

SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

Docket No. 2010-0683

In the Matter of the Appeal of the New Hampshire Sierra Club from an Order of the New Hampshire Public Utilities Commission in Public Service Company of New Hampshire, Petition for Approval of Long-Term Debt and Related Relief, Docket DE 10-122

NEW HAMPSHIRE SIERRA CLUB RESPONSE TO MOTION FOR SUMMARY
DISMISSAL OF APPEAL

STANDING TO INTERVENE

The New Hampshire Sierra Club [NHSC] founded in 1992, with almost 4000 members, is a proud Chapter of the Sierra Club, an organization of 1,300,000 members, that has an over 100 year history of battling for a clean and healthy environment.¹

The decision of the NHSC to petition the New Hampshire Public Utilities Commission to intervene in Public Utilities Commission docket DE 10-122 was grounded on its grave concern that Public Service Company of New Hampshire [PSNH] would spend over \$1,000,000,000 of debt financing it sought in the docket on projects that would pollute the air and damage the environment to the detriment of the public health and safety without a thorough review of the public good.

The NHSC concern about the financing proposal was exacerbated by the haste the Public Utilities Commission exercised in processing the financing proposal. PSNH filed its Petition for Approval of Issuance of Long-Term Debt and Related Relief on May 3, 2010.² On July 20, 2010, the Commission denied the timely filed NHSC Petition to Intervene and scheduled the merit hearing on September 14, 2010. On September 10, 2010, just days before the merit hearing, the Commission denied the timely filed NHSC Motion for Reconsideration.

NHSC, in its Petition for Intervention in Public Utilities Commission docket DE 10-122, set forth the basis for its standing:

¹ See attached, confirming Sierra Club authorization for the New Hampshire Chapter to file this appeal.

² The Petition asked for over a billion dollars in financing authority over a 2 year period [compared to the usual 1 year period] "as soon as practicable...which would enable the Commission to...issue its initial decision on or before September 30, 2010." The need for such haste and why the Commission acceded to it is inexplicable.

“Each and every appellant named herein is entitled to the protections and benefits of 41 USC § 7401 et seq. the Clean Air Act and RSA 125-O et seq. New Hampshire Multiple Pollutant Reduction Program, and have, and will in the future, suffer direct and actual adverse affects and injury from air pollution as defined in the Clean Air Act and the New Hampshire Multiple Pollutant Reduction Program.”

Air pollution causes serious adverse health effects. The members and friends of NHSC have suffered or will suffer the adverse health effects of air pollution, a claim which meets the standing requirement articulated by this Court. Appeal of Richards, 134 N.H. 148, cert denied, 502 U.S.899 [1991]; In re Stonyfield Farm, Inc., 159 N.H. 227 [2009]; Appeal of Union Telephone, 160 N.H. 309 [2010]

The Sierra Club has many years of experience advocating for clean air in relevant venues; legislative, judicial, and administrative.

The New Hampshire Public Utilities Commission is duty bound by RSA 369:1 to examine whether the proposed financing is in the public good. Appeal of Easton, 125 N.H.205 [1984]; Appeal of Conservation Law Foundation, 127 N.H.606 [1986].³ The scope of the public good enquiry requires the Public Utilities Commission to determine whether the financing will provides safe and reliable service which is economically justified when measured against adequate alternatives and whether the proposed capitalization would be supportable by reasonable rates. Appeal of Conservation Law Foundation, *supra*.

The Public Utilities Commission would benefit by NHSC intervention because of its knowledge of the Clean Air Act, current and pending regulatory changes for green house gases, increasingly stringent ozone emission limits, increasingly stringent toxic air pollutant limits and its vast environmental litigation enforcement experience. This NHSC experience is directly relevant to the Public Utility Commission responsibility to determine that the proposed financing will provide safe and reliable service at a supportable cost.

³ In both the Easton and Conservation Law Foundation cases, the appealing parties were granted intervention by the PUC. Standing is not, nor should it be, a procedural tactic, applied subjectively, case by case. Why would PUC grant intervention in the leading New Hampshire cases on financing dockets and deny it in DE 10-122?

MEMORANDUM OF LAW

PSNH, in its Motion for Summary Dismissal, wrongly conflates the aggressive NHSC challenges to PSNH compliance with the Clean Air Act and the New Hampshire Multiple Pollutant Control Program before the New Hampshire Department of Environmental Services-Air Resources Council in dockets 09-10 ARC and 10-06 ARC with the purpose of Sierra Club intervention in Public Utilities Commission docket DE 10-122.

NHSC does not intend to use the Public Utilities Commission as a venue to litigate Clean Air Act and New Hampshire Multiple Pollutant Control Program violations. NHSC intent is to assist the Public Utilities Commission in its determination whether the proposed financing will provide safe and reliable service at a supportable cost.

A review of the comprehensive analysis provided by this Court in Appeal of Conservation Law Foundation, *supra*, will help clear up the confusion PSNH has engendered in its Motion for Summary Dismissal.⁴

1. PSNH has the affirmative responsibility to provide the Public Utilities Commission record evidence that the proposed financing is in the public good. It has not done so.

This Court, at page 614, Appeal of Conservation Law Foundation, *supra*, stated:

“...Accordingly, we emphasize that the express statutory concern for the public good comprise more than the terms and conditions of the financing itself and we held that the commission was obligated to determine whether the object of the financing was reasonably required for use in discharging a utility company’s obligation, which is to provide safe and reliable service....”
[Emphasis added]

The PSNH Petition for Approval of Long-Term Debt and Related Relief and the testimony it provided in support of the Petition to the Public Utilities Commission provided nothing more than the terms and conditions of the financing itself. PSNH did not provide any evidence of the object of

⁴ The case involved the Seabrook nuclear power plant that led PSNH into bankruptcy.

the financing and whether the object of the financing would provide safe and reliable service.

The Court went to say at page 614:

“...Moreover, we specifically decided that the commission was obliged to determine whether the company’s plans to accomplish the object were economically justified when measured against any adequate alternatives; and whether the capitalization resulting from the utility company’s plans would be supportable.”

The record before the Commission is devoid of factual evidence, presented by PSNH, of what projects will be financed if the proposal is approved. The failure of PSNH to produce evidence regarding the projects to be financed makes it impossible for the Commission to issue fact based findings necessary to render a proper determination that the financing is in the public good.

2. Although the law provides that Public Utilities Commission findings of fact must be deemed *prima facie* lawful in a review by this Court, the Commission must make its findings of fact based upon an evidentiary record sufficient to sustain the Commission’s conclusions. Appeal of Conservation Law Foundation, *supra*, page 615:

“Although these principles limit our authority to disturb the commission’s resolution of factual and judgmental issues, we nonetheless have broad responsibility to review the evidentiary record... ‘to assure [ourselves] that the[c]ommission has given reasoned consideration to each of the pertinent factors’ upon which the responsible derivation of policy and resolution of opposing interests must rest....” Page 616, Appeal of Conservation Law Foundation, *supra*. [Emphasis added]

The Court went on to make an exhaustive review of the issues relating to the costs of completion of Unit 1 of the Seabrook project; the methodology and comparison of project completion to alternatives; and, the reasonableness of the resulting rates. The Court noted, at page 641, that it:

“...[F]ollows that in an Easton hearing the commission’s responsibility to address the rate implications of a decision approving a utility’s financing request is not a responsibility to

determine what these rates will actually be if the financing is allowed....Rather, the commission's responsibility is to determine whether at a later ratemaking proceeding a reasonable rate can be set that will allow the company to support the capitalization that will result from the use of the proceeds of the financing...."

PSNH, in the presentation of its case to the Commission, did not offer any evidence on the points required to establish the public good; whether the projects to be financed will provide safe and reliable service, economically justified compared to alternative adequate alternatives, at a supportable cost.

Therefore, the Commission does not have the evidence before it to make the required findings of fact,⁵ nor is there an adequate record for this Court to review. See Appeal of Union Telephone, *supra*, page 8.

THE ROLE OF NHSC IN THE FINANCING DOCKET

NHSC, if granted intervention, would bring information to the Public Utilities Commission that directly relates to Commission responsibility to determine the public good. In the Motion for Reconsideration, NHSC raised matters that will have substantial safety and cost consequences to PSNH and its ratepayers, including Clean Air Act and New Hampshire Multiple Pollution Control Program permitting responsibilities at Merrimack Station for the MK2 turbine and related projects; substantial permitting, safety and cost consequences for generation upgrade, de-bottlenecking and life extension projects that require a separate finding of the public good under RSA 369-B:3-a; and, the projected, increasingly stringent Clean Air Act regulatory changes for green house gases, toxic air pollutants, ozone and regional haze and its impacts on Class I wilderness areas.

PSNH knows that it has permitting responsibilities. PSNH knows that the imminent, more stringent regulatory emission limits will impact its generating assets. PSNH knows exactly what generation upgrade, de-bottlenecking and life extension projects it has undertaken. PSNH knows that there will be substantial pollution control costs associated with each of these matters.

⁵ The PUC conducted the merit hearing on the financing proposal on September 14, 2010, but has not issued a decision.

PSNH knows, or should know, what the pollution control costs will be. PSNH is bound by law to present this information to the Public Utilities Commission in order that the Public Utilities Commission may perform its responsibilities. Appeal of Conservation law Foundation, supra.

The Order of the New Hampshire Public Utilities Commission denying the Motion for Reconsideration of the Commission's denial of the New Hampshire Sierra Club Petition to Intervene in docket DE 10-122 should be reversed and the matter remanded to the Commission with an order to allow the intervention; an order requiring the Commission to provide a schedule that will permit discovery pursuant to Puc 203.09; and, an order that requires the Commission to fully examine the public good required by RSA 369:1 in a merit hearing pursuant to Part Puc 203, Adjudicative Proceedings, together with such other relief proper in the premises.

11/5/10

Respectfully submitted,

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Certificate of Service

Appellant served copies of this Response to the attorneys of record for Public Service Company of New Hampshire; the Public Utilities Commission; and, the Office of Consumer Advocate, first class mail, postage prepaid as follows: Wilbur A. Glahn and Barry Needleman, 900 Elm Street, PO Box 326, Manchester, NH 03105; Robert A. Bersak and Catherine E. Shively, 780 N. Commercial Avenue, PO Box 330, Manchester, NH 03105; Public Utilities Commission, 21 South Fruit Street, Suite 10, Concord, NH 03301; and Office of Consumer Advocate, 21 South Fruit Street, Suite 18, Concord, NH 03301, this 5th day of November, 2010.

Arthur B. Cunningham

Arthur Cunningham

From: Nathaniel Shoaff [Nathaniel.Shoaff@sierraclub.org]
Sent: Tuesday, October 12, 2010 7:25 PM
To: Arthur Cunningham
Cc: Catherine.Corkery@apps.sierraclub.org
Subject: Merrimack PUC appeal to NH Supreme Court SC# 10-112

Art,

As you are no doubt aware, the Sierra Club approved the NH Chapter's request to appeal the PUC's standing decision on Merrimack to the New Hampshire Supreme Court.

Any settlement of this matter will need national litigation committee approval. That approval process usually takes 2-4 weeks. You'll need to let us know as soon as possible if it looks like the case may settle. You do not need to have every wrinkle sorted out before coming to us with a draft settlement agreement.

Be sure to forward copies of all pleadings, including the original appeal and any briefs you submit, so that we have a copy for our file.

Good luck with the case.

Nathaniel Shoaff
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11/4/2010