

DE 05-150

ALDEN T. GREENWOOD d/b/a ALDEN ENGINEERING COMPANY

Petition for Declaratory Order

Order Denying Petition

ORDER NO. 24,613

April 13, 2006

On September 15, 2005, Alden T. Greenwood d/b/a Alden Engineering Company (ATG) filed a petition with the New Hampshire Public Utilities Commission (Commission) seeking a declaratory ruling with respect to three hydroelectric projects owned and operated by ATG in the service territory of Public Service Company of New Hampshire (PSNH). The facilities in question are known as Waterloom Falls, Otis Falls and Chamberlain Falls.

ATG requests a declaratory ruling that a 30-year rate order approved by the Commission in 1985 remains in full force and effect. According to ATG, the order in question is No. 17,814, issued in Docket No. DR 85-230 on August 13, 1985. It does not appear in the New Hampshire Public Utilities Commission Reports, the published volumes of Commission decisions. However, a copy is on file in the Commission's archived records. The Commission issued its order on a *nisi* basis, leaving open the possibility of revisiting the determination if requested by PSNH within 20 days of the Order. ATG does not allege that PSNH, or any other party, did or did not submit such a request.

It is clear that the Commission was acting in 1985 pursuant to its authority under the federal Public Utility Regulatory Policy Act (PURPA) and its state-law analog, the Limited Electrical Energy Producers Act, RSA Chapter 362-A, to establish rates at which PSNH is obliged to purchase energy from the three hydroelectric facilities based on PSNH's avoided cost

of producing the power itself. It further appears that the Commission approved a long term rate to be effective over a 30-year period.

According to ATG, the Commission “attempted to back-track” on its 1985 determination by issuing Order No. 19,095 in Docket No. DR 85-230 on June 30, 1988. The referenced order is published as *Lakeport Hydroelectric Corp.*, 73 NH PUC 228 (1988). In the *Lakeport* order, the Commission ruled that, upon reconsideration of 30-year rate orders issued as to both the three ATG facilities as well as the Lakeport Dam project owned by a different party, the public interest required the Commission to limit the effective period of the previously approved rates to 20 years. *Id.* at 229. Thus, the Commission explicitly determined that the long-term rate established in 1985 would not be applicable to the years 2006 through 2015. *Id.*

According to ATG, the Federal Energy Regulatory Commission (FERC) and every federal court that has addressed the issue have made clear that it is inconsistent with PURPA for state utility commissions to alter, amend or modify previously approved PURPA rate orders or contracts. As examples, ATG cites *Freehold Cogeneration Associates v. Board of Regulatory Commissioners*, 44 F.3d 1178 (3d Cir. 1985), and the Commission’s own acknowledgement of the *Freehold* precedent in *Connecticut Valley Electric Company*, 87 NH PUC 150 (2002). The conclusion reached by the Third Circuit in *Freehold* is that once a state utility commission approves a power purchase agreement between a PURPA contract on the ground that the rates were consistent with avoided cost, “any action or order by the [commission] to reconsider its approval or to deny the passage of those rates to [the utility’s] consumers under purported state authority was preempted by federal law.” *Freehold*, 44 F.3d at 1194.

ATG further contends that PSNH has repeatedly taken a similar position itself. Specifically, ATG refers to assertions by PSNH before the Commission “over the last ten to fifteen years that the Commission’s rate orders with the so-called wood fired Biomass plants, which are delineated in the Rate Agreement between the State and [PSNH parent company] Northeast Utilities, are sacrosanct and may not be unilaterally amended, altered or otherwise varied in rates or terms by PSNH or this Commission.” ATG Petition at ¶ 8.

ATG takes the position the Commission was preempted from making the decision reflected in the June 1988 *Lakeport* order. ATG therefore seeks a declaratory ruling that the long term rates approved in 1985 remain effective through the originally approved period ending in 2015.

Not referenced in the ATG petition is a subsequent Commission ruling, *Lakeport Hydroelectric Corporation*, 73 NH PUC 504 (1988), issued in Docket No. DR 85-230 as Order No. 19,257 on December 9, 1988. In Order No. 19,257, the Commission (after noting appearances by ATG as well as PSNH and the Commission Staff) determined that (1) ATG had filed a motion for reconsideration of the June 1988 *Lakeport* order, (2) the Commission granted the motion and scheduled a hearing for November 28, 1988, and (3) that ATG appeared at the November 28, 1988 hearing and “conceded that the commission had acted within its authority in issuing the rescission order and did not contest the merits of the order as set forth in [Commission] staff testimony and the order itself.” *Id.* at 504-05. The Commission therefore ruled that, notwithstanding the arguments in ATG’s reconsideration motion, the *Lakeport* decision of the preceding June was “lawful, reasonable and in the public good.” *Id.* at 505.

The relief now requested by ATG is accordingly barred by the doctrine of *res judicata*. In the judicial context, "[t]he essence of the doctrine of *res judicata* is that a final judgment by a court of competent jurisdiction is conclusive upon the parties in a subsequent litigation involving the same cause of action." *Osman v. Gagnon*, 152 N.H. 359, 362 (2005) (citation omitted). "Res judicata attempts to avoid repetitive litigation in order to promote judicial economy and a policy of certainty and finality in our legal system." *Id.* (citation omitted). "Three conditions must be met for *res judicata* to apply: (1) the parties must be the same or in privity with one another; (2) the same cause of action must be before the court in both instances; and (3) a final judgment on the merits must have been rendered on the first action." *Id.* (citation omitted).

Res judicata applies to administrative proceedings in appropriate circumstances. Specifically, Res judicata is applicable in connection with a decision of an administrative agency "which was rendered in a judicial capacity, resolved disputed issues properly before it and which the parties had an opportunity to litigate." *Cook v. Sullivan*, 149 N.H. 774, 777 (2003) (citation omitted). All of these requirements are satisfied with respect to Order No. 19,257.

The contention that the Commission's *Lakeport* decision was inconsistent with PURPA, and thus preempted notwithstanding any-state law authority to the contrary, is unavailing in these circumstances. Under the doctrine of *res judicata*, "[a] valid judgment finally negatives every defense that was or might have been raised." *Osman*, 876 A.2d at 195 (citation omitted).

Based upon the foregoing, it is hereby

ORDERED, that the petition of Alden T. Greenwood d/b/a Alden Engineering Company for a declaratory ruling submitted on September 15, 2005 is **DISMISSED** without hearing as a matter of law.

By order of the Public Utilities Commission of New Hampshire this thirteenth day of April, 2006.

Graham J. Morrison
Commissioner

Clifton C. Below
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary