

State of New Hampshire
Supreme Court

2000 TERM

OCTOBER SESSION

NO. _____

APPEAL OF CAMPAIGN FOR RATEPAYERS RIGHTS
(PUBLIC UTILITIES COMMISSION)

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

PETITION FOR APPEAL

By: Joshua L. Gordon, Esq.
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APPEAL BY PETITION FROM ORDERS OF THE
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

A. PARTIES

The Campaign for Ratepayers Rights (CRR) hereby appeals to the New Hampshire Supreme Court from an order of the New Hampshire Public Utilities Commission (PUC) which approved a settlement agreement between the State and Public Service of New Hampshire (PSNH).

CRR is a public interest organization concerned with the provision of utility services in New Hampshire. It maintains its headquarters at 4 Park St., Concord, N.H. The New Hampshire Public Interest Research Group (NHPIRG) is also a public interest organization with similar concerns. It maintains its headquarters at 80 N. Main St., Concord, NH. Both are represented in this appeal by Joshua L. Gordon, Esq., 26 S. Main St., #175, Concord, N.H. 03301 (603) 226-4225, jlgordon@appealslawyer.net.

It is expected that the State may oppose this appeal. It is expected that the State will be represented by one or more of the following: Lynmarie Cusak, Esq. N.H. P.U.C., 8 Old Suncook R., Concord, N.H. 03301, (603) 271-2431, lcusack@puc.state.nh.us; Wynn Arnold, Esq., Asst. Atty. General, 33 Capitol St., Concord, N.H. 03301, (603) 271-3650, warnold@doj.state.nh.us; James K. Brown, Esq., Foley, Hoag & Eliot, 1 Post Office Sq., Boston, M.A. 02109, (617) 832-1109, jbrown@fhe.com.

It is expected that PSNH may oppose this appeal. It is expected that PSNH will be represented by Robert A. Bersak, Esq., PSNH, 1000 Elm St., Manchester, N.H. 03101, (603) 634-3355.

B. DECISIONS AND ORDERS SUBJECT TO APPEAL

- *PSNH Proposed Restructuring Settlement*, Order No. 23,443 (April 19, 2000). It is believed that the Executive Summary is adequate for review of this petition, and it is appended hereto. The entire order is voluminous, and is available on the PUC's website at <<http://www.puc.state.nh.us/orders/2000ords/23443e.pdf>>.
- *Order Addressing Motions for Clarification and Rehearing, Amended Settlement Agreement and Financing Issues*, Order No. 23,549 (Sept. 8, 2000). A copy is appended hereto.

C. QUESTIONS PRESENTED FOR REVIEW

1. The PUC orders consumers to reimburse PSNH for its past generation expenditures through a "stranded cost recovery charge," added to consumers' electric bills. The New Hampshire Constitution prevents takings that are not for a public purpose. Did the PUC err in ordering a transfer of money from consumers to the utility when the purpose of the reimbursement is for unwise private investments, when consumers paying the mandatory surcharge enjoy no commensurate benefit, and when the reimbursement does not serve any allowable public purpose?
2. The PUC orders consumers to reimburse PSNH for its past generation expenditures through a "stranded cost recovery charge," added to some consumers' electric bills. The New Hampshire Constitution requires that takings of private property be paid out of tax revenue, but not from some special subset of citizens. Did the PUC err in ordering a transfer of money from consumers to the utility?
3. The PUC orders consumers to reimburse PSNH for its past generation expenditures through a "stranded cost recovery charge," added to consumers' electric bills. The New Hampshire Constitution prohibits the government from charging special assessments on property for the cost of public services unless there is a rational nexus between the costs and benefits, and only then if the costs are not in substantial excess of the benefits received. Did the PUC err in ordering a transfer of money from consumers to the utility when consumers are obligated to bear the cost, but receive no benefit?

4. The State has the constitutional authority to raise funds through taxation. There is nothing in the New Hampshire Constitution, however, that allows the State to require private parties to enter binding contracts, or to order transfers of property from one private party to another. Did the PUC err by creating the stranded cost recovery charge which raises funds other than by taxation, by ordering property to be taken from ratepayers, and by ordering the transfer of property to PSNH?
5. The PUC has the constitutional power to regulate utility rates when monopoly conditions exist. As of the day competitive electric generation is available in New Hampshire, however, the Legislature has deemed the monopoly ended, thereby withdrawing the PUC's power to regulate rates. Did the PUC err in ordering consumers to pay the stranded cost recovery charge, which is effectively a regulation of utility rates?
6. The deregulation statute provides that it is not intended to create a greater opportunity for stranded cost recovery than would otherwise be available, and requires that stranded costs be reconciled to actual market conditions from time to time. The PUC order guarantees a level of stranded cost recovery into the future greater than that which would otherwise be collected by the utility. Did the PUC err in locking in excess stranded cost recovery?
7. The deregulation statute provides that recovery of stranded costs be conducted in a nondiscriminatory manner which is fair to all customer classes. In traditional ratemaking, lower rates for large users was justified because the cost of billing them was less, a concern not relevant in the deregulation of electric *generation* for which the stranded cost recovery charge is intended to reimburse. Did the PUC err in creating class-based differing stranded cost recovery charges?
8. The deregulation statute provides that rates should approach competitive regional average rates. The PUC order creates rates based on a seven-year fixed stranded cost recover charge such that rates in New Hampshire will be much higher than others in the region, and which will diverge ever further from regional averages during the seven-year period. Did the PUC err in setting the stranded cost recovery charge?
9. The deregulation statute allows PSNH to recover past stranded costs, but did not allow for the creation of new ones. The PUC order creates artificially low interim rates for a period of transition which will result in the creation of new stranded costs. Did the PUC err in setting transition service in violation of the statute?
10. The law allows differing rate classes so long as there is no cross-subsidization of costs. The PUC has allowed industrial and commercial customers with special contracts to pay lower rates than they would otherwise, and allows this practice to

continue after the advent of competitive generation. Did the PUC err in not taking into account 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, and thus effectively creating an artificially high stranded cost recovery charge for non-special contract customers?

D. CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES OR REGULATIONS IN ISSUE

- U.S. Const. amds. 5 & 14
- N.H. Const. pt. I, arts. 2, 10, & 12
- N.H. Const. pt. II, arts. 5, 6, & 83
- RSA 374-F:1
- RSA 374-F:3, II, III, XI, XII, XII(a), XII(d)

Copies are appended hereto.

F. STATEMENT OF THE CASE

Several years ago, the New Hampshire legislature began to deregulate the electric utility industry. Upon PUC implementation, PSNH sued the state, claiming it had a right to collect more money from New Hampshire ratepayers than the legislature and the PUC would have allowed. After litigation in the federal courts, the State and PSNH reached a settlement, which requires approval by the PUC. This appeal is from that approval.

On April 19, 2000, the PUC issued its order approving the settlement. *PSNH Proposed Restructuring Settlement*, Order No. 23,443 (April 19, 2000). It is believed that the Executive Summary is adequate for review of this petition, and it is appended hereto. The entire order is voluminous, and is available at <<http://www.puc.state.nh.us/orders/2000ords/23443e.pdf>>.

On May 19, 2000, CRR filed a Motion for Rehearing, which is appended to this appeal. On May 26, 2000, a perfunctory objection was filed by PSNH, and a somewhat more substantive objection was filed by the state. Both are appended to this appeal.

On September 8, 2000, the PUC issued its response. *Order Addressing Motions for Clarification and Rehearing, Amended Settlement Agreement and Financing Issues, Order No. 23,549* (Sept. 8, 2000), appended to this appeal. This appeal is from that order.

G. JURISDICTIONAL BASIS FOR APPEAL

- RSA 365:21
- RSA 541:6

H. REASONS WHY THIS APPEAL SHOULD BE ACCEPTED

At the beginning of the last century, federal and state courts grappled with the rights of individuals in the face of public policy pressures demanding the government regulate economic entities on a large scale. Thus, issues such as zoning, minimum wage laws, and workplace safety regulations, for instance, were first rejected as impinging upon the property rights of owners and employers, but then given constitutional imprimatur based on public policy necessity.

In our time, however, we have seen the government retreat from large-scale regulation. The question thus arises: what becomes of the public policy justifications for the now-abandoned regulatory regime?

Electric rate regulation was justified on the grounds that it was a monopoly. Regarding the delivery of power – wires and poles – nobody wanted multiple sets of wires running down the street because it would be ugly and a massive waste of resources. Regarding the generation of power – oil, coal, and nuclear stations – they cost so much that the only way they could be built was to guarantee the utility that it would be the only entity allowed to sell power in its service territory.

These monopoly conditions justified utility regulation that American law would not abide

in other contexts – minimum and maximum prices, governmental review of private companies’ books, bureaucrats deciding how much profit was enough or too much, regulation of what costs and charges can and cannot be added to consumers’ bills.

The monopoly in wires and poles remains. In generation, however, there has been marvelous developments in financing mechanisms and generating technology. Whatever monopoly conditions once existed in the generating side of the electric industry are now gone. Thus, the New Hampshire deregulation statute and the PUC orders refer to “C-Day” – the date upon which consumers may chose among competing generators of electric power.

When the monopoly disappears, however, what happens to the regulations it spawned? More important for development of the law, what happens to the public policy justifications for those regulations?

This case concerns whether the government maintains its authority to regulate prices when the existence of the monopoly which justified it has been explicitly repealed. CRR’s position is that when the government dismantled PSNH’s generation monopoly, it simultaneously relinquished its authority to regulate prices. Upon abandonment of the monopoly, private rights that were once subjugated to the public policy imperative now reassert themselves.

As of C-Day, PSNH will no longer have a service territory. Yet the PUC in this case ordered all consumers living in PSNH’s former territory to pay to PSNH a “stranded cost recovery charge,” even though the consumer elects to buy power from another provider.

This court should accept this case to decide these matters, which are important to ratepayers everywhere.

I. PRESERVATION

Counsel for CRR hereby certifies that every issue specifically raised has been presented to the administrative agency and has been properly preserved for appellate review by a properly filed pleading.

For the reasons stated, CRR prays that the Court accept this appeal, issue an appropriate order of notice to the PUC and direct the submittal of briefs and the scheduling of oral argument in the ordinary course of Supreme Court business.

Respectfully submitted,
Campaign for Ratepayers Rights,
By its Attorney,

Dated: October 9, 2000

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CERTIFICATION

I hereby certify that, in accordance with Rule 26(2), copies of this Appeal by Petition have been served on all parties noted in section A of this Petition, and by other means to all other parties in PUC Docket No. DE 99-099.

Dated: October 9, 2000

Joshua L. Gordon, Esq.

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