STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DE-11-105

UNITIL ENERGY SYSTEMS, INC.

RIVERWOODS' REPLY IN SUPPORT OF MOTION TO DISMISS OR STAY

Intervenor RiverWoods Company at Exeter, New Hampshire ("RiverWoods") hereby replies to the Objections filed by Unitil Energy Systems, Inc. ("Unitil") and the Office of the Consumer Advocate ("OCA") to RiverWoods' Motion to Dismiss or Stay.

A. The PUC Does Not Have Exclusive Jurisdiction

1. Neither Unitil nor the OCA addresses the fact that the PUC lacks jurisdiction to award full recovery to RiverWoods, or suggests why – in light of the limited PUC authority – RiverWoods' claims against Unitil should be adjudicated in both this forum and the Superior Court.

2. Unitil argues that the PUC has "exclusive jurisdiction" over the issues presented in Unitil's Petition for Declaratory Judgment. Unitil relies principally on language in RSA 363:17-a which states that the PUC "shall be the arbiter" between the interests of a customer and regulated utilities. Unitil's argument that this phrase should be viewed in isolation, and construed as affording the PUC with exclusive jurisdiction over this and all other disputes between a utility and a customer, lacks merit.

3. First, RSA 363:17-a does not purport to vest the PUC with exclusive jurisdiction over all disputes between customers and utilities.[1] Instead, it provides that the PUC shall be the arbiter "as provided by this title." Id. It is apparent from the legislature's use of the limiting

[1] The language in RSA 363-A:17-a is far different from language in other statutes which unambiguously confer exclusive jurisdiction to state agencies. See, e.g., RSA 5-B:4-a (stating that the Secretary of State has exclusive jurisdiction); RSA 231:161, I(c) (stating that the Commissioner of Transportation has exclusive jurisdiction); RSA 383:10-d (stating that the Commissioner of the Banking Department has exclusive jurisdiction).

phrase "as provided by this title" that it did not intend to vest the PUC with exclusive jurisdiction.

4. One need look no further than RiverWoods' Motion for authority to refute Unitil's argument that under RSA 363:17-a, the PUC is the exclusive arbiter of all matters concerning utilities addressed by RSA 362 through RSA 382. For example, Nelson v. Public Serv. Co. of New Hampshire, 119 N.H. 327 (1979), construed RSA 365:1, which states that "any person may make complaint to" the PUC concerning the actions of a public utility. Id. at 330. Relying on this statute, PSNH argued – similar to Unitil in this case – that courts lacked jurisdiction to resolve a customer complaint over the timing of PSNH's application of an approved rate increase. In rejecting this argument, the Supreme Court emphasized that the PUC "does not have exclusive jurisdiction over all matters concerning public utilities." Id. The Court then held:

> The issue before us does not involve the type of rate case that is usually within the commission's sole expertise. It is simply a case involving a claim by a ratepayer that he has been overcharged, the resolution of which involves interpretation of a statute. The courts may properly decide this purely legal question.

Id. at 331.

5. Since Nelson, the Supreme Court has re-affirmed its conclusion that while the PUC has exclusive jurisdiction over technical matters such as rate setting, the validity of rates, and rate components, the courts have broad jurisdiction to resolve other disputes between utilities and their customers, including customer claims that they were overcharged or overbilled. See Bacher v. Public Serv. Co., 119 N.H. 356, 357 (1979) (holding that courts have jurisdiction to address cases involving overcharges); Mountain Springs Water Co. v. Huber, 119 N.H. 676, 679 (1979) (same).

6. RiverWoods' claims against Unitil do not concern the establishment of rates or tariffs, or other issues falling within the PUC's "sole expertise." Indeed, the expertise of the PUC is not necessary to resolve RiverWoods' claims, as Unitil admits that it is liable for the defective meter, and that the defect caused RiverWoods to be overbilled by more than $1.8 million. Unitil Objection at ¶¶11-13. Simply stated, this case does not involve "complex issues of rates, fair return, distribution of rates among classes, or other matters better left to the commission." Nelson, 119 N.H. at 330.

7. Unitil also contends that its Petition "asks complex questions calling on the PUC's expertise and experience in interpreting statutes." The statute in question is RSA 365:29, which as discussed below does not apply to this matter. Moreover, "interpreting statutes" is not a matter reserved for the PUC. The Supreme Court has held that where "the issue involves a question of law rather than an exercise of administrative discretion, a court will usually resolve the matter regardless of the administrative posture." Hamby v. Adams, 117 N.H. 606, 609 (1977).

8. Finally, Unitil cites Win-Tasch Corp. v. Town of Merrimack, 120 N.H. 6 (1980), in arguing that agency interpretations of statutes are entitled to deference by courts. Win-Tasch is one of a line of cases which stand for the proposition that when there is a record of a "longstanding and plausible interpretation given a statute of doubtful meaning" by the agency responsible for the statute's implementation, this record is evidence that the agency's interpretation is correct. Id. (citing cases) However, this "maxim of statutory construction has no application" where the proffered interpretation "is in conflict with the express statutory language." Hamby, 117 N.H. at 609. Here, Unitil points to no "longstanding and plausible interpretation" of RSA 363:29 by the PUC or any other agency, let alone an interpretation that

supports Unitil's position in this case. Nor has Unitil suggested how RSA 363:25 is "of doubtful meaning."

B. The Doctrine Of Primary Jurisdiction Does Not Apply

9. Similarly, the OCA argues the PUC has "primary jurisdiction" over the interpretation of RSA 365:29. This is incorrect as well. The Supreme Court has held unequivocally that the doctrine of primary jurisdiction does not apply to a "case involving a claim by a ratepayer that he has been overcharged, the resolution of which involves interpretation of a statute." Nelson, 119 N.H. at 330 (emphasis added).

10. The doctrine of primary jurisdiction "requires judicial abstention until the final administrative disposition of an issue, at which point the agency action may be subject to judicial review." Konefal v. Hollis/Brookline Coop. Sch. Dist., 143 N.H. 256, 258 (1998). The doctrine has been applied in cases involving "complex issues of rates, fair return, distribution of rates among classes, or other matters better left to the commission." Nelson, 119 N.H. at 330. For example, the doctrine bars a customer from challenging in Superior Court the validity of a rate or tariff previously approved by the PUC. Id. Conversely, the interpretation of a statute is "purely [a] legal question" that is not within the PUC's "sole expertise," and should be resolved by the courts. Id. See also Tremblay v. Town of Hudson, 116 N.H. 178, 179-80 (1976) (interpretation of zoning ordinance involves a question of law that would not fall within primary jurisdiction of zoning board); Metzger v. Town of Brentwood, 115 N.H. 287, 290-91 (1975) (exhaustion of remedies required by doctrine of primary jurisdiction does not apply when issue involves a question of law).

11. Once again, the question of whether RSA 365:29 limits the recovery by RiverWoods raises a purely legal question, and, for that reason, the doctrine of primary

jurisdiction would not require the Superior Court to refrain from exercising jurisdiction over this matter.

C. RSA 365:29 Does Not Apply To RiverWoods' Claims

12. Unitil continues to argue that this matter concerns an illegal or discriminatory "rate or charge" within the meaning of RSA 365:29. This is incorrect. RiverWoods seeks recovery for overpayments made after Unitil miscalculated RiverWoods' use of electricity. RiverWoods is not contesting the approved rate, charge or tariff that Unitil charged for that electricity. In this respect, the instant case is analogous to one where, for example, an error in printing a utility's invoices caused a customer to be billed for electricity it did not receive or use. If the customer filed suit to recover overpayments and other damages arising from the printing error, it would be absurd to argue that the customer's claims concerned the legality of a rate and fell within the exclusive jurisdiction of the PUC. The instant case is no different.

13. Further, while RSA 365:29 imposes a two-year limit on the ability of the PUC to award reparations arising from an illegal or discriminatory rate or charge, the statute does not limit the Superior Court's ability to award full relief to a customer damaged by a utility's conduct. See In re Public Service Co. of New Hampshire (Complaint of Guillemette), 2002 N.H.P.U.C. 116 (2001) (discussing PUC's limited ability to award monetary damages); In Re Verizon New Hampshire (Petition for Approval of Proposed Carrier to Carrier Performance Guidelines and Performance Assessment Plan), 2002 N.H.P.U.C. 24 (2002) (same). Unitil also relies on an unpublished order by the Maine PUC, Appeal of Consumer Assistance Order Division Decision by Customer #2010-28271, Docket No. 2010-86 (April 7, 2010) at 34. This case is inapposite. In its order, the Maine PUC applied Maine law to conclude that a customer who filed an administrative complaint regarding overbillings was bound by a six-year limit on

recovery for overbilling provided for under a Maine Statute, Chapter 815, §8(E)(2). That statute does not even remotely resemble RSA 365:29. The order contains no discussion regarding whether a customer could alternatively file a civil lawsuit to obtain full recovery of its damages.

14. Finally, RSA 365:29 only applies when the PUC – acting on "its own initiative" or in response to a "petition or complaint" – has determined that a utility has charged an illegal or discriminatory rate, fare or price. The term "petition" does not relate to declaratory judgment actions under N.H. Code Admin. Rules Puc 207.01, but instead refers to the process set forth in RSA 365:1, which states that "any person may make complaint to the commission *by petition* setting forth in writing any thing or act claimed to have been done or to have been omitted by any public utility in violation of any provision of law." (Emphasis added.)

15. A review of the legislative history of RSA 365:29 further supports this interpretation. Prior to 2008, RSA 365:29 stated that the statute only applied "when a complaint has been made" by a customer. In 2008, RSA 365:29 was amended to clarify that it also applies when the PUC initiates a complaint on its own motion. See Exhibit A (Senate Committee hearing dated October 16, 2007); Exhibit B (Senate Calendar dated April 5, 2007 at 16). There is no indication that the legislature intended to allow utility companies to initiate actions under RSA 365:29 in an effort to limit their liability to customers.

16. In sum, Unitil has improperly relied on RSA 365:29 to bring this matter before the PUC. The instant proceeding should be dismissed so that RiverWoods' claims can be resolved in the proper forum, in Superior Court.

Respectfully submitted,

THE RIVERWOODS COMPANY OF EXETER, NEW HAMPSHIRE

By its attorneys,

Dated: July 27, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the foregoing Reply to Objections to RiverWoods' Motion to Dismiss or Stay was forwarded, via first class mail, postage pre-paid, to all counsel of record.

Christopher H.M. Carter

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EXHIBIT A

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Date: October 16, 2007
Time: 3:07 p.m.
Room: SH 103

The Senate Committee on Energy, Environment and Economic Development held a second hearing on the following:

SB 177 relative to orders of reparation by the public utilities commission.

Members of Committee present: Senator Fuller Clark
Senator Cilley
Senator Odell

The Chair, Senator Jacalyn L. Cilley, opened the hearing and called upon Senator Reynolds, prime sponsor, to speak to the bill.

Senator Deborah R. Reynolds, D. 2: Well, thank you again, Madam Chair. And thank you, Senate colleagues on the Committee for all of your work and your service. My name is Deb Reynolds, and I have the honor and privilege of serving as the New Hampshire State Senator for Senate District 2, which consists of 31 towns, including 27 towns in Grafton County and four in Belknap County.

In beginning my testimony, I just want to note that the amendments to SB 177 have been formulated in conjunction with my Senate colleague and Committee member, Senator Jackie Cilley, and I wanted to take this opportunity to thank Senator Cilley for working with me to craft the amendments to SB 177 that you see before you. Senator Cilley and I have also worked on the amendments to SB 177 in conjunction with Meredith Hatfield, the Office of Consumer Advocate at the Public Utilities Commission, as well as with Commissioner Thomas Getz who's also here to testify.

One of the original objections to the legislation was the inclusion of the phrase "quality of service" in the original bill. You will note that, due to the concerns that were raised by the carriers regarding that language, that language has been removed. Instead, the focus of the bill this afternoon and the amendment that you have before you is simply to update the existing language in the statute that has not received attention for many years. It's

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the legislative intent of the amendments to provide the Public Utilities Commission with some additional tools to address utilities where the consumer has been charged a rate or fare that is illegal or unjustly discriminatory by increasing the amount of the civil penalty and directing that payment may be made directly to the consumer as opposed to the general fund.

I want to focus in on the penalty amounts that are being updated. For example, in Section 365:41 the amount has been increased from 25,000 to 250,000, or 2.5 percent of the annual gross revenue that the utility received from the sales in the state, whichever is lower. Now, that tiering was done because there were concerns in our discussion groups about this legislation about smaller utilities and wanting to make sure that we were capping the penalties commensurate with the particular utility's annual revenues. In paragraph 365:42 the amount has been increased a hundred thousand dollars for each violation; the original amount was $10,000 for each violation, or for each day of a continuing violation. So, arguably, you could have an excess of a hundred thousand dollars for a violation.

The existing law allowed for the imposition of the penalties in excess of a hundred thousand, and we decided to clarify it and limit to a hundred thousand dollars, because we thought that was prudent and reasonable.

Now, I want to focus on the intention of penalties in the civil law. First, a civil penalty is not a fine as used in our penal code. Civil penalties are compensatory; they're intended to compensate the consumer, and they're not penal in nature. Fines, as we know, are monetary assessments imposed by the State to deter illegal or criminal conduct. That is not what is being proposed. All we're doing is actually increasing the dollar amount of the civil penalty that's already in the statute.

The civil penalty imposed is distributed to the consumer; it does not go to the general fund. There is precedent with regard to other agencies and that way of distributing funds. For example, the New Hampshire Consumer Protection statute allows for the imposition of civil damages that go directly to the consumer as opposed to the general fund. And remember that the Public Utilities Commission is an agency that has, regulates a regulated industry. Typically, the consumer, if they have a complaint, goes to the PUC to raise that complaint; they don't sue the carrier directly. And that's something because of the monopolistic nature of a public utilities, that's the way it's done.

Another example of that is, that sometime we use the court filing fees that people pay when they bring suits or, in family law cases, those funds are directed to the New Hampshire Coalition Against Sexual Violence.

The idea behind these amendments is to actually strengthen the Commission's ability to handle a situation where a rogue utility may be overcharging a consumer or a particular consumer. Again, it's not as fine, but it's a form of compensation for the consumer. These amendments are more in line with what our surrounding states have done. For example, in Massachusetts the penalty is actually much higher, or $25,000 per day, up to a million dollars, for a related series of violations. In contrast, the amendments that we have are quite modest and more in line with the spirit of the original bill.

This is going to be a tool that the PUC can use. I think they are supporting it; you will hear testimony from Commissioner Getz as well as Meredith Hatfield. I think this is something that helps the consumers in New Hampshire, and I would urge your support.

Senator Martha Fuller Clark, D. 24: Thank you very much, Senator Reynolds. And would you be able to leave a copy of your remarks with the Committee?

Senator Deborah R. Reynolds, D. 2: Yes, I would.

Senator Martha Fuller Clark, D. 24: Thank you so very much.

Senator Deborah R. Reynolds, D. 2: Thank you very much.

Senator Martha Fuller Clark, D. 24: Are there questions for Senator Reynolds? Yes, Senator Odell.

Senator Bob Odell, D. 8: Thank you, Madam Chair. Senator Reynolds, do we have a lot of "rogue" utilities in New Hampshire, or do we have a history of rogue utilities?

Senator Deborah R. Reynolds, D. 2: Well, let's put it this way: I think that, historically, we have had, you know, and Meredith Hatfield can give you some instances where, in certain situations over the years, and I think she's actually prepared a sheet that discusses some of the violation cases. I don't mean to suggest that it's rampant as though this is happening willy-nilly throughout the state. I think the intention of it, however, is to strengthen existing law, to actually put some teeth into some of these provisions so that they'll, hopefully, give incentives to carriers not to overcharge or charge a

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discriminatory rate. So we're hoping that it would be more in terms of incentive as opposed to having a lot of new cases. If that answers the question.

Senator Martha Fuller Clark, D. 24: Senator Reynolds, I have a question with regard to just the legislation on line 9, it says: "On its own initiative or whenever a petition or complaint ..." And is there a need anywhere for the definition of "petition" in this case to be included, or is that dealt with elsewhere in the statutes?

Senator Deborah R. Reynolds, D. 2: Well, I think typically, Madam Chair, the way complaints procedurally are presented to the PUC, it's in the form of a petition. So I think that word has some, you know, discrete meaning --

Senator Martha Fuller Clark, D. 24: Already.

Senator Deborah R. Reynolds, D. 2: -- for the Commission. It's not --

Senator Martha Fuller Clark, D. 24: I just wanted to make sure of that.

Senator Deborah R. Reynolds, D. 2: Right, it's not a lawsuit, it's a petition; that's the procedural device by which a complaint is filed.

Senator Martha Fuller Clark, D. 24: But, I guess what I'm trying to drive at – I know Meredith is nodding her head in the background – but, you know, usually there's some sort of requirements with a petition, does it have to have so many signatures. And perhaps when Meredith comes forth, she can clarify that for us, just so that we understand how that process is able to be implemented.

Senator Deborah R. Reynolds, D. 2: That's fine, Madam Chair. I mean, I would say that there are rules at – that are promulgated by the PUC. Obviously, any kind of formal proceeding would have to comply with fundamental notions of due process, but I'll let her speak to that, and will leave a copy of my remarks. Thank you very much.

Senator Martha Fuller Clark, D. 24: Thank you very much. Other questions for Senator Reynolds? Thank you.

(Please see copy of Amendment 2007-2499s attached hereto as Amendment #1; copy of written testimony of Senator Reynolds attached hereto as Amendment #2.)

Senator Martha Fuller Clark, D. 24: Commissioner Getz.

Senator Bob Odell, D. 8: Because I'd get it both ways.

Commissioner Thomas Getz: Yeah. I guess, you know, in that category we would have to think through what's the, what's the benefit of imposing a civil penalty. We run into this in small water company cases sometimes; it's like what's the point of imposing a civil penalty – and I'm talking real small companies – where all that's going to do is basically make the company – put the company in the position where it can't afford to do business and you're hurting customers. In that case I guess we'd have to take into consideration, are you advancing the ball, or are you only hurting customers by imposing a civil penalty.

Senator Bob Odell, D. 8: Thank you.

Senator Martha Fuller Clark, D. 24: Further questions? Thank you very much, we appreciate your being today. And I'd like to call on Meredith Hatfield.

Ms. Meredith Hatfield, Office of Consumer Advocate: Good afternoon, Madam Chairman, members of the Committee. My name is Meredith Hatfield and I'm here representing the office of Consumer Advocate. And I think both Senator Reynolds and Chairman Getz gave a good overview of the purpose of the amendment that's before you.

I did just want to stress a couple of things. As Chairman Getz discussed, our office and the PUC, and Senator Cilley and Senator Reynolds, worked together on how best to achieve the goals that we had originally intended for the bill that you saw last year, and so we did focus on the penalty section. But I did want to just mention that in 365:29 we did make those few housekeeping changes, and those are, we think, necessary to reflect current practice.

And specifically, the first few words, "On its own initiative," we have a Supreme Court case that says that the PUC can start a petition for reparation, it can consider reparations on its own initiative, so we thought it would be best to clarify in statute that the PUC does have that authority. And then the words at the end dealing with how far back you can go for reparations has been an issue in a couple of cases, so we thought it would just be clear to set that time frame; it's kind of a statute of limitations, if you will. So those are the two changes that are in that statute.

With respect to the penalty statutes, the OAC agrees with much of what has been said by both Senator Reynolds and Chairman Getz, and we really think

EXHIBIT B

April 5, 2007
No. 15

STATE OF NEW HAMPSHIRE

Web Site Address: www.gencourt.state.nh.us

Legislative

SENATE CALENDAR

REPORTS, AMENDMENTS, HEARINGS, MEETINGS AND NOTICES

I. For a child who enters an out-of-home placement prior to an adjudicatory finding and who is in an out-of-home placement for 12 or more months, the court shall hold and complete an initial permanency hearing within 14 months of the child's entry into out-of-home placement or within 12 months of the court's adjudicatory finding, whichever is earlier. For a child who enters an out-of-home placement subsequent to an adjudicatory finding and who is in an out-of-home placement for 12 or more months, the court shall hold and complete an initial permanency hearing within 12 months of the child's entry into out-of-home placement. For a child who is in out-of-home placement following the initial permanency hearing, the court shall hold and complete a subsequent permanency hearing within 12 months of the initial permanency hearing and every 12 months thereafter as long as the child is in an out-of-home placement.

II. At a permanency hearing the court shall consider whether the parent or parents and child have met the responsibilities pursuant to the dispositional orders issued by the court. If compliance with the dispositional orders pursuant to RSA 169-D:17 is not met, the court shall adopt a permanency plan other than reunification for the child. Other options for a permanency plan include:

(a) Termination of parental rights or parental surrender when an adoption is contemplated;

(b) Guardianship with a fit and willing relative or another appropriate party; or

(c) Another planned permanent living arrangement.

III. At a permanency hearing the court shall determine whether the department has made reasonable efforts to finalize the permanency plan that is in effect. Where reunification is the permanency plan that is in effect, the court shall consider whether services to the family have been accessible, available, and appropriate.

Sen. Reynolds, Dist. 2
February 16, 2007
2007-0237s
06/09

Amendment to SB 177

Amend the bill by replacing section 1 with the following:

1 Reparations. RSA 365:29 is repealed and reenacted to read as follows:

365:29 Orders for Reparation. The commission may on its own motion, or whenever a complaint has been made to the commission covering any rate, fare, charge, or price demanded and collected by any public utility, or the quality of service provided by any public utility, after a finding following a hearing and investigation that an illegal or unjustly discriminatory rate, fare, charge, or price has been collected for any service, or inadequate quality of service has been delivered, order the public utility which has collected the illegal or unjustly discriminatory rate, fare, charge, or price, or provided the inadequate quality of service, to make due reparation to the person who has paid such illegal or unjustly discriminatory rate, fare, charge, or price or received such inadequate service, with interest from the date of the person's payment of the illegal or unjustly discriminatory rate, fare, charge, or price or the person's payment for the inadequate service. Such order for reparation shall cover only payments made within 2 years before the date of filing the complaint for reparation or, when the commission acts on its own motion, within 2 years before the date of the commission's finding that an illegal or unjustly discriminatory rate, fare, charge, or price has been collected or that inadequate quality of service has been delivered.

2007-0237s

AMENDED ANALYSIS

This bill allows the public utilities commission, on its own motion, to consider the quality of use or adequacy of service in awarding reparations.

Senate Finance
April 4, 2007
2007-1169s
10/01

Amendment to SB 191-FN-A

Amend the bill by replacing section 1 with the following: