whereby PSNH recovered any such incentive payments at the time PAYS funds are paid back.

**E. Staff**

As did the other signatories, Staff urged the Commission's adoption of the Settlement Agreement. On the subject of the shareholder incentive, Staff stressed that (1) it viewed the issue as a relatively small point of controversy to be resolved in the context of an overall laudatory initiative by PSNH and the NHEC to implement a PAYS pilot, and (2) it was not the propriety or even the amount of shareholder incentive for PSNH, but only the timing of its recovery. According to Staff, because no PSNH shareholder funds are at risk (given that the PSNH aspect of the PAYS pilot is funded by funds received through the RSA 374-F:3, VI system benefits charge) and because the risk of non-repayment with regard to the customer group PSNH proposes to serve in the PAYS pilot (municipalities) is very low, the appropriate juncture for PSNH to recover its shareholder incentive is upon repayment of the PAYS funds by the customer.

Staff noted that, of seven key implementation tasks identified in the appendix to the NARUC Paper, all are the responsibility of the utility in question and all involve actions that must be taken after disbursement of PAYS funds. Therefore, according to Staff, shareholder incentives should be deferred to the post-disbursement period in order to match the recovery with the activities being incented. Noting that both ECS and the EEI witness, Mr. Cillo, had indicated support for a so-called split

incentive (i.e., with recovery divided between the disbursement and repayment of loan funds) Staff indicated that it could support such an approach. Staff noted that shareholder incentives of the sort proposed here comprise a form of performance-based ratemaking, and thus it is inappropriate to apply principles derived from traditional rate-of-return ratemaking to the issue of whether, and when, PSNH should recover a shareholder incentive in connection with PAYS.

### **III. COMMISSION ANALYSIS**

As we have already had occasion to note in this docket, the Legislature has instructed the Commission to design the restructuring of the state's electric industry so as to "reduce market barriers to investments in energy efficiency and provide incentives for appropriate demand-side management and not reduce cost-effective customer conservation." RSA 374-F:3, X; see also RSA 374-F:4, VIII (authorizing Commission "to order such charges and other service provisions and to take such other actions that are necessary to implement restructuring and that are substantially consistent with the principles established in [the Restructuring Act]"). Cognizant of this mandate, we stated in Order No. 23,574 that "[a] properly designed Pay As You Save (PAYS) program . . . could potentially unleash pent-up consumer demand for efficiency measures." Order No. 23,574, slip op. at 18. Accordingly, we directed the NHEC and PSNH, working together

if possible, to propose a PAYS pilot that would involve up to ten percent of the two utilities' combined Demand-Side Management budgets.

Having reviewed the companies' proposal, as amended and further explained by the Settlement Agreement into which the companies have entered with the other active parties in this docket and Staff, we will approve it, subject to our discussion of the shareholder incentive issue, *infra*. The PAYS pilot the NHEC and PSNH have proposed closely resembles the program described in the NARUC paper and, thus, will make New Hampshire a key laboratory in determining whether the hypotheses presented to NARUC about market transformation are valid. We commend the companies for their energetic participation in the PAYS experiment.

As recommended by the Settlement Agreement, we will explicitly approve the two aspects of the PAYS program that we indicated were within our authority in Order No. 23,758: utility authority to impose disconnection for non-payment of PAYS charges, and utility authority to require customers to assume PAYS payment obligations when beginning service at premises where permanent PAYS measures have been installed and unaccrued PAYS payments remain. We are satisfied that the proposal contained in the Settlement Agreement includes appropriate disclosure safeguards, and we agree with those parties who point out that

these disclosures are key elements. They are key not only because they are consistent with the way utilities must treat their customers generally, but also because inadequate disclosures would undermine the public's confidence and interest in the PAYS program.

We note, with approval, that the program reflected in the companies' proposal and the Settlement Agreement contemplates that landlords and owners will undertake certain legally binding notification obligations concerning tenants and purchasers of realty at which permanent PAYS measures are installed. It is appropriate for us to require the utilities to impose these obligations as a critical part of the PAYS pilot program design. We caution, however, that we lack the jurisdiction to enforce landlord-tenant disputes, or disputes that arise between purchasers and sellers of real estate, that do not arise under our enabling statutes even though they may concern the adequacy of PAYS notifications.



The settling parties and Staff have appropriately placed considerable emphasis on program evaluation. Obviously, the objective of this pilot program is to establish a working basis for making PAYS available throughout New Hampshire. The best means to assure the achievement of this objective is through appropriate and thorough evaluation - not simply at the conclusion of the pilot, but at all stages, as envisioned by the Settlement Agreement. We will expect the utilities to honor their commitments in this regard.

On the question of PSNH's shareholder incentive, we return to the principles articulated in Order No. 23,574. There, we approved an incentive mechanism that we intended to apply generally to energy efficiency programs. We described the purpose of this formula as giving the utilities an "opportunity to provide, at least for now, utility-sponsored programs that would either not be provided by the market or programs that will help the transition to non-subsidized energy efficiency programs." Order No. 23,574, slip op. at 20. We stressed that

[t]he utility must demonstrate that the program for which it seeks incentive payments offers customers extraordinary benefits and will enhance the move toward either non-subsidized [Demand-Side Management] programs or market-based energy efficiency. These benefits should be over and above what would accrue to ratepayers with prudent utility management.

Id.

While there may be some argument whether PSNH has made

such a showing here, we find that the PAYS pilot is a laudable initiative, reflecting both an innovative approach to energy efficiency and a high level of cooperation among two of the state's utilities and other interested parties.

Nonetheless, we also note PSNH's response to the Commission's record request at hearing, which confirmed that PSNH ratepayers are already rewarding the relevant PSNH employees for any exemplary work on the PAYS program through employee incentive payments that PSNH recovers in base rates. Thus, in a sense PAYS customers are being asked to provide two incentive payments to PSNH - one to shareholders and one to employees. There is a legitimate question here of whether such payments are equitable.

Moreover, we note that the Settlement Agreement pending before us purports to resolve "all outstanding issues in this proceeding, except for the method of collecting the shareholder incentive proposed by PSNH." Settlement Agreement at 1. One of the "Basic Understandings" of the Settlement Agreement is that PSNH and the NHEC will conduct the PAYS pilot described in their April 12, 2001 filing, *see id.* at 2, and the April 12 filing, in turn, recites that PSNH will recover a 6 percent incentive payment on PAYS loans. The Settlement Agreement is "expressly conditioned upon the Commission's acceptance of all its provisions without change or condition," barring which the Agreement would become "null and void and without effect." *Id.*

at 5. In these circumstances, our understanding is that we may take any action we deem proper as to the method of recovery by PSNH of a shareholder incentive, because that issue is expressly reserved as a contested one, but a ruling that denies or reduces the amount of the shareholder incentive would void the Settlement Agreement.

In view of the evidence adduced at hearing, we will adopt Staff's position and rule that PSNH shall recover its proposed shareholder incentive on PAYS funds as they are duly paid back to the utility. We agree with Staff that this recovery mechanism places the incentive where it belongs, across the entire course of the PAYS program, so that PSNH is encouraged to be vigilant in both seeking PAYS participants and in assuring their compliance with the program until the PAYS obligation is satisfied. Although we are permitting PSNH to recover its proposed incentive, we are concerned about the double recovery issue described above. To address this concern we direct that, in the event PSNH decides to financially reward its employees for their work on the PAYS program, any such rewards or bonuses paid above and beyond the employees' annual salaries shall be funded by the incentive payment and not by base rate revenues.

Since the program we approve today is of a pilot nature, it should be understood that all program components - including the existence, extent and timing of any shareholder

incentive - are subject to ongoing evaluation. We reserve the right at the conclusion of the pilot to implement PAYS programs that differ in material respects from the initial effort we endorse now.

#### **IV. CONCLUSION**

In conclusion, we again express our appreciation to the parties, particularly the NHEC and PSNH, for their commitment to the PAYS pilot. The program has the potential to become a key aspect of Demand-Side Management efforts in New Hampshire's restructured electric industry. We look forward to the utilities' vigilant efforts to make this pilot program's potential a reality.

**Based upon the foregoing, it is hereby**

**ORDERED,** that the Settlement Agreement entered into by Public Service Company of New Hampshire, New Hampshire Electric Cooperative, Inc., the Governor's Office of Energy and Community Services, the Office of Consumer Advocate and the Staff of the Commission in this docket is APPROVED; and it is

**FURTHER ORDERED,** that the PSNH shareholder incentive mechanism described in the April 12, 2001 filing of Public Service Company of New Hampshire and New Hampshire Electric Cooperative, Inc. is approved except insofar as PSNH may recover incentive payments only upon repayment of program funds by customers, as more fully set forth above.

By order of the Public Utilities Commission of New  
Hampshire this twenty-ninth day of November, 2001.

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Thomas B. Getz  
Chairman

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Susan S. Geiger  
Commissioner

Attested by:

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Claire D. DiCicco  
Assistant Secretary