

STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

DE 11-105 UNITIL ENERGY SYSTEMS, INC. PETITION FOR DECLARATORY RULING
AND APPROVAL OF ADJUSTMENTS TO CERTAIN ACCOUNT BALANCES

OCA RESPONSE TO RIVERWOODS COMPANY AT EXETER
MOTION TO DISMISS OR STAY

Now comes the Office of the Consumer Advocate (OCA), and presents the following Response to the Motion to Dismiss or Stay of RiverWoods Company at Exeter, New Hampshire ("RiverWoods"). In support of its Response, OCA states as follows:

1. On March 13, 2011 Unitil Energy Systems, Inc. (Unitil) filed with the New Hampshire Public Utilities Commission (Commission) a "Petition for Declaratory Ruling and Approval of Adjustments to Certain Account Balances" ("Petition") related to overbilling of RiverWoods Company at Exeter (RiverWoods) between 2004 and 2011.¹
2. On June 7, 2011 the Commission issued an Order of Notice opening the docket and scheduling a prehearing conference on June 24, 2011.
3. On June 20, 2011 RiverWoods filed a Writ of Summons in Rockingham County Superior Court asserting claims for negligence, unjust enrichment, violation of RSA 358-A (the Consumer Protection Act), and breach of contract.
4. On July 11, 2011 RiverWoods filed a Motion to Dismiss or Stay "any portion of [Unitil's] declaratory judgment action [at the Commission] by which Unitil seeks to

¹ Unitil requested that the identity of the customer to be confidential in its Petition, but RiverWoods later agreed that its identity could be public.

adjudicate the scope of its liability to RiverWoods for damages caused by a defective Unitil electrical meter.”

5. In its March 13, 2011 Petition, UES admits that RiverWoods had been incorrectly billed due to erroneously labeled equipment from October 2004 through January 2011 (See paragraph 1 of Petition).
6. Unitil has calculated the full amount of the overcharge to RiverWoods as \$1,801,504 (see paragraph 1 of Petition), and states that it “is willing to pay the full amount of the overcharge” so long as the Commission permits Unitil to adjust certain reconciling rates of other customers to cover nearly all of the refund due to RiverWoods.² Paragraph 7 of the Petition.
7. The main issues before the Commission involve the interpretation of certain of its enabling statutes, including RSA 365:29, and whether and to what extent the Commission may authorize Unitil to recover, through adjustments to other customers’ rates, an amount to refund to RiverWoods. These are issues that the Commission has primary jurisdiction over as the agency vested with express authority for ordering reparations and setting utility rates.
8. New Hampshire courts have abided by the doctrine of primary jurisdiction in cases involving the PUC and other agencies in order to “encourage the exercise of agency expertise, preserve agency autonomy, and promote judicial efficiency.” NH Div. of Human Services v. Allard, 138 NH 604, 607 (1994) (citations omitted).

² See Joint Testimony of Asbury, Eisfeller and Furino filed with Unitil’s Petition at p. 17, lines 11-13, for the amount of \$55,447 that Unitil states that it will “absorb” rather than seek to collect from customers if the Commission allows Unitil to collect the total over charge amount from other customers.

9. The doctrine of primary jurisdiction requires that a court refrain from exercising jurisdiction in cases involving issues within the scope of the PUC's jurisdiction: "The doctrine mandates that a court refrain from exercising its jurisdiction to decide a question until it has first been decided by a specialized agency that also has jurisdiction to do so." Pennichuck Corporation v. City of Nashua (2004 WL 1950458 at p. 8 (NH Super.); *affirmed by* Pennichuck Corporation v. City of Nashua, 152 NH 729 (2005) (citations omitted).
10. Even if both an agency and the Superior Court have concurrent jurisdiction, courts have still cited the doctrine of primary jurisdiction as a reason to refrain from taking jurisdiction. "[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." NH Div. of Human Services v. Allard, 138 NH 604, 607 (1994) (citations omitted).
11. Parties must also first exhaust administrative remedies when they are available prior to resorting to the courts for relief, and courts have refrained from taking jurisdiction when a plaintiff has not done so, especially when a state agency has primary jurisdiction over the issues. *See* Konefal v. Hollis/Brookline Cooperative School District et al., 143 NH 256, 258 (1998) ("[A]pplying the doctrine of primary jurisdiction, the trial court correctly concluded that the plaintiff's contract claims should be been resolved before the PELRB in the first instance.").
12. In the Konefal case the court also noted that "the plaintiffs did not pursue administrative proceedings that could have eliminated or narrowed the parties' dispute." *Id.* In this case, issues have been raised that are best suited to resolution at the PUC, including

whether RSA 365:29, the reparation statute, applies, and whether Puc Administrative Rule 305.05(c), which requires certain customer refunds, applies. Other questions to be considered could include whether other provisions of law that deal with the PUC's general oversight of utilities and its authority over rates apply; whether the PUC has other express or implied authority to require Unitil to refund the over charged amounts to the customer; whether Unitil properly applied its PUC-approved tariffs; and the prudence of Unitil's actions in the case.³ All of these questions are more properly considered before the specialized agency that was created to regulate utilities. *See generally* RSA 362, RSA 363, RSA 365, RSA 374, and RSA 378. To the extent that RiverWoods has claims that are not or cannot be adjudicated by the PUC, it may pursue these limited claims in Superior Court after these PUC proceedings.

13. It is more efficient to investigate these issues in Unitil's Petition at the PUC rather than having to do so in Superior Court.
14. Therefore, RiverWoods' motion to dismiss or stay the PUC proceeding should be denied so the issues before the Commission can be investigated and adjudicated.

³ The OCA is not taking a position at this time on these issues, including the applicability of RSA 365:29.

WHEREFORE, the OCA respectfully requests that the Commission:

- A. Deny RiverWoods' motion to dismiss or stay the proceeding;
- B. Direct the parties to develop a procedural schedule in the Docket; and
- C. Grant such other relief as justice may require.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was forwarded this day to the parties by electronic mail.

July 21, 2011



Meredith A. Hatfield