

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2010-0683

Appeal of the New Hampshire Sierra Club

On Appeal by Petition under RSA 541
from An Order of the
New Hampshire Public Utilities Commission

MOTION FOR SUMMARY DISMISSAL
OF PUBLIC SERVICE CO. OF NEW HAMPSHIRE

Public Service Co. of New Hampshire (“PSNH”), the petitioner in the proceeding before the New Hampshire Public Utilities Commission (the “Commission” or the “PUC”) in Docket DE 10-122, Petition For Approval of Long and Short Term Debt (the “Financing Proceeding”), moves, pursuant to Rule 25 of the Court’s Rules, for a dismissal of the appeal filed by the New Hampshire Sierra Club (the “NHSC”).

Proceedings at the Commission

No final order has been entered on the merits of the Financing Proceeding. The NHSC moved to intervene in that proceeding on June 10, 2010, both for itself and for 21 “members and friends” listed in the Motion. As grounds for its intervention, NHSC asserted that it was a “non-profit organization whose...members in New Hampshire are dedicated to securing a pollution free and healthy environment.” NHSC Motion at 1. As for the “members and friends,” the Motion alleged that “many of the [them] are PSNH taxpayers.” *Id.*

Rule Puc 203.17 provides that the “commission shall grant one or more petitions to intervene in accordance with the standards of RSA 541-A:32.” RSA 541-A:32, I provides that a petition for intervention must identify both the rights and privileges asserted to be in issue, and *how* those rights and privileges “may be affected by the proceeding.” RSA 541-A:32, I (b). NHSC’s Motion claimed that “each and every appellant [sic] named herein is entitled to the protections and benefits” of the federal Clean Air Act, 41 U.S.C. § 7401 *et seq.* and the New Hampshire Multiple Pollutant Reduction Program, RSA Ch. 125-O. Yet it conceded that it had also appeared in two ARC proceedings (Dockets 09-10 and 10-16) to raise these issues, and to protect its claim that PSNH had violated the Clean Air Act and RSA Ch. 125-O. It stated that it sought to intervene in the Financing Proceeding because:

NHSC plans to pursue its legal remedies until such time as PSNH provides all information that will permit a full and fair determination, on the merits, of whether or not it has complied with its responsibilities under the Clean Air Act and the New Hampshire Multiple Pollutant Reduction Program.

NHSC Motion at 4. The Motion was silent as to which of the individuals seeking intervention were ratepayers or what rights or privileges as ratepayers were allegedly impacted.

The Commission denied the request for intervention, concluding that NHSC had not stated any right or substantial interest that would be affected by the Financing Proceeding because the alleged violation of environmental statutes and in particular, the Clean Air Act and RSA Ch. 125-O, were not the subject of that Proceeding, and were in issue in other proceedings where NHSC was involved and in which NHSC had stated that it would pursue its right to appeal to this Court. In short, even if NHSC had identified a valid right or substantial interest, it had not even alleged, let alone made a showing, that such an interest was implicated in the Financing Proceeding. The Commission also denied discretionary intervention under RSA 541-A:32, II because it found that NHSC intended to use the Financing Proceeding to reargue matters that

were before the Air Resources Council, “the agency with competent jurisdiction over PSNH’s compliance with applicable environmental laws” (Order No. 25,131 at 6), or to conduct discovery for materials pertinent to proceedings pending in other forums. (*Id.*)

On August 18, 2010, NHSC sought rehearing on the denial of its intervenor status. The individual petitioners for intervention did not seek rehearing. When NHSC moved for reconsideration, it argued, for the first time, that the Commission was required to consider environmental issues (and its claimed statutory rights) as part of the requirement that financing be “consistent with the public good” under RSA 369:1 and *Appeal of Easton*, 125 N.H. 205 (1984). NHSC Motion for Reconsideration at 2. By Order dated September 10, 2010, the PUC denied NHSC’s motion for rehearing. PUC Order No. 25,143 at 3. The Commission found that NHSC had not properly raised the issue in its Motion but that to the extent that NHSC was tying “environmental compliance issues... with questions of current and future costs of compliance and potential future rate impacts of such compliance issues,” those issues were beyond the scope of the Financing Proceeding and had already been raised in the ARC dockets. Order No. 25,143 at 5.¹ Both orders were correct and should be summarily affirmed.

Grounds for Summary Dismissal

This Court should dismiss this appeal because, as the Commission properly found in denying NHSC’s Petition for Intervention, NHSC (and other individual intervenors) did not allege “a right, duty, privilege, immunity, or other substantial interest that would be affected by the outcome of that proceeding” as required by RSA 541-A:32, I. PUC Order No. 25,131 at 5. The Commission also properly denied discretionary intervention under RSA 541:32. II. It found

¹ On September 20, 2010, the Air Resources Council ruled in favor of PSNH on all issues raised by NHSC in Docket 09-10. NHSC has sought reconsideration and in this appeal has noted its intent to appeal that ruling to this Court.

that the interests of justice would not be served by allowing NHSC to use the Financing Proceeding to re-litigate PSNH's compliance with air emissions requirements or to conduct discovery for materials that have not been provided in other forums, and that NHSC could address, and was addressing, the myriad and diverse environmental issues it sought to raise in more appropriate fora, such as proceedings before the New Hampshire Department of Environmental Services, the Air Resources Council ("ARC"), and the federal Environmental Protection Agency. *Id.* at 6.

NHSC has no basis for this appeal. A party seeking to set aside an order of the PUC has the burden of demonstrating that the order is contrary to law or, by a clear preponderance of the evidence, that the order is unjust or unreasonable. RSA 541:13 (2007); see *Appeal of Stonyfield Farm*, 159 N. H. 227, 231 (2009); *Appeal of Verizon New England*, 153 N.H. 50, 56 (2005). Findings of fact by the PUC are presumed *prima facie* lawful and reasonable. RSA 541:13; see *Verizon*, 153 N.H. at 56. To have standing to appeal an administrative agency decision to this court, a party must demonstrate that his rights "may be directly affected by the decision, or in other words, that he has suffered or will suffer an injury in fact." *Stonyfield*, 159 N.H. at 231, citing *Appeal of Richards*, 134 N.H. 148, 154 (quotations and citations omitted), *cert. denied*, 502 U.S. 899 (1991); see RSA 541:3 (2007).

As the Commission found, environmental concerns and rights under federal and State environmental statutes were not properly before the Commission in the Financing Proceeding. As a result, even if NHSC and the individuals might have had standing to complain about those matters in other proceedings (which they are currently doing), *this* proceeding did not affect any of those rights. The Commission also made factual findings that the NHSC intended to use the proceedings to re-litigate issues already addressed in other forums. The NHSC does not address

that issue at all, and apparently does not contend that the Commission abused its discretion in denying intervention under RSA 541-A:32, II.

Without conceding the issue, the only conceivable right or interest that might have served as a basis for intervention in the Financing Proceeding was the alleged status of some “members or friends” as ratepayers of PSNH. But NHSC did not specifically identify any of the proposed intervenors as ratepayers and did not identify any asserted interest that would be impacted as ratepayers. On the contrary, NHSC’s motion focused only on the impact of the Proceeding on the intervenors’ interest in protecting environmental matters.

More important, the individual “members and friends” have not appealed the denial of their Motion to Intervene to this Court, nor did they file a motion for reconsideration with the PUC, which is required for any appeal to this Court from an administrative agency. RSA 541:3. NHSC’s Motion for Reconsideration makes no mention of the individual intervenors, and their notice of appeal refers solely to NHSC.²

Because NHSC has not and cannot meet its burden to demonstrate in this appeal that its rights were directly affected by the decision of the Commission, or in other words, that it has suffered or will suffer an injury in fact by virtue of the Financing Proceeding, this appeal should be summarily dismissed and the decision of the Commission should be summarily affirmed pursuant to Rules 10 and 25 of the Court’s Rules.

² NHSC sought standing at the Commission, and seeks in this appeal, to claim that the members of a duly constituted organization have been injured. *See, Sierra Club v. Morton*, 405 U.S. 727, 739 (1972). However, “NHSC” has no right to represent any “members or friends” because NHSC does not exist as a matter of law. Although asserting that it is a “non-profit organization,” no such organization is on record with the Office of the New Hampshire Secretary of State. The “Sierra Club” is an entity organized under California law registered to do business in New Hampshire and has a chapter with offices in New Hampshire. But that chapter is not a legally distinct organization from the Sierra Club nor is it, itself, an organization. The Sierra Club may have standing in proceedings to represent its members, including its members in New Hampshire, and might have sought to intervene in the Financing Proceeding as the Sierra Club through its New Hampshire Chapter, but the “NHSC” cannot independently have standing in any proceeding since it does not exist, nor can it represent individual members of a non-existent organization. Likewise, there is no evidence that the national Sierra Club has any interest in this Appeal. This is an independent basis for dismissal of the appeal.

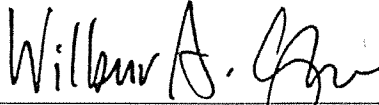
PUBLIC SERVICE COMPANY
OF NEW HAMPSHIRE

By its attorneys,

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Date: October 29, 2010

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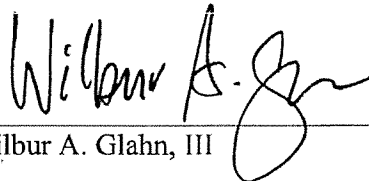
Certificate of Service

I hereby certify that on October 29, 2010, I served the foregoing Motion for Summary Dismissal of Public Service Company of New Hampshire by mailing two copies thereof by first class mail, postage prepaid, to each of the following:

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