State of New Hampshire Supreme Court

NO. 96-268

1997 TERM

OCTOBER SESSION

APPEAL OF CAMPAIGN FOR RATEPAYERS RIGHTS

(PUBLIC UTILITIES COMMISSION)

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

REPLY BRIEF BY APPELLANT, CAMPAIGN FOR RATEPAYERS RIGHTS

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ARGUMENT

I. SB 533 Does Not Make CRR's case Moot

In its brief, PSNH alleges that SB 533 renders CRR's case moot. *PSNH Brief* at 24. In fact, SB 533 has little effect on this case.

A. SB 533 Does Not Apply to The Special Contracts at Issue

The special contracts at issue in this case pre-date SB 533. The contracts were approved by the PUC in January 1996, while SB 533 did not become effective until June 3, 1996. Thus, even if SB 533 may be construed as allowing special contracts, notwithstanding CRR's arguments to the contrary, *infra*, this Court must apply the law as it existed at the time of these special contracts. *R. Zoppo Co. v. City of Dover*, 124 N.H. 666 (1984) (contract interpretation focuses on intent of parties at time of agreement); *Smith v. Smith*, 82 N.H. 399 (1926) (although usury laws had been repealed in 1854, court in 1926 interpreted contract entered into before repeal with reference to repealed laws); *Feakes v. Bozyczko*, 369 N.E.2d 978 (Mass. 1977) (contract deemed to include law as it existed at time of agreement, but not subsequent change in law). Accordingly, SB 533 does not apply to this case.

B. SB 533 Assumes the Existence, but Expresses no Approval, of Special Contracts

While the legislation assumes the existence of special contracts, it expresses neither approval nor disapproval of their existence. The legislation is concerned mainly with the establishment of tariffs to foster economic development and to help retain business in the state. RSA 378:11-a; *see*, *Appendix to PSNH Brief*, at 33-35. The prior-existing special contracts provision, RSA 378:18, was untouched, except to add a clause at its end exempting telephone

utilities from some procedural requirements.[1]

A new section was added, which limits somewhat the ability of utilities which have entered special contracts to recover from other customers any losses associated with the contracts. RSA 378:18-a, I. Further, by requiring specific findings by the PUC, the act circumscribes somewhat the availability of additional contracts. RSA 378:18-a, II-IV.

If anything, the new section expresses a scepticism that utility special contracts are beneficial to the public. In its "Findings" section, RSA 186:1, the legislature recognized that special contracts "may be necessary in some circumstances."[2] There is no dispute that special contracts currently exist, having been entered into by every major utility in the state. That the legislature assumed their existence, therefore, is unsurprising. That assumption does not affect this case.

Moreover, even if the legislature intended to ratify existing special contracts, it cannot constitutionally do so. *See infra.*

C. SB 533 Does Not Apply to PSNH

Even if SB 533 precludes suits attacking special contracts as PSNH contends, the statute does not effect contracts entered into by PSNH. PSNH's rates are currently provided for and

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[1]Below are the provisions of RSA 378:18 before and after its amendment, with the original text in regular type and the added text in italics.

> "Nothing herein shall prevent a public utility from making a contract for service at rates other than those fixed by its schedules of general application, if special circumstances exist which render such departure from the general schedules just and consistent with the public interest, and*, except as provided in RSA 378:18-b,* the [PUC] shall by order allow such contract to take effect."

[2]In its initial brief, CRR cited with approval the special contract PSNH negotiated with the Crotched Mountain Rehabilitation Center. *CRR Brief* at 18-19.

guided by the Rate Agreement, which the legislature cannot constitutionally alter.

1. The Rate Agreement Prohibits Rate Design

The rate agreement prohibits rate design without a proceeding. *Rate Agreement* ¶ 6, *Appendix to CRR's Brief* at 16. The enabling legislation prohibits that proceeding from ever taking place. RSA 362-C:8. Since shortly after the rate agreement was made effective in 1990, there has been no rate design proceeding. However, by granting industrial users a different price for their electricity, the PUC has effectively allowed rate design with respect to those users, in violation of the rate agreement and the legislation.

2. The Rate Agreement Cannot Be Changed by Legislation Alone

Even if the rate agreement contract allows changing of a customer's rates by methods other than those provided in it, the enabling legislation forbids such action, as is amply argued in CRR's opening brief. As was there pointed out in detail, the rate agreement was the product of negotiation by many parties, and to become effective needed the approval of the Bankruptcy Court, the PUC, the SEC, the FERC, and the General Court. Thus it cannot be changed by the Legislature alone without the consent of those other bodies.

3. The Rate Agreement Cannot Be Constitutionally Altered

Moreover, the rate agreement and its enabling legislation cannot be changed by the legislature because doing so effects vested rights protected by the United States and New Hampshire Constitutions. U.S. Const. art. I, § 10 (contracts clause); N.H. Const. Pt. I, art. 23 (retrospective application of laws article).

A third party beneficiary, such as CRR, can raise these constitutional matters. *Appeal of Pennichuck Water Works*, 120 N.H. 562, 566 (1980) (rate tariff is in the nature of a contract, and ratepayers entitled to rely, for purposes of retrospective application of laws clause and contracts

clause, upon rates set forth in utility's tariff, even when parties tacitly agree to an alteration of the tariff); *Spaulding v. Town of Andover*, 54 N.H. 38 (1873) (third party beneficiary may maintain an action regarding legislative impairment of contract even though parties tacitly agree to the alteration, with suit resulting in court's finding that the contract was unconstitutionally impaired); *Tamposi Assocs., Inc. v. Star Mkt. Co.*, 119 N.H. 630 (1979) (third party may claim under contract if intent of parties); *Hrushka v. State, Dep't of Pub. Works & Highways*, 117 N.H. 1022 (1977) (same).

The legislature cannot impair vested contractual rights. *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819); *see also Trustees of Dartmouth College v. Woodward*, 1 N.H. 111 (1817) (state action impairing contract to protect public rights is violation of contracts clause) (reversed on other grounds, 17 U.S. 518); *Spaulding v. Town of Andover*, 54 N.H. 38 (1873).

The New Hampshire constitution also protects against the impairment of vested rights by the enactment of retrospective laws.

> "Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses."

N.H. Const. Pt. 1, art. 23; *see, e.g.*, *Socha v. City of Manchester*, 126 N.H. 289 (1985). The retrospective laws clause applies "where a law impairs a contract, or where a law abrogates an earlier statute that is itself a contract." *Opinion of the Justices (Furlough)*, 135 N.H. 625, 630 (1992). New Hampshire's retrospective laws clause duplicates the federal constitution's prohibition on impairment of contracts. *Id.* at 630. The clause applies to utility rate tariffs. *Pennichuck Water Works*, 120 N.H. at 566.

To the extent that SB 533 works a change to the rate agreement, or to its enabling legislation, the change is invalid. As the rate agreement and its enabling legislation relate to the same matter, have a common purpose, and their scope and aim are connected, they are in *pari materia* with each other and must be construed together for the purposes of analyzing impairment of contract and the retrospective application of laws. *Dodge v. Board of Educ.,* 302 U.S. 74, 78 (1937) (when legislation "provides for the execution of a written contract on behalf of the state the case for a [contracts clause] obligation binding upon the state is clear.")

While most cases concerning PSNH since the 1970s, and certainly since its bankruptcy, are unique in American jurisprudence, there are cases addressing the matter here. The United States Supreme Court, in *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n.14 (1977), provides guidance.

In the 1920s the states of New York and New Jersey entered into a covenant concerning commercial railroads in their shared port, and later providing that the Port Authority they created could issue bonds. After the bankruptcy and takeover of a transit rail company by the Port Authority, and due to feared energy shortages, in the 1970s the states repealed that part of the covenant which prohibited use of funds for mass transit. Bond holders, calculating that human traffic is less profitable than commerce, sued contending that New Jersey's repealer legislation worked an impairment of contract.

The Supreme Court first found that the legislation enacting the covenant was in fact part of the covenant. The court wrote:

> "In general, a statute is itself treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State. In addition, statutes governing the interpretation and

> enforcement of contracts may be regarded as forming part of the obligation of contracts made under their aegis."

Trust Co., 431 U.S. at 17, n.14 (citations omitted). The Court went on to hold that because the obligation was financial, the enactment was an unconstitutional impairment of contract, and not a mere exercise of the state's police power to act in the public interest.

CRR and its members have vested rights in the rate agreement and its associated legislation. PSNH has also claimed it has vested rights in the rate agreement, and, in other fora, has alleged the state has impaired them by legislation restructuring the electricity industry. *See e.g.*, Amended Complaint for Preliminary and Permanent Injunctive Relief and for Declaratory Judgment, *PSNH v. Douglas L. Patch, et al.*, (D. N.H. No. 97-97-JD; D. R.I. No. CA97-121L) (filed March 18, 1997). SB 533, which PSNH has raised as a defense to this case, impairs obligations under the rate agreement because it changes its enabling legislation, which must be construed as part of the rate agreement. Accordingly, SB 533 is invalid insofar as it purports to ratify existing special contracts PSNH has entered with its various industrial customers.

D. CRR did not Mention SB 533 in its Brief

PSNH correctly points out the CRR did not mention SB 533 in its brief. *PSNH Brief* at 27. However, this was not out of an attempt to mislead the court, as PSNH alleges, *PSNH Brief* at 26, but because CRR considers that SB 533 may be a defense (albeit weak) to its claims. For the reasons set forth in this Reply Brief, CRR determined that it was unlikely that PSNH would raise the defense.

The Rules of Professional conduct make it unethical conduct for an attorney to knowingly fail to disclose to the tribunal legal authority "directly adverse" to a party's position and "not

disclosed by opposing counsel." *N.H. R. Prof. Cond.* 3.3(a)(2). CRR does not consider SB 533 directly adverse to its position, and has in fact argued that it has little bearing on this case. Further, as SB 533 is a defense, it was not unethical or misleading for CRR to wait and see whether PSNH would raise it and then address the issue, as here, in a reply brief. While CRR's attorney is aware that he may have an obligation to apprize this Court of the existence of SB 533 had other parties not done so, CRR had no duty in its opening brief to anticipate PSNH's defense.

E. CRR's Legislative Testimony on SB 533

PSNH charges that CRR's attorney was misleading because CRR testified to the legislature with regard to SB 533. *PSNH Brief* at 27. It is important to note that Attorney Gordon was testifying in favor of an amendment that narrowly prohibited "recover[y] from other ratepayers the difference between the regular tariff rate and the special contract rate." At that time, the amendment did not contain much of the language allegedly detrimental to CRR's position in this case. In its appendix, PSNH has reprinted the amendment and Attorney Gordon's testimony on it. *Appendix to PSNH Brief* at 450 (the amendment); *Appendix to PSNH Brief* at 436-37 (testimony). A review of the testimony reveals that CRR approved of the amendment on the same grounds stated in this Court.

II. Laches Does Not Apply

Both PSNH and the Attorney General allege that CRR's claim is barred by laches. *PSNH Brief* at 28; *AG Brief* at 30. Laches are alleged because since 1990 the PUC has approved more than 60 special contracts, and granting the remedy CRR requests would result in hardship for the parties to the contracts.

The laches argument is procedurally absurd. The PUC opens a separate docket for each special contract, and the order in each can be appealed or not appealed as a party (or other person) wishes. CRR is contesting the legality of only five special contracts.

One cannot dispute, however, that a declaration that these five contracts are unlawful would impinge upon the lawfulness of others. However, to deny relief on a meritorious claim because other similar illegalities are occurring elsewhere would effectively turn the legal system upside-down. Widespread illegality calls for widespread remedy, not abstention.

When the first special contracts were approved by the PUC several years ago, it was assumed by most people involved in utility matters that there were going to be a few special contracts to address special and specific issues faced by a few industrial facilities. It was not until a few years ago that, due to the large number of contracts approved and the cumulative amount of lost revenue they involved, it became clear to CRR that PSNH and the PUC regarded special contracts as a major way to prevent competition and that CRR's members faced significant potential harm from them. Special contracts now account for a whopping one-third of PSNH's industrial load. When this trend became clear, CRR acted quickly to protect its members' interests.

Even if CRR waited a long time before asserting its claims, that does not make the conduct complained of any more lawful. To the extent that the government is involved in unlawful action, one cannot blame the hardship in fixing it on the on the person who points it out. This would be like the southern states claiming in 1954 that the time for filing *Brown v. Board of Education* had gone by because the conduct it attacked had been going on for 100 years and undoing it would prejudice those who had relied on the illegal racial discrimination.

III. CRR Has Not Engaged in Forum Shopping

In its brief, PSNH charges CRR with forum shopping. Because it is not true, CRR believes PSNH must misunderstand the proceedings leading up to this case. On or about August 18. 1995, CRR filed with the Public Utilities Commission a Petition for Declaratory Ruling on whether special contracts are barred by the Rate Agreement statute. Several months passed with no Commission ruling. PSNH alleges that there was a "CRR request" for the Commission to delay consideration of its Petition. CRR knows of no such request, and stated so under oath before the Superior Court. Because the PUC had taken no action, on November 1, 1995, CRR filed a similar Petition in the Merrimack County Superior Court. CRR simultaneously filed a Demand for Voluntary Nonsuit at the PUC. The contracts then moved forward in the PUC with CRR's participation, and it became clear that the issues would be resolved to finality by the PUC. By the consent of the parties, the Superior Court litigation was delayed and eventually dismissed when this Court accepted the PUC's order for review.

PSNH was not a party to the Superior Court action and its attempt to characterize CRR's procedural decisions as forum shopping are a result of an apparent misunderstanding. CRR did no forum shopping. Rather, it attempted Superior Court action only in the face of an apparently stagnant PUC.

IV. Attorney General is an Amicus Curiae

The brief of the Attorney General is entitled "BRIEF FOR THE PUBLIC UTILITIES COMMISSION." The Attorney General was not a party to the case below. The Public Utilities Commission is the administrative agency which issued the order appealed from, and also is not a party to the case. The Attorney General appears in this Court merely as an *Amicus Curiae*

pursuant to Supreme Court Rule 30, and CRR assumes that the erroneous titling of the Attorney General's brief was a clerical mistake. Nonetheless, to ensure that all parties and the Court are aware of the Attorney General's role, CRR points out the error.

V. Further Authority on Issue Argued in CRR's Brief

In its brief, CRR argued that the word "rate," which appears in various statutes, has a consistent meaning. *CRR Brief* at 16. Further authority supporting this proposition has come to CRR's attention. In *In re Thomas M.*, 141 N.H. 55 (1996), this Court was asked to hold that the word "court" could mean two different things. This Court wrote:

> "It seems implausible that the legislature would use the word 'court' twice in one sentence and assign a different meaning to each use."

Id. at 60.

CONCLUSION

Based on the foregoing, CRR requests that this Court find that SB 533 does not preclude this appeal.

Respectfully submitted,
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Dated: August 8, 2000

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CERTIFICATION

I hereby certify that on October 2, 1997, a copy of the foregoing will be forwarded to Gerald Eaton, Public Service Company of New Hampshire, 1000 Elm St., Box 330, Manchester, NH 03105; J. Denny Houston, Textron Automotive Interiors, Industrial Park, PO Box 1504, Dover, NH 03821; Public Utilities Commission, 8 Old Suncook Rd., Concord, NH 03301; Office of Consumer Advocate, 8 Old Suncook Rd., Concord, NH 03301; Wynn Arnold, Office of the Attorney General, 33 Capital St., Concord, NH 03301; Chuck Douglas, Douglas & Douglas, Christian Mutual Bldg., 6 Loudon Rd., Concord, NH 03301

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