

EXHIBIT 1

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

Hemphill Power & Light Company

v.

Docket #07-C-0294

Public Service Company of New Hampshire, Inc.

**HEMPHILL'S OBJECTION TO PSNH'S MOTION TO STAY
AND CROSS-MOTION TO ENJOIN**

Hemphill Power & Light Company ("Hemphill") objects to defendant's motion to stay this proceeding. Hemphill also moves the court for an order enjoining defendant from proceeding with an action it has filed with the New Hampshire Public Utilities Commission (the "Commission"). The objection and cross-motion rest on the following grounds.

I. INTRODUCTION

The court should deny PSNH's motion to stay and should enjoin PSNH from forum shopping. Hemphill commenced this action on April 30, 2007, by a writ of summons. Six months later, and after the commencement of discovery, PSNH filed a petition with the Commission seeking relief arising from the same dispute between the parties. PSNH has asked this court to suspend its proceedings in favor of piecemeal litigation before the Commission.

Only the superior court has the general and equity jurisdiction necessary to afford the *complete* legal and equitable relief requested by Hemphill and PSNH. New Hampshire law requires the first court having the jurisdiction necessary to afford the parties complete relief to exercise that jurisdiction. The two doctrines raised by PSNH to justify proceeding before the Commission – primary jurisdiction and exhaustion of administrative remedies – do not apply

where an agency such as the Commission lacks the jurisdiction to grant all of the relief requested by the parties.

The superior court should not defer to a tribunal having jurisdiction over only a part of the parties' dispute. Accordingly, PSNH's motion to stay should be denied and Hemphill's motion to enjoin should be granted.

II. STATEMENT OF FACTS

Hemphill sells electricity to PSNH under a 1978 federal statute¹ designed to encourage the development of power plants using renewable fuel supplies. New Hampshire's implementation of this federal statute, RSA ch. 362-A, required the Commission to create "legally enforceable obligations" on the part of PSNH and parties – like Hemphill – seeking to sell power to PSNH. Pursuant to these federal requirements, the Commission approved arrangements known as "rate orders" that required PSNH to purchase electricity produced by small power producers like Hemphill for terms of twenty years. The price or "rates" that PSNH was obligated to pay Hemphill for power for each of the twenty years of Hemphill's rate order were set by the Commission.

Hemphill served its writ on PSNH on May 7, 2007. One of the causes of action in Hemphill's writ is a request for a declaration that Hemphill's twenty-year rate order and PSNH's consequent obligation to purchase energy ended on October 27, 2007. Exhibit 1 at 3 ¶ 15. PSNH stopped purchasing Hemphill's power output at the rates specified by the Commission on October 26, 2006, after only nineteen years. Accordingly, Hemphill's writ also seeks economic damages arising from this unilateral decision by PSNH to cut short its twenty-year obligation by one year and demands a jury trial on this issue. Hemphill's writ also requested a mandatory

¹ The Public Utility Regulatory Policies Act or "PURPA." 16 U.S.C. § 824a-3.

injunction requiring PSNH pay the appropriate rates through October 27, 2007. In response to Hemphill's writ, PSNH filed an equitable counterclaim in set-off claiming that if the court enforced a twenty-year obligation, Hemphill would be unjustly enriched.

PSNH's petition before the Commission seeks a declaration that Hemphill's rate order ended a year early, on October 26, 2006. Exhibit 3 at 3-4. PSNH's petition also claims that Hemphill would be unjustly enriched if the twenty-year obligation were enforced. *Id.* at 3.

III. ARGUMENT

A. The First Court to Acquire Jurisdiction Must Exercise It.

It is a long-established and fundamental principle of New Hampshire law that the tribunal first having jurisdiction to adjudicate all of the claims between the parties takes precedence over a tribunal later taking jurisdiction or having jurisdiction over only a fraction of those claims. *See, e.g., Robinson v. Potter*, 43 N.H. 188, 191 (1861) (court having "the power . . . adequate for the administration of complete justice" should enjoin a party attempting to "divert the litigation to another court"); *Smith v. Atlantic Mutual Fire Insurance Co.*, 22 N.H. 21, 22 (1850) (first tribunal that can "give an adequate and complete remedy" to the parties is to exercise its jurisdiction, irrespective of the sequence in which the actions are filed).

In *Woodstock Soapstone Co. v. Carleton*, 133 N.H. 809 (1991), a landlord and tenant had a dispute over the amount of property taxes that the tenant was required to pay under a commercial lease, and the tenant refused to pay any of the taxes demanded by the landlord. *Id.* at 813. The landlord filed an eviction action in the district court. Subsequently, the tenant exercised an option to purchase the property. The landlord refused to honor the tenant's exercise of the purchase option. In response, the tenant filed an action in the superior court for declaratory and injunctive relief on the tax issue and specific performance for the purchase

option. The superior court then enjoined the landlord from adversely affecting the tenant's rights in the property, resulting in the dismissal of the district court action. *Id.*

On appeal the supreme court affirmed the superior court's issuance of the injunction, reasoning that the superior court is a court of general jurisdiction while the district court has jurisdiction over possessory actions but no jurisdiction in equity. Thus, even though the superior and district courts had concurrent jurisdiction over one of the claims, only the superior court could provide complete relief:

Although some of the issues before the superior court would have arisen in the district court case, [the tenant] would not have been able to litigate in the district court the issues requiring specific performance. *This is not a case where the courts have concurrent jurisdiction.*

Emphasis supplied. *Id.* at 816. Accordingly, where a tribunal of limited jurisdiction can resolve some issues but lacks jurisdiction to provide adequate and complete relief, concurrent jurisdiction does not truly exist and the superior court must enjoin a party from attempting to litigate selected issues elsewhere. *Id.*; see also *J. Dunn & Sons, Inc. v. Paragon Homes of New England, Inc.*, 110 N.H. 215, 218 (1970) (proper for court to enjoin contractual arbitration of one claim in a multi-claim proceeding and to control the litigation before it by requiring all claims to be tried at once in superior court).

In all relevant respects, this case is no different from *Woodstock Soapstone*. Conceding for the sake of argument that the Commission has the limited jurisdiction to issue a declaratory order concerning the expiration of Hemphill's power sales arrangements, the Commission has no power to award damages. *Re: PSNH, Complaint of Guillemette*, 2001 NHPUC LEXIS 116 at *14, Docket No. DE 01-023, Order No. 23,734 (June 28, 2001) (Commission "lack[s] authority to award civil damages"); *Re Verizon New Hampshire, Complaint of Harris*, 2005 NHPUC LEXIS 22 at *9-10, Docket No. DT 03-153, Order No. 24,440 (March 4, 2005) (same). Even if

the Commission had power to award damages, which it cannot, it could not provide a jury trial on Hemphill's damages claim. *Cf.* RSA 491:7 (conferring general authority on superior court to hold jury trials); *cf. also* RSA 498:12-a and :15 (conferring limited authority on regional district courts to hold jury trials). Additionally, the Commission has no jurisdiction to hear or decide PSNH's claim of unjust enrichment, a claim entirely in equity. *See New Hampshire Gas & Electric Company*, 86 NH at 31. There is therefore no true concurrent jurisdiction, and PSNH should be enjoined from pursuing piecemeal litigation before the Commission.

B. The Doctrine Of Primary Jurisdiction Does Not Apply.

The New Hampshire Supreme Court has described the primary jurisdiction doctrine in the following terms:

a court will refrain from exercising its *concurrent jurisdiction* to decide a question until it has first been decided by a specialized agency that also has jurisdiction to decide it . . . to encourage the exercise of *agency expertise*, preserve agency autonomy, and promote *judicial efficiency*.

Emphasis supplied. *New Hampshire Division of Human Services v. Allard*, 138 N.H. 604, 607 (1994); *see also Wisniewski v. Gemmill*, 123 N.H. 701, 706 (1983). Thus, a threshold requirement for application of the doctrine is that the court and the administrative agency have concurrent jurisdiction. The court also identified the purpose of the doctrine as promoting judicial economy, preserving agency autonomy, and taking advantage of agency expertise. The doctrine does not apply in this case because there is no concurrent jurisdiction, application of the doctrine would undermine judicial economy, and the superior court has greater expertise in interpreting language than does the Commission.

1. *The primary jurisdiction doctrine does not apply, because the Commission and the superior court do not have concurrent jurisdiction.*

For jurisdiction to be concurrent, both tribunals must be able to grant all of the relief sought by the parties. Thus, in *Woodstock Soapstone*, for example, the court held that the district court and superior court did not have concurrent jurisdiction because only the superior court could grant specific performance as a remedy for breach of contract. 133 N.H. at 816; *cf. Smith v. The Atlantic Mutual Fire Ins. Co.*, 22 N.H. 21, 1850 N.H. Lexis 144, *5-7 (1850) (describing and distinguishing scope of jurisdiction in terms of scope of relief that could be granted).

This rule is analogous to the federal abstention doctrine in which “all courts appear to agree that mere commonality of subject matter does not amount to the contemporary exercise of concurrent jurisdiction.” *Williams v. Security National Bank*, 314 F. Supp. 2d 886, 899 (N.D. Iowa, 2004) (citations and quotation marks omitted). Rather, in deciding whether to abstain from exercising jurisdiction when a similar action is ongoing in state court, “parallelism [of the two actions] is considered in terms of whether one of the actions, as it then existed, could afford complete relief.” *Id.*

PSNH cites Judge Conboy’s decision in *Franklin Power, LLC v. Public Service Company of New Hampshire* (Hillsborough County Superior Court, Northern Division, Docket No. 02-E-0258) as authority for the application of the primary jurisdiction doctrine here. In *Franklin Power*, however, the court did not consider whether the court and the Commission could both provide adequate and complete relief and there is no suggestion in the opinion that Franklin Power had sought a jury trial. The court therefore did not reach the question whether there was true concurrent jurisdiction under *Woodstock Soapstone*.

In this case, only the superior court can afford Hemphill a jury trial, grant damages, and adjudicate PSNH’s counterclaim in equity. Accordingly, there is no concurrent jurisdiction and the primary jurisdiction doctrine does not apply.

2. *The primary jurisdiction doctrine does not apply because in this case the doctrine would undermine – not promote – judicial economy.*

PSNH seeks a stay of this proceeding while it pursues its petition before the Commission.

PSNH fails to recognize, however, that no matter what the Commission were to decide with respect to PSNH's petition, the parties would still have to return to this court. If Hemphill were to win declaratory judgment at the Commission, it would return to this court for enforcement of that order in the form of a damages award. Likewise, if PSNH wishes to invoke the equitable principle of unjust enrichment to offset a damages award, it would also have to return to this court. Thus, PSNH seeks to apply the primary jurisdiction doctrine when it would result in two separate proceedings in two tribunals. Such an outcome would actually undermine the goal of judicial economy that the doctrine is supposed to promote.

Application of the primary jurisdiction doctrine would therefore result in serial proceedings at the Commission (or supreme court on appeal) and the superior court. What PSNH styles a "stay" is functionally a *de facto* bifurcation and dismissal of one of the Hemphill's claims. No court rule, however, allows for such a bifurcation and dismissal. Furthermore, whether this court were to maintain a stay for the duration of an appeal of a Commission decision to the supreme court² or proceed with adjudication of the parties' claims upon conclusion of the Commission proceedings, the result would be to complicate and unnecessarily protract the final resolution of this case. Because a Commission ruling on PSNH's

² Decisions of the Commission *must* be appealed within thirty days of the Commission's denial of a motion for rehearing, RSA 541:6, but an appeal does not affect the finality of the Commission's decision on the merits in the way an appeal prevents a superior court order from becoming final. *Cf.* RSA 541:18 (administrative decision remains final during appeal) and Super. Ct. R. 74 (appeal from superior court decision suspends entry of judgment)

petition will not moot the parties' claims, moreover, bifurcating the dispute into two proceedings in two tribunals will result in the likelihood of two appeals rather than one. As the supreme court recently stated in the context of a zoning action, "It would be illogical and unduly cumbersome on the parties and the judicial process for a single . . . matter to be simultaneously pending before two different tribunals." *McDonald v. Town of Effingham Zoning Bd. of Adjustment*, 152 N.H. 171, 175 (2005).

Were the court to grant PSNH's motion to stay and deny Hemphill's motion to enjoin, it would undermine one of the express purposes of the primary jurisdiction doctrine. The court should therefore enjoin PSNH from pursuing its petition before the Commission.

3. *The primary jurisdiction doctrine does not apply in this case because the superior court has greater expertise in construing language than does the Commission.*

The primary jurisdiction doctrine is applied to take advantage of an administrative agency's expertise. But the Commission's area of expertise is not implicated in this case, and the superior court has the greater relevant expertise.

The mere fact that a case involves a public utility like PSNH or that one of the issues in the case concerns the meaning of a Commission order does not mean that it calls for the Commission's expertise. The Commission's special expertise is important to cases that involve "complex issues of rates, fair return, or distribution of rates among classes." Emphasis supplied. *Bacher v. Public Service Company of New Hampshire*, 119 N.H. 356, 643 (1979) (citation, quotation marks, and brackets omitted). The Commission's expertise is not implicated in cases like this one, however, that involve a straightforward question of when a twenty-year term began and ended. See *Nelson v. Public Service Company of New Hampshire*, 119 N.H. 327, 330 (1979)

(district court, rather than Commission, properly determined when utility's rate took effect). No special knowledge about ratemaking is required. Rather, the case presents a pure question of law which the superior court is abundantly qualified to answer. *See id.*

Instead of expertise in ratemaking, this case requires expertise in construing language. It requires interpretation of the language of Hemphill's rate order and the parties' subsequent course of conduct. This is no different than interpreting a contract, statute, or court order, which the superior court does routinely.

The Commission has no advantage over the superior court in deciding this case. None of the individuals currently serving on the Commission was serving at the time the orders were issued. Thus, even if the orders were found to be ambiguous, none of the commissioners has *actual* knowledge of what the individuals who signed the orders *actually* intended. Like the superior court, they would have to discern intent from the language of the rate order, the record of the proceeding, and consideration of the parties' course of conduct. Because the superior court has greater expertise in the construction of language, and ratemaking expertise is not required, the primary jurisdiction doctrine does not apply.

C. Exhaustion of Administrative Remedies Is Not Required Where, as Here, the Administrative Agency Cannot Grant the Relief Sought.

PSNH argues that the court must stay the proceeding until Hemphill has exhausted its administrative remedies at the Commission. But exhaustion of administrative remedies is not required where, as here, the administrative agency cannot grant the relief sought. *See Wisniewski*, 123 N.H. at 707. PSNH seeks to characterize this case as involving the exercise of administrative discretion, but this is emphatically not so. No one has asked the Commission to reform Hemphill's rate order, nor does the Commission have authority to do so. All that is required now is enforcement of Hemphill's rate order as issued. This does not require

administrative discretion; it requires expertise in the *interpretation* of the written word. Again, it is the superior court that has the greater expertise when it comes to the resolution of the issues in this case.

D. Hemphill Is Entitled to a Trial By Jury on its Damages Claim.

Hemphill's writ and declaration seek damages in excess of \$10,000,000 arising from PSNH's breach of a legally enforceable obligation. *See Appeal of Public Serv. Co.*, 130 N.H. 285, 292 (1988) (PURPA rate order results in legally enforceable obligation). Hemphill has a constitutional right to have a jury determine these damages. Part 1, Article 20 of the New Hampshire Constitution provides:

In all controversies concerning property, and in all suits between 2 or more persons except those in which another practice is and has been customary and except those in which the value in controversy does not exceed \$1,500 and no title to real estate is involved, the parties have a right to a trial by jury. This method of procedure shall be held sacred unless, in cases arising on the high seas and in cases relating to mariners' wages, the legislature shall think it necessary to alter it.

N.H. Const. pt. 1, art. 20.

By deferring to the Commission, the superior court would deny Hemphill its right to a trial by jury. Unlike in other agency proceedings where there is an appeal de novo to the superior court, there is no right to appeal from the Commission to the superior court where a right to trial by jury can be invoked. *Cf. ICS Communications v. Fitch*, 145 N.H. 433, 434-35 (2000), *quoting Opinion of the Justices*, 113 N.H. 205, 214 (1973) ("Jury trial need not be had in the first instance if a reasonably unfettered right of appeal is allowed to a court where the constitutional right of trial by jury can be enjoyed."). Here, appeal from the Commission would be directly to the supreme court, and Hemphill's right to trial by jury would be abridged. *See* RSA 365:21 and 541:6 (appeal to supreme court).

Accordingly, Hemphill respectfully requests that the court deny PSNH's motion to stay and enjoin PSNH from pursuing its petition before the Commission.

Respectfully submitted,

HEMPHILL POWER & LIGHT COMPANY
By Its Attorneys,
BROWN, OLSON & GOULD, P.C.

Dated: 11-20-07

By: Bryan K. Gould
Bryan K. Gould, Esq.
David J. Shullock, Esq.
Brown, Olson & Gould, P.C.
2 Delta Drive, Suite 301
Concord, NH 03301-7426
(603) 225-9716

CERTIFICATE OF SERVICE

I hereby certify that the within document was this day forwarded via U.S. Mail, postage prepaid, to Gerald M. Eaton, Esq., PSNH, 780 North Commercial Street, P.O. Box 330, Manchester, NH 03105-0330.

Date: 11-20-07

Bryan K. Gould
Bryan K. Gould, Esq.