State of New Hampshire Supreme Court

No. 2000-637

2000 TERM

DECEMBER SESSION

APPEAL OF CAMPAIGN FOR RATEPAYERS RIGHTS (PUBLIC UTILITIES COMMISSION)

APPEAL BY PETITION PURSUANT TO RSA 541 AND SUPREME COURT RULE 10

REPLY BRIEF OF APPELLANT, CAMPAIGN FOR RATEPAYERS RIGHTS

By: Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

Robert A. Backus, Esq.
Backus, Meyer, Solomon, Rood & Branch
116 Lowell St.
Manchester, NH 03104
(603) 668-7272

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

I. CRR Appealed the Correct Order

The State and PSNH are correct that the PUC issued an order on September 8, 2000 which bears on the matters in this appeal. The order, however, was in response (in part) to CRR's motion for rehearing. The order is entitled: "Order Addressing Motions for Clarification and Rehearing, Amended Settlement Agreement and Financing Issues." As it pertains to CRR's takings and special contracts claims, the order was merely a denial of CRR's motion for rehearing. It does not require a further motion for rehearing before the matters contained in it can be appealed. CRR appealed issues in the Commission's April 19, 2000 order, which were unamended by the September 8 order. CRR appealed the correct order.[1]

II. CRR's Non-Response to PUC's Letter Does Not Default Its Appeal

The State and PSNH maintain that CRR somehow defaulted its appeal by not responding to a June 12, 2000 letter from Gary Epler to the parties in the PUC docket. First, CRR notes that a letter from the PUC does not supercede any state statute, and that the PUC cannot by mere letter create procedural requirements that do not otherwise exist.

At the time of the letter (and still), CRR believed that neither the revised settlement agreement nor the new statutory provisions, which are the concern of the letter, had any impact

---

[1]A recent PUC order belies the appellees' claim that the April 19 order was not the correct order from which to appeal. On December 1, 2000 the PUC issued a "Notice of Opportunity to Comment on the Divestiture of Public Service Company of New Hampshire Electric Generation Facilities" (DE 00-272). In the notice the PUC wrote: "The Commission approved the PSNH restructuring Settlement Agreement, with conditions, by Order No. 23,443 (April 19, 2000) in Docket No. DE 99-099 and a conformed Settlement Agreement was filed June 23, 2000. On September 8, 2000, the Commission issued Order No. 23,549, which addressed motions for clarification and rehearing on the amended Settlement Agreement." *Appx. to Reply Br.* at 19.

on its then-pending motion for rehearing.

Moreover, on CRR's copy of the letter appear CRR's attorney's contemporaneous notes of a conversation with Gary Epler, PUC General Counsel and author of the letter. They say (with abbreviations expanded):

> "I spoke to Gary Epler on 7/12/00. He said no need to file a letter as this letter directs – he will note our phone call and my representation that CRR and others plan to continue to press our motion for rehearing."

LETTER FROM GARY EPLER, PUC GENERAL COUNSEL TO ALL PARTIES IN DOCKET NO. DE 99-099 (June 12, 2000), *Appx. to Reply Br.* at 17 (with counsel's markings).

III. Stranded Costs Are a State Debt

The State appears to agree with CRR that the Rate Agreement "was negotiated with PSNH and its parent, Northeast Utilities, by the Governor and the Attorney General, and those two Constitutional Officers signed the Agreement on behalf of the State." *State's Br.* at 25. The State does not contend that the agreement was undertaken just on behalf of ratepayers living in PSNH territory. PSNH bases its claim for stranded costs on that agreement, from its general "duty to serve," and from a variety of other state-imposed obligations. Moreover, in the months before the settlement, the State's counsel in a variety of forums repeatedly expressed a concern that a non-consensual restructuring would result in claims by PSNH against the State for damages. It is CRR's position that, if any money is owed to PSNH, it is owed by the State. No party has provided any cogent argument that PSNH's costs that are now stranded are owed by any party other than the State of New Hampshire.

IV. There Is No Legislative Authority to Set Rates When Electric Generation Has Been Explicitly De-Monopolized

PSNH and the State place great weight on the fact that the Legislature has the authority to regulate electric rates. CRR does not dispute that.

This authority exists, however, only because the generation of electricity has been, up to now, regarded as a monopoly.

The New Hampshire Constitution makes plain that there is a constitutional right to free markets. N.H. CONST., pt. II, art. 83 ("Free and fair competition in the trades and industries is an inherent and essential right of the people and should be protected against all monopolies and conspiracies which tend to hinder or destroy it."). Although this court has not ruled on what sort of state interest is compelling enough to overcome this right, it has suggested that a mere "public interest" standard is not sufficient. *Appeal of Omni Communications, Inc.*, 122 N.H. 860 (1982). *Omni* is not mentioned in the appellees' briefs.

PSNH argues that *Chronicle & Gazette Pub. Co. v. Attorney General*, 94 N.H. 148 (1946), stands for the proposition that the government has the authority to regulate prices. *Chronicle* involved a statute that mandated newspapers to sell political advertising at the same price as commercial advertising. The case is easily distinguished. First, the statute there did not regulate how much the commodity cost consumers – it merely said that prices must be non-discriminatory. Here, the government has set the price. Second, it is likely that the Legislature in 1945 regarded newspaper advertising for politicians largely as a monopoly. The case arose before the internet and television, and when political advertising on radio was in its infancy. Third, the rationale for the decision was the state's interest in fair elections. Given *Buckley v.*

Valeo, 424 U.S. 1 (1976), that rationale is not sufficient.

The State alleges that CRR "overlooks a whole host of non-monopolistic industries for whom rates are set in New Hampshire." *State's Br.* at 29. Those mentioned by the state are listed here and easily distinguished:

> • RSA 375-A regulates household goods carriers. The statute does not set rates nor give any agency the authority to set rates. At most it merely requires that carriers submit a tariff to the Department of Safety and that they adhere to the tariff in all their business dealings.
>
> • RSA 375-B regulates vehicles carrying property for hire. It is essentially identical to the household goods statute. The statute does not set rates nor give any agency the authority to do so. It merely requires that the carriers submit a tariff, and to adhere to it.
>
> • RSA 372 regulates railroads. Railroads, with their tracks and rights-of-ways are, of course, the traditional example of a monopoly.

PSNH also points to this court's opinion in *Opinion of the Justices*, 88 N.H. 497 (1937). There, this court was asked whether a statute giving an agency authority to set the price of milk violated the constitution. The court's reply was:

> "If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public."

Opinion, 88 N.H. at 499. These are the sorts of questions one might ask in determining whether a monopoly exists and thus whether there are conditions sufficient to engage in price-setting. If this is the test that must be met before price regulation is constitutional, neither the PUC nor the Legislature has asked, nor answered, the questions. It is apparent that on the present record there

is no basis for this court to do so. Moreover, the standard is not sufficient. Because the right to free markets is a *constitutional* right, the State must show a compelling interest in setting prices.

Accordingly, the appellees have not provided any argument or authority to support their position that the Legislature's authority to set rates exists outside of a monopoly or other compelling economic condition. CRR's maintains that there is no legislative authority to set rates when electricity generation has been explicitly de-monopolized, and that the SCRC is therefore not a product of rate-making.

V. Takings, Taxation, and the Police Power

In New Hampshire, the State's takings power, taxation power, and police power are not identical nor co-terminus. While they certainly overlap, they are governed by separate constitutional provisions, and should not be confused. In their various arguments, the appellees conflate these three powers.

VI. It Is Not Reasonable to Suggest That Customers Can Easily Stop Buying Electricity

Both PSNH and the State suggest that because customers can leave the system and can chose to not buy electricity, they therefore suffer no compulsory taking of their property. In theory this is true. But it is unreasonable to suggest that a small grocery store, for example, which relies on refrigeration for its beer and ice cream has the means and the money, if alternative equipment is available at all, to somehow stop buying electricity. It is equally unreasonable to expect the average homeowner to invest in solar arrays, 12-volt appliances, and back-up power to go off the grid. Some people, who rely on electric medical devices, simply cannot. It is hoped, with the advances in fuel cell and other technology, that this can happen, but unfortunately it is not a current reality for most people. Electricity is a necessity of modern life: even an oil- or gas-fired furnace relies on electricity for its spark, blower, and controls.

VII. CRR Stands by All its Factual Assertions

In various places, the State and PSNH accuse CRR of incorrect statements of fact. CRR stands by all its factual assertions, and responds to several claims of inaccuracy.

PSNH claims that its stranded costs are $900 million, not the approximately $2 billion asserted by CRR. *PSNH Br.* at 10. The PUC's order approving the settlement included an executive summary. On its first page the PUC wrote that "PSNH's recoverable stranded costs [are] approximately $2.0 billion." *Appx. to Pet. for Appeal* at 12.

PSNH claims there are only 44 special contracts, not the 75 referenced in CRR's brief. The CRR total comes from the listing of special contracts found in a document supplied by the PUC as part of the record in *Appeal of Campaign for Ratepayers Rights*, 142 N.H. 929 (1998) (*Appx. to Br. of the Office of Consumer Advocate* at 56-59). CRR concedes it is possible that since the 1996 appeal, certain special contracts have expired, but it has no knowledge of this.

The State says that CRR is "simply wrong" in its observation that the SCRC in this case is higher than others, and cites figures for Boston Edison and Commonwealth Electric, both in Massachusetts. *State's Brief* at 23. It is true that Boston Edison (now NSTAR) originally had a transition charge, comparable to the SCRC, of 3.51 cents, and that Commonwealth had a charge of 4.26 cents, as the state reports. These charges, however, were promptly reduced by crediting the gain on the sale of the generating assets and sale of power contracts by those companies. Today, according to figures filed with the Massachusetts Department of Telecommunications and Energy, the charges for NSTAR are 1.89 cents, dropping to 1.3 cents in 2001, and the charges for Commonwealth are 2.5 for 2000 and 3.039 for 2001, far below the stranded cost charge to be imposed on residential customers of PSNH. Moreover, the SCRC charges for New Hampshire

customers will not drop upon the sale of PSNH's assets, but will continue until the so-called recovery end date, which may extend through September, 2007, or a few months earlier if the asset sale is very successful. Thus, CRR's concern about the SCRC is not misplaced as the State implies.

The State claims that CRR made an "egregious misstatement" in saying that consumers have a new irrevocable obligation. *State's Br.* at 23. The fact is that the obligation is new. "Rate reduction bonds" did not exist before, and they do now.

VIII. Special Contract Rates Harm Other Ratepayers

Both the State and PSNH contend that RSA 369-B mandates the treatment of special contracts as approved by the PUC.

It is true that the statute contains detailed directives in order for securitization to be approved. It does not, however, mandate disproportionate treatment of special contract customers, to the detriment of other customers.

Notably, the PUC does not suggest in its September 8 order that granting discounted stranded cost charges to special contract customers was mandated by the Legislature. Thus, it is the PUC's policy decision, made in its April 19 order, that it would "not adjust the Company's revenue requirement" during the initial transition service period. Although the Legislature approved the negotiated distribution rate of 2.8 cents for all customers and stated that special contract customers' rates should not be changed, it did not prevent the PUC from adjusting PSNH's revenue requirement to account for the discounted rates.

The State may contend that the effect of the PUC's policy is to prevent the recovery of lost revenues from the discounted rates, but the fact is that because of the special contracts, all

other customers are going to be asked to contribute disproportionately to PSNH's stranded cost recovery. The PUC had means to prevent this.

IX. CRR Might Not Sign the Granite State Electric Settlement Today

The State notes it is "extremely ironic" that CRR signed-on to a settlement with Granite State Electric (GSE). *State's Br.* at 2. In 1998 when CRR signed-on to that deal, it believed competition under the terms of the GSE settlement could work. But it hasn't. Only a handful of customers in GSE's territory have chosen a new supplier, and rate-reductions in the deal have been eviscerated by recent price increases. CRR might not sign-on to that deal if it were presented today. Moreover, the GSE settlement did not include securitization, nor a 12-year bond obligation.

X. Recent Authority: *Manufactured Housing Communities of Washington v. Washington*

In a recent decision of the Washington Supreme Court, that state's mobile home owners statute was found unconstitutional on takings grounds. *Manufactured Housing Communities of Washington v. State of Washington*, No. 66831-1 (Wash. Nov. 7, 2000), *Appx. to Reply Br.* at 1, <http://www.cdlaw.com/cases/2ds/11_00/66831-1.htm>. It is a lengthy opinion, and fully states the basis for the decision.

The Washington statute provided that a qualified group of mobile home park tenants may organize themselves into an association, and thus gain a right-of-first-refusal to buy the park upon its being put up for sale. The park owners sued claiming they have a property right to sell to whomever they please, and that giving the right-of-first-refusal to a tenants' association is a taking. The court agreed. While the decision is based on Washington's constitution, the takings

principles apply with equal vigor here.

It appears that the court's most difficult problem was determining that a right-of-first-refusal was a property interest. The court then, while admitting the statute was for a good cause, took the state to task:

> The State, apparently assuming "public purpose" and "public use" are always the same thing under existing Washington law, argues that preserving a declining housing resource so greatly benefits the public that [the statute] plainly converts the private use to a public use. It does not.

Manufactured Housing Communities v. Washington, slip op. at 15-16, *Appx. to Reply Br. at* 1, 4. Because there was property taken, it was not for a public use, and there was no compensation provided, the court thus decided:

> the well-intentioned effort of the Legislature to encourage the conversion of mobile home parks to resident ownership conflicts with Washington State's constitutional prohibition against taking private property solely for a private use.

Manufactured Housing Communities v. Washington, slip op. at 17-18, *Appx. to Reply Br. at* 1, 5.

The Washington Supreme Court's decision is commended to the attention of the court, and a copy of the slip opinion is in the appendix to this reply brief. CRR would also like to bring to the court's attention a useful book on takings. *Richard A. Epstein*, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

Respectfully submitted,

Campaign for Ratepayers Rights, and
N.H. Public Interest Research Group,
By their Attorney,

Law Office of Joshua L. Gordon

Dated: December 6, 2000

Joshua L. Gordon, Esq.
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

CERTIFICATION

I hereby certify that copies of the foregoing will be forwarded to all parties.

Dated: December 6, 2000

Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

APPENDIX (filed separately)