State of New Hampshire
before the
Public Utilities Commission

IN RE:

PSNH PROPOSED

RESTRUCTURING SETTLEMENT

Docket No. DE 99-099

LAW OFFICE OF JOSHUA L. GORDON, 26 SOUTH MAIN ST. #175, CONCORD, NH

MOTION FOR REHEARING

NOW COMES Campaign for Ratepayers Rights (CRR), Granite State Taxpayers, Inc., THINK-NH, and New Hampshire Public Interest Research Group, Inc. (NHPIRG), by and through their attorney, Joshua L. Gordon, and respectfully request that it be granted a rehearing pursuant to RSA 541:3 of matters contained within the Public Utilities Commission (PUC) Order No. 23,443, and further that the order be altered to conform with the proper resolution of the matters contained in this motion.

As grounds it is stated:

1. On April 19, 2000, the PUC issued its order No. 23,443 approving with conditions the restructuring settlement between PSNH and the State.

2. CRR, Granite State Taxpayers, and THINK-NH are parties to this proceeding. NHPIRG and its members are directly affected by the Commission's order. RSA 541:3. The matters determined in the proceeding and covered or included in the Commission's order work a direct economic injury to ratepayers, to the named organizations, and to their members. *Appeal*

of Campaign for Ratepayers Rights, 142 N.H. 629 (1998).

I. The SCRC Is Unconstitutional Because It Is Not For A Public Purpose

3. The New Hampshire and federal constitutions prohibit taking private property without payment for it. N.H. CONST., pt. I, art. 2; N.H. CONST., pt. I, art. 12; U.S. CONST., amd. 5; U.S. CONST., amd. 14. When there is a taking without payment, it violates constitutional due process also contained in the provisions cited. *Eyers Wollen Co. v. Gilsum*, 84 N.H. 1 (1929); *Missouri Pac. Ry v. Nebraska*, 164 U.S. 403, 417 (1896) ("The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the 14th Article of Amendment of the Constitution of the United States."). Unjustified rates are a taking of consumers' property. John N. Drobak, *From Turnpike to Nuclear Power: The Constitutional Limits on Utility Rate Regulation*, 65 B.U.L. L.REV. 65 (1985).

4. The settlement agreement contemplates the "stranded cost recovery charge" (SCRC), which is a surcharge that will added to bills of consumers who are geographically located in areas that will have formerly comprised the territory in which PSNH had an obligation to serve with electric service. The SCRC is intended to pay for PSNH *generation* assets. Upon the date electric competition is allowed in New Hampshire ("C-day"), consumers will be able to chose their generation supplier. As of that date, the Legislature has declared that a generation monopoly is no longer in the public interest. RSA 374-F:1; RSA 374-F:3, II & III.

A. Secondary Effects Are Not Public Purposes

5. To be a constitutional taking, it must be for a public purpose. Our constitution

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requires that takings be for "public uses." N.H. CONST., pt. I, art. 12. It also prohibits takings for private purposes. N.H. CONST., pt. I, art. 10 ("Government being instituted for the common benefit, protection, and security, of the whole community, and not for the private interest or emolument of any one man, family, or class of men."). The federal constitution imposes similar requirements.

6. The constitution allows public money to be given to private parties, but only if the purposes are public. Secondary benefits, such as the economic well-being of the community, does not transform a private benefit into a public purpose. In *Eyers Wollen Co. v. Gilsum*, 84 N.H. 1 (1929), for example, the town of Gilsum proposed a tax benefit to build a mill. The New Hampshire Supreme Court held that "[a]iding a private manufacturing corporation is not a public purpose." *Eyers*, 84 N.H. at 16. The Court wrote:

> "The nature of the business undertaken is in no sense public. It is a private undertaking for private business and profit. The use of it to the public is secondary to that, and tributary to that; the benefit to the public is remote and consequential. . . . Any such enterprise tends indirectly to the benefit of every citizen by the increase of general business activity, the greater facility of obtaining employment, the consequent increase of population, the enhancement in value of real estate and its readier sale, and the multiplication of conveniences. But these are not the direct and immediate public uses and purpose to which money taken by tax may be directed."

Eyers, 84 N.H. at 12 (quotations and citations omitted).

7. The State may claim there is a public benefit to charging ratepayers the SCRC because it will ensure the financial health of PSNH and thereby ensure a healthy economy of New Hampshire. While the truth of such a claim is itself doubtful, any such effects are far too attenuated to justify the taking.

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B. Bailing Out a Failed Business Is Not a Public Purpose

8. Bailing out a failed business is not a public purpose. In *Opinion of the Justices*, 103 N.H. 281 (1961), a bank was being liquidated, and the Legislature proposed having all other banks pay the expenses of liquidation, such that the money collected would be deposited in the accounts of the depositors of the liquidated bank. The Court found that the proposal "would appropriate public funds to reimburse private depositors for losses sustained," and would thus be unconstitutional.

9. The purpose of the SCRC is to allow PSNH to recover costs it expended on generation facilities. The expenditures were unwise, and caused PSNH to incur high interest rates. These failed investments are the business of PSNH's stockholders and bondholders. They are not, however, the proper place for public money.

C. To Have a Public Purpose, the Utility Must Create a Benefit For Those From Whom Property is Taken

10. "[T]o justify public aid to a private enterprise serving a public purpose, there must be some obligation to the public assumed by the enterprise in consideration for the aid." *Opinion of the Justices*, 88 N.H. 484, 487 (1937). Thus, in order to be a constitutional taking, the person from whom property is taken must be capable of enjoying a commensurate and definite obligatory benefit from the party to whom the property is given. If there is no such obligation, the taking is unconstitutional.

11. In *Rockingham Light & Power Co. v. Hobbs*, 72 N.H. 531, 537-38 (1904), a utility wanted to exercise its statutory eminent domain power to build a new set of wires mostly to serve

a railroad. The owner of the land though which the wires would go complained. The court held that takings are proper only when the utility has an obligation to use the facility to benefit those from whom the land is taken. In upholding the constitutionality of the taking, the court read into the utility's corporate charter such an explicit obligation.

12. In the PSNH case, however, there is no obligation by the utility to use the generation facilities, for which the SCRC pays, for those whose property is taken. Seabrook power can (and is) sold anywhere. As of C-day, the Legislature will have deregulated electricity generation, explicitly renouncing any obligation of the utility to provide generation services. Because there is thus no commensurate obligation by the utility to provide any service to those who must pay the SCRC, the taking is unconstitutional.

D. 1937 Opinion of the Justices

13. In *Opinion of the Justices*, 88 N.H. 484 (1937), the New Hampshire Supreme Court decided a case that is strikingly similar to the situation presented by the SCRC here. The Court was faced with a proposal by which the Legislature would authorize bonds to pay for a hydro-electric facility on the Connecticut River in Pittsburg. The opinion is worth quoting at length.

> "In the case of a utility, the enterprise is primarily undertaken by reason of the profit motive. A venture involving service to the public is regarded prospectively by its promoters as one of financial success to its owners. It is as a money making business that it is entered into and engaged in. Service to the public is thought to be sufficiently promising of a return on the investment to induce it. Whatever direct aid it receives from the public helps it. The public is benefitted from the aid it grants because the aid helps to obtain or improve or maintain the service. But the public need of the creation, maintenance or increase of the service must exist to justify the aid therefor. It must be given for the public use and purpose, and if the public is already adequately served, its aid is essentially for a private purpose. The indirect public advantage of industrial welfare and general prosperity is not a

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valid reason for the aid. Even if the public advantage takes specific form, such as work for those in need of employment and without employment dependent on public assistance, public aid to the employer is a violation of the constitutional principle against taxation for private purposes. . . .

"The woolen mill in the small town of Gilsum may have been as much needed for the town's healthy economic life as the Manchester and Keene Railroad was for the city of Keene, in proportionate equality. But public aid to the mill was forbidden by reason of its wholly private character. No public service was to be rendered in return for the aid. So, with the railroad and the utility, if the aid does not impose the obligation of the service, it is improperly granted. Aid to a utility is forbidden except in protection of the public welfare and interest. And the protection must be in a needed service furnished the public by the utility as a condition of the aid. Without the condition the protective principle is inapplicable. Unconditional aid is not a proper charge of government to be met by the taxpayers.

"It appears here that the three utilities with which it is proposed to make contracts all transmit electric energy outside the state. They produce more than is needed for local use. In such transmission beyond the state they are serving no public purpose, but are engaged in private industry. Their obligation to furnish adequate local service is already secured. Their need of further facilities and development, at present at least, is wholly private. In this state of matters our opinion is that specific aid to them is at this time forbidden. The constitutional provision that government is "instituted for the common benefit . . . of the whole community, and not for the private interest or emolument of any one man, family, or class of men" (Const., Pt. I., Art. 10), is controlling.

"As a corollary to the prohibition against taxation to aid a private purpose, legislation resulting in or leading to taxation therefor is also invalid. The legislature may not exercise or delegate its taxing power for private benefit through the indirect expedient of an exemption. Eyers Woolen Co. v. Gilsum, supra."

"An appropriation of public money for a private purpose is forbidden, whether the money therefor is to be raised in the first instance by borrowing or by a tax levy. If the money is borrowed, there is the obligation of ultimate taxation for the payment of the loan. No less is the pledge of the public credit, or its guaranty, for a private obligation void. An obligation which may require money to be raised eventually by taxation to meet it stands on equal footing with one that is certain to do so.

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Opinion of the Justices, 88 N.H. at 488-489 (citations as in original).

14. In the first paragraph above quoted, the Supreme Court required that the service to the public be "prospective." Thus, there can be no public purpose if the taking is for facilities already existing. Here, the generation facilities for which the SCRC is intended to pay all already exist.

15. The court also required that takings must be to "obtain or improve or maintain the service." Here the SCRC is a pay-off so that PSNH will go away. It does not obtain, improve, or maintain any service.

16. The Supreme Court further said that if the supposed public purpose is already served – if there is no public need "of the creation, maintenance or increase of the service" – there can be no public purpose. In PSNH's case, the Legislature has explicitly found that there are many sources of adequate alternative electric service; the purpose of the deregulation statute is to take advantage of them.

17. In the second paragraph above quoted, the Supreme Court noted that unconditional aid – aid not contingent upon an obligation to serve those who pay – is unconstitutional. In the PSNH case there is no such obligation.

18. In the third paragraph above quoted, the Supreme Court further defined what constitutes an adequate obligation. When the electricity is bound for places beyond our border, and there is adequate in-state service, there is not the required commensurate obligation. In the PSNH case, Seabrook power is sold everywhere. It produces far more power than necessary in New Hampshire, a fact which the company used to justify building it and of which it has been

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proud for years.

19. In the fourth paragraph above quoted, the Supreme Court noted that the method of giving the property to the private concern, whether by direct grant, tax expenditure, bonding, or another method, is not relevant to the constitutional takings analysis. In the PSNH case, the fact that property is taken by a surcharge on ratepayers bills does not mitigate the constitutional violation.

E. The SCRC Is Not a Public Purpose

20. The purpose of the SCRC is not public. It is intended to pay for past poor generation investments of the utility. It will not be used to build or purchase any new machine or facility that will have a future benefit to the public, rather it is largely a pay-off for the company to settle its lawsuits against the state and to go away. The investments which the SCRC is intended to pay for were made a long time ago. Any benefit that might have been gained from PSNH's investments are already being enjoyed. While a stable electric company may have intangible benefits for the state, the massive public spending via the SCRC will mostly benefit shareholders and bondholders far from the community paying it. PSNH is not obligated to serve the people paying the SCRC. There is excess generation capacity in New Hampshire and no requirement that the power produced by PSNH's generation facilities remain in-state, or in any way benefit New Hampshire citizens. If there ever were a public purpose in aiding PSNH to build electric generation facilities, the terms of the deregulation statute mooted it, and there can be no prospective or future benefit to the public.

21. Accordingly, the SCRC serves no public purpose for takings analysis, and it is

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therefore unconstitutional.

II. Takings for Public Purposes Must be Paid by Taxation

22. If it is found that the SCRC is for a public purpose, the State may be free to pay to PSNH the amount that the SCRC is designed to cover. Takings for public purposes, however, must be paid out of tax revenue, and not from some special subset of citizens.

23. The New Hampshire Constitution provides that "The public charges of government, or any part thereof, may be raised by taxation." N.H. CONST., pt. II, art. 6.

24. Any law that provides for an unequal division of public expense is unconstitutional. *State v. U.S. & Canada Express Co.*, 60 N.H. 219 (1880); *Claremont School District v. Governor*, 142 N.H. 462 (1997). If a person is billed for another person's share of a state burden, it is an unconstitutional taking, a due process violation under the State and federal constitutions. *Opinion of the Justices*, 103 N.H. 281 (1961) ("Under the provisions of Part I, Article 12th, New Hampshire Constitution, every member of the community must contribute his share in the cost of the protection afforded by the State of his life, liberty and property. But this obligation extends no further than the payment of a just share."), and also a violation of New Hampshire's requirement of equal taxation.

25. During the civil war, the federal government allowed a man who was drafted to escape military service by paying $100 to a substitute soldier. After the war, several towns enacted ordinances allowing men from that town who had paid a substitute to get reimbursement from the town. Several men, who apparently were not reimbursed, sued for the $100. In *Gould v. Raymond*, 59 N.H. 260 (1879), the New Hampshire Supreme Court found that service in the

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military benefitted all the citizens of the state, and not just the citizens of particular towns. It was thus an unconstitutional taking to force citizens of the town alone to bear the cost of reimbursement. Chief Justice Doe wrote

> "If the federal service of the New Hampshire militia in the late war can be assumed as a public obligation of tax-payers, it can be assumed only as a common debt of all the tax-payers of the state. It is not a local debt, to be incurred at the option of municipal bodies exercising a power of local legislation. If it could be and were assumed as a public expense, and a common burden of all the tax-payers of the state, it could not be divided by local legislation compelling some of them to perform their duty, and releasing others without performance. The obligation of every member of the community to contribute his share of the public expense, is a part of the foundation which neither branch of the government is authorized to remove."

Gould v. Raymond, 59 N.H. at 278. Thus, state obligations must be paid for by the state, and not by some subset of its citizens.

26. In the PSNH case, the SCRC is payment for a debt incurred by the state. "Stranded cots" arose, according to PSNH, from its duty to serve customers, which duty it claims was created by state law. "Stranded costs" also arose, according to PSNH, from the "rate agreement" which the State entered with PSNH after its late bankruptcy. In a regulatory regime, payments for such past investments may be allowed to be included in ratebase. But upon the legislative finding that a generation monopoly is no longer in the public interest, and the commensurate repeal of PSNH's obligation to serve and customers' obligation to buy from it, there is no longer any benefit PSNH ratepayers can expect from PSNH's generation assets. If there is any duty to alleviate PSNH's "stranded costs," it is a State duty. As such, it must be paid from State revenues, and not by some selected subset of citizens.

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27. The SCRC, however, will only be collected from ratepayers who live in PSNH territory. Accordingly, the SCRC is an unconstitutional taking of their property.

III. A Utility Bill Charge That Serves No Utility Purpose is an Unconstitutional Taking

28. Even assuming that Seabrook and bailing out PSNH are public purposes, the New Hampshire and federal takings clauses require that ratepayers must pay only for that which is related to a *utility* purpose. If a charge on a consumer's utility bill is for a purpose other than a utility purpose, the charge is an unconstitutional taking. *Denver Union Stock Yard Co. v. United States*, 304 U.S. 470, 475 (1938). For this reason, before a facility can be put into ratebase, it must be found "used and useful" for a utility purpose. *See e.g., Appeal of Conservation Law Foundation*, 127 N.H. 606 (1986). *See* John N. Drobak, *From Turnpike to Nuclear Power: The Constitutional Limits on Utility Rate Regulation*, 65 B.U.L. L.REV. 65 (1985).

29. The New Hampshire Supreme Court has provided a definition of a constitutional utility purpose.

> "It is well settled that special assessments upon property for the cost of public services are in violation of our constitution if they are in substantial excess of the benefits received. There must be special benefits which compensate for the . . . assessments, and there must be a rational nexus between costs and benefits. It is these benefits that constitute the just compensation required by part I, article 12.

Chasan v. Village District of Eastman, 128 N.H. 807, 818 (1986) (internal citations omitted). In *Chasan*, the Court held that the assessment on consumers water bills were not arbitrary or unreasonable in relation to the benefits received because, the court found, the "benefit obtained from having the water system available for future use, and the benefit derived from the presence

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of the water facilities in the village district, are benefits upon which the charges may be based." *Chasan v. Village District of Eastman*, 128 N.H. at 819.

30. In the PSNH case, one cannot identify a benefit, beyond the general public interest of having the State settle its disputes with PSNH, to a consumer from paying the SCRC. The SCRC is for the purpose of paying for past debts on generation assets – it does not pay for the wires that come to a customer's door. Thus, because one cannot divide by zero, even if the SCRC is *de minimus*, it is substantially in excess of the benefits received. And the SCRC is not *de minimus*; it is a substantial part of consumers' utility bills. Moreover, there is no "future use" as found in *Chasan*. The SCRC is for the purpose of paying past debts. Any charge, in particular, that is for the purpose of paying for the costs associated with excess capacity, are a taking. *See Appeal of Conservation Law Foundation*, 127 N.H. 606 (1986); *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989) (disallowance of excess capacity not a taking for the utility).

31. An example illustrates the issue. Suppose, that the State allows PSNH to issue bonds to fund the State's schools. The bonds are backed by ratepayers, with a "school cost recovery charge" assessed on consumers' electric bill. While schools are clearly a public purpose, funding them is not related to a utility purpose, that is, a school is not "used and useful" for a utility ratepayer. Thus, to the extent such bonds are in the public interest, their costs must be borne by taxpayers, not ratepayers.

32. Accordingly, the SCRC is not used and useful for the purposes of takings law, and is therefore unconstitutional.

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IV. The Legislature Has No Constitutional Power to Create the SCRC

33. The New Hampshire Legislature has those powers delegated to it by the people through their constitution. While the federal 10th amendment allows states to have plenary police powers, the New Hampshire Constitution does not go that far.

34. The New Hampshire Constitution provides, "[A]ll government of right originates from the people." N.H. CONST., pt. I, art. 1. It also provides, "The people of this state have the sole and exclusive right of governing themselves." N.H. CONST., pt. I, art. 7. If further provides, "All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents." N.H. CONST., pt. I, art. 8.

35. Our Supreme Court has made apparent the New Hampshire approach to government. In *Trustees of Phillips Exeter Academy v. Exeter*, 90 N.H. 472 (1940), the school claimed that its tax exemption, granted by the legislature, could not be undone by a future legislature. The Court found that one legislature cannot impair a later's sovereign power to change its mind regarding taxation. The court wrote that, "The powers of government granted by the people to their representatives to administer are defined by the Constitution, and the courts may validate no action not within the powers." *Exeter*, 90 N.H. at 487. The court said of legislative power that, "Power not granted may not be assumed" *id.*, and called this view the "American theory of government." *Id.* at 488. "A body delegated to exercise the powers of sovereignty may exercise only such as it has received grant of authority to exercise." *Id.* at 493. "The mere election or appointment of agents, public or private, does not hold them out to possess more authority than is actually bestowed upon them." *Id.* at 495.

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36. In *State v. U.S. & Canada Express Co.*, 60 N.H. 219 (1880), the court wrote:

> "It must not be forgotten that the constitution enforces the idea that the sovereignty is in the people, and that all the power not expressly delegated to the legislature was reserved to the people. The provisions of the constitution must be regarded in the light of a grant to the legislature, and as conferring no power except what is expressly granted, or is indispensable to the exercise and enjoyment of those powers which are expressly granted."

Canada Express, 60 N.H. at 235. *See also Dow v. Northern Railroad*, 67 NH 1, 48-49 (1886).

37. If the Legislature takes action beyond its delegated authority, the action is *ultra vires*, and is as though no action were taken. *Exeter*, 90 N.H. at 495.

38. When the Court has discussed the Legislature's plenary power, it has done so in the context of powers expressly delegated by the constitution. *Sundeen v. Rogers*, 83 N.H. 253, 258 (1928) (zoning within police power of the state; noting that police power extends only as far as the Legislature's "constitutional grant of power"); *State v. Griffin*, 69 N.H. 1 (1896) (legislative power to regulate clean water is within "the power vested in the legislature by the constitution"). Thus, the state's sovereign power acts as a state-level necessary and proper clause, allowing the Legislature to carry out those powers that have been delegated to it.

39. The Legislature's power is broad and deep, but not infinite. The list of things it can do is contained largely in Part II of the Constitution, in Articles 5, 6, and 83.

> "And farther, full power and authority are hereby given and granted to the said general court, from time to time, to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions, and instructions, either with penalties, or without, so as the same be not repugnant or contrary to this constitution, as they may judge for the benefit and welfare of this state, and for the governing and ordering therefor, and of the subjects of the same, for the necessary support and defense of the government thereof."

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N.H. CONST., pt. II, art. 5. The Legislature may also

> "impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and residents within, the said state; and upon all estates within the same; to be issued and disposed of by warrant, under the hand of the governor of this state for the time being, with the advice and consent of the council, for the public service, in the necessary defense and support of the government of this state, and the protection and preservation of the subjects thereof, according to such acts as are, or shall be, in force within the same."

N.H. CONST., pt. II, art. 5. Thus, for instance, the New Hampshire Legislature does not have the power to authorize the coining of money, and not just because the federal constitution forbids it, *Legal Tender Case*, 110 U.S. 421 (1884), but also because the People have not delegated to the Legislature the power to do it.

40. The Legislature has the power to discharge the State's obligations by taxation, N.H. CONST., pt. II, art. 6. The SCRC is not a tax, however, nor is it in the nature of a license. *Opinion of the Justices*, 116 N.H. 351 (1976).

41. The Legislature can, of course, regulate electric rates, when conditions do not allow the market to work, such as when there is a natural monopoly. *Appeal of Richards*, 134 N.H. 148 (1991). The SCRC is not a price for a commodity, which a customer enjoys, however, but payment of failed past investments which on the market could never be recovered and which is intended to mainly indemnify investors. *Richards*, 134 N.H. at 172. The price of the commodity is clearly lower. Moreover, the Legislature has explicitly repealed PSNH's monopoly upon C-day, making the *Richards* analysis inapplicable.

42. There is nothing in the New Hampshire Constitution's delegation of power that allows the Legislature to require private parties to enter binding contracts, or to order transfers of

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property from one private party to another. Accordingly, except by taxation with the limitations that normally apply to it, the New Hampshire Legislature does not have the constitutional power to create the SCRC as set forth by the PUC, to collect it from ratepayers, or to order its payment to PSNH.

V. Insofar as the SCRC Pays for the Acquisition Premium, it is Unconstitutional

43. The New Hampshire Constitution provides that "The size and functions of all corporations should be so limited and regulated as to prohibit fictitious capitalization." N.H. CONST., pt. II, art. 83. Fictitious capitalization means watered securities. *See* JOURNAL OF THE CONSTITUTIONAL CONVENTION 556, 557 (1903). Securities backed by real assets are not watered. *See* 4 FLETCHER ON CORPORATIONS. Insofar as the SCRC will pay for the acquisition premium, *see Appeal of Conservation Law Foundation*, 127 N.H. 606, 675 (1986) (*Brock*, C.J., & *Batchelder*, J., dissenting, warning of "overcapitalization"), however, any security stemming from it is watered, and issued in violation of article 83.

VI. Stranded Cost Recovery Allowed by the PUC's Order is Greater Than Allowed By Statute

44. The deregulation statute provides that

> "Nothing in this section is intended to provide any greater op
> stranded cost recovery than is available under applicable regulatio
> effective date of this chapter."

RSA 374-F:3,. XII(a)

45. The PUC order guarantees a level of stranded cost recovery through securitization. But under traditional ratemaking, over time it is certain that one cannot know whether there

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would be any stranded cost recovery in the future. Thus, regardless of the amount of stranded cost recovery guaranteed by the PUC order, it is greater than the possibility of no recovery in the absence of the PUC order.

46. Moreover, the statute provides that stranded costs "should be reconciled to actual electricity market conditions from time to time." RSA 374-F:3, XI(d). By locking in a stranded cost amount by a contract, the PUC prevents any lowering of the amount in the future without potentially running afoul of the utility's federal contract rights. U.S. CONST., art. § 10, cl. 1.

VII. Stranded Cost Recovery Charge is Neither Nondiscriminatory Nor Fair

47. The restructuring statute provides that

> "Any recovery of stranded costs should be through a nonbypassable, *nondiscriminatory*, appropriately structured charge that is *fair to all customer classes*, lawful, constitutional, limited in duration, consistent with the promotion of fully competitive markets and consistent with these principles."

RSA 374-F:3, XII(d) (emphasis added)

48. The PUC order charges some customers different stranded cost recovery charges for different rate classes. Under traditional ratemaking, lower rates for large industrial users was justified on the grounds that the cost of distribution was less than for residential customers because the electric usage per meter was by definition less, and it was therefore more efficient to bill a large customer than many small ones.

49. The SCRC, however, is based mainly on generation. Any economies of scale that may have existed formerly have been obviated by the advent of competition in the generation market on C-day. The justification for differing rates, therefore, does not apply here.

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50. The PUC, however, arbitrarily set SCRC lowest for industrial classes by merely importing into the generation charge those economies that only exist with regard to distribution. PUC ORDER at 205. The PUC acknowledged that PSNH "had not used a cost of service study to allocate stranded costs to classes." *Id.* The PUC order creates five SCRC levels, with those for residential ratepayers about 17 percent higher than for industrial consumers.

51. Even though the Commission allowed parties to revisit this issue at a later date, for the time being, the SCRC is neither "nondiscriminatory" nor "fair" to residential ratepayers and others, and therefore violates the statute.

VIII. The SCRC Pushes New Hampshire Rates Higher and Higher Above Regional Rates

52. The restructuring statute demands that New Hampshire's rates tend to meet the rates non-PSNH consumers pay in our region.

> "To the greatest extent practicable, rates should approach competitive regional electric rates. The state should recognize when state policies impose costs that conflict with this principle and should take efforts to mitigate those costs."

RSA 374-F:3, XI. In order to compare rates with other rates in t energy component of rates (which are presumably equal in a competitive calculation

53. The PUC order sets a SCRC, which is much higher than the other stranded cost recovery charges in New England. The PSNH SCRC is also constant for a seven-year period. Thus, reminiscent of the 1989 rate agreement, the regional average will fall during that time, while PSNH's will remain the same. By definition, rather than "approach competitive regional electric rates," PSNH rates will climb higher and higher above regional averages during the

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period.

54. The PUC's order directly conflicts with the statutory policy. Thus, the PUC is required to "mitigate those costs." This it has not sufficiently done. Accordingly, the PUC order violates the statute.

IX. Transition Service Deferrals Are an Illegal Stranded Cost

55. The PUC order which artificially sets the price of transition service, will result in the creation of illegal stranded costs. Creation of transition service deferrals by creating an obligation to provide service at artificially low prices with power purchased at market-based prices constitutes creation of a new stranded cost. The Legislature intended recovery of past stranded costs, not new ones. *See* RSA 374-F:3, XII.

X. Special Contract Revenues

56. The PUC erred in not taking into account proper treatment of the difference in revenues between those expected under special contracts and those that would be received had customers been billed at the tariff rate appropriate for their usage patterns. *See Appeal of Campaign for Ratepayers Rights*, 142 N.H. 629 (1998).

LAW OFFICE OF JOSHUA L. GORDON, 26 SOUTH MAIN ST. #175, CONCORD, NH

WHEREFORE, the Campaign for Ratepayers Rights, Granite State Taxpayers, Inc., THINK-NH, and New Hampshire Public Interest Research Group, Inc., respectfully request that the Public Utilities Commission revise its order in accordance with the forgoing.

Respectfully submitted
for Campaign for Ratepayers Rights,
for Granite State Taxpayers, Inc.,
for THINK-NH, and
for NHPIRG, Inc,
by their attorney,

Dated: October 31, 2000

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

I hereby certify on this 31th day of October 2000, a copy of the foregoing is being forwarded to the service list in this docket.

Dated: October 31, 2000

Joshua L. Gordon, Esq.