UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE

Public Service Company of New Hampshire Plaintiff v. Time Warner Entertainment Company, L.P. Defendants	)	Docket No. 12-cv-00098-PB

OBJECTION TO MOTION TO DISMISS

NOW COMES Plaintiff Public Service Company of New Hampshire ("PSNH"), by its attorneys, Gallagher, Callahan & Gartrell, P.C., and objects to Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction, or in the alternative, Motion to Stay Proceedings, and says as follows:

INTRODUCTION

The logical and judicially efficient outcome to this jurisdictional dispute should be that this Court retains jurisdiction over PSNH's contract/debt action for unpaid fees ("Pole Rent") while the New Hampshire Public Utilities Commission ("PUC") addresses the ratemaking issue raised in Time Warner's ("TW") PUC petition for 2013 and beyond. This would allow the parties to litigate the retrospective factual and legal dispute over the terms and conditions of the existing Agreement in a court experienced with contract and debt actions; and would allow the PUC to use its agency expertise to address the prospective ratemaking issues.

No determination by the PUC on matters within the PUC's expertise is needed by this Court to adjudicate PSNH's contract/debt claim against Time Warner. The contract terms and

conditions existing between PSNH and TW are before this Court and the contract dispute can be resolved pursuant to the contract language and actions of the parties without the need for prospective ratemaking issues to be determined by the PUC.

On May 24, 2012, the parties appeared before the PUC for a pre-hearing conference on Time Warner's ratemaking petition. At that conference, the PUC explained that it would issue a decision with regard to its jurisdiction over the ratemaking issue and the contract/debt dispute. PSNH requested that the PUC consider a similar bifurcation as is requested here: that the Court retain jurisdiction over the contract/debt action while the PUC retain the prospective ratemaking issue. The PUC has requested copies of the parties' federal court pleadings on this jurisdictional issue and will make its own ruling shortly.

This Court maintains diversity jurisdiction over this contract/debt action pursuant to 28 U.S.C. § 1332. PSNH need not exhaust administrative remedies before bringing such an action. Moreover, to the extent that Time Warner argues that primary jurisdiction lies with the PUC, Time Warner admits that this Court maintains concurrent subject matter jurisdiction. TW's Motion to Dismiss should be denied.

CONTRACT FACTS AND ARGUMENT

I. Pursuant to the parties' Agreement, this contractual Pole Rent debt dispute is properly before the Court

In 2004, TW as "Licensee" and PSNH as "Licensor" entered into and signed a binding contract ("Agreement") to govern the rental of poles by TW from PSNH for the use and placement of TW cables and equipment on PSNH's jointly and solely-owned poles in New Hampshire.[1] *See* Document No. 5-7.

[1] Verizon New England, Inc., the predecessor of FairPoint Communications, was also a party to the Agreement as a licensor with respect to separate licensing of TW's attachments to Verizon's joint ownership interest in the poles.

The parties agreed at Section 2.1 of the Agreement that "This Agreement governs the fees, charges, terms and conditions under which the Licensor issues such licenses to Licensee."

Pursuant to Section 3.1.1 of the Agreement, Licensee TW agreed to pay Pole Rent to Licensor PSNH, as specified in and in accordance with the terms and conditions of the Agreement and Appendix I.

Pursuant to Section 3.1.2 of the Agreement, Licensee TW agreed that Licensor PSNH may change the Pole Rent amount upon Licensor PSNH by providing Licensee TW at least 60 days prior written notice of a change in the Pole Rent amount. In every year from 2005 to the present, Licensee PSNH provided Licensee TW with written notice of a change in the Pole Rent amount that would be taking effect the following January of the new year. *See* Pole Attachment Fee change letters attached as Exhibits A and B to Affidavit of Paula Vincent.

Pursuant to Section 3.1.2 of the Agreement, if the proposed change by PSNH in the Pole Rent amount was not acceptable to Licensee TW, TW had the right under the Agreement to terminate the Agreement by providing PSNH with 60 days written notice of termination.

Pursuant to Section 3.1.3 of the Agreement, any proposed change by PSNH in the Pole Rent "shall become effective" on the date specified by Licensor subject to the 60 day written notice period.

Pursuant to Section 3.1.3 of the Agreement, TW agreed with PSNH that any changes in the Pole Rent amount "shall be presumed acceptable" unless TW:

a. advised PSNH in writing within 30 days prior to the end of the 60 day notice period that the change in the Pole Rent amount was unacceptable; **and**

b. submitted the issue to a regulatory body with jurisdiction over the Agreement for a decision.

Pursuant to Section 3.2.1. of the Agreement, TW agreed with PSNH that TW "shall pay" the Pole Rent amount to PSNH for "each attachment" made to PSNH poles.

Pursuant to Sections 3.2.2 and 3.4.1 of the Agreement, TW agreed that the Pole Rent amount shall be payable semi-annually or annually in advance, with payment due within 30 days of the bill.

Pursuant to Section 3.4.1 of the Agreement, a late payment is subject to a late fee of 1.5% per month applied to the outstanding balance from the date of the bill, and PSNH could change the late fee from time to time during the term of the Agreement to reflect prevailing market conditions.

Pursuant to Section 3.4.2 of the Agreement, non-payment of any amount due "shall constitute a default of this Agreement."

Pursuant to Section 3.5.1 of the Agreement, if TW disputed in good faith a bill or invoice rendered by PSNH, TW agreed to pay all portions of the bill or invoice not in dispute and, where the disputed amount exceeded $10,000, deposit the excess disputed amount in an interest-bearing escrow account until such time as the dispute was resolved.

Pursuant to Section 3.5.2 of the Agreement, if TW failed to pay an amount due and owing under the Agreement (including amounts in dispute less than $10,000) or failed to establish an escrow account for disputed amounts over $10,000 **or** failed to invoke the dispute resolution procedures of the Agreement (§ 15.10), in addition to all other remedies available to PSNH under the Agreement, PSNH may also refuse to perform Survey, Inspection or Make-

ready Work for TW and may refuse to issue any license to TW until such amounts are paid or deposited into escrow.

Pursuant to Section 15.5 of the Agreement, the parties agreed that either party may choose the forum in which to initiate a contract dispute in:

a. a court of competent subject-matter jurisdiction (in this case, the Merrimack County Superior Court); **or**

b. a regulatory agency with subject-matter jurisdiction.

TW chose not to dispute the Pole Rent charged by PSNH under the contract. Nor did TW properly dispute the bills and invoices it received from PSNH as required under the Agreement.

PSNH properly complied with the Agreement's Choice of Law provision by filing an action to collect unpaid Pole Rent in Merrimack County Superior Court (a court of competent subject-matter jurisdiction), choosing the forum in which to pursue its debt and contract dispute against TW. That the action was removed by TW to federal court has no bearing on the propriety of PSNH's initial forum selection. This action is properly before the Court.

II. TW failed to comply with the dispute resolution provisions of the Agreement.

TW had multiple avenues of dispute resolution available to it under the Agreement but chose not to pursue any of them. TW has sat on its rights.

At the time TW received each notice from PSNH of a change to the Pole Rent with which TW did not agree, TW had the option to terminate the Agreement pursuant to Section 3.1.2 **or** dispute the change in writing and submit the issue to the regulatory board pursuant to Section 3.1.3. When TW received notice of each year's Pole Rent change, however, it failed to pursue either of its contractual options. Consequently, each Pole Rent change was presumed acceptable.

TW alleges that it properly objected to PSNH's Pole Rent, supporting its allegation with two letters (from April, 2006 and August, 2008). *See* Document 5-8. Neither of these letters was received within the 30 day time period required for such objections under Section 3.1.3 of the Agreement. Nor do these letters reflect any objection for other years. No contractually proper objections to Pole Rent changes exist. At most, these letters reflect objections to specific invoices, but even accepting that as true, the letters fail to conform to the appropriate "billing dispute" provisions of Section 3.5 of the Agreement.

TW received invoices bi-annually. At the time TW received any invoice from PSNH with which TW did not agree, TW could have properly disputed the invoice in good faith under Section 3.5 of the Agreement. Pursuant to that section, TW was contractually obligated to pay any undisputed amount of each invoice and deposit all disputed amounts in an interest-bearing escrow account until the dispute was resolved. But for the two inadequate and insufficient objection letters in 2006 and 2008, TW chose not to properly dispute any invoice in good faith and failed to deposit disputed amounts in escrow.

Finally, if TW felt that a term or condition of the Agreement was unjust or unreasonable, TW could have submitted a complaint to the Manager-License Administration Group pursuant to Section 15.10 of the Agreement. Pursuant to the Agreement, the Group would have discussed the terms or conditions with which TW took issue and, if unable to resolve the matter, TW could have then filed a complaint with the regulatory board. TW chose not to submit a complaint to the Manager-License Administration Group.

Non-payment of any amount due under the Agreement constitutes default. PSNH was well within its rights to initiate an action seeking payment of outstanding Pole Rent. TW has sat on its rights by failing to properly dispute the Pole Rent changes, the bills and invoices, or any

terms or conditions of the Agreement in a contractually timely manner. Only in response to PSNH's proper collection action did TW file a petition with the PUC and raise a jurisdictional dispute.

JURISDICTION ARGUMENT

III. The PUC does not have primary jurisdiction over this contract/debt action.

Neither the enabling statute (RSA 374:34-a) nor the PUC's implementing regulations (Puc 1304.02-1304.05) give the PUC sole or "exclusive" jurisdiction over pole attachment contract disputes. *Cf.* RSA 273-A:6 (providing the PELRB with "primary jurisdiction" over unfair labor practices); RSA 547:3 (granting the probate court "exclusive jurisdiction" over specific actions); RSA 541-B:9 (giving the board of claims "original and exclusive jurisdiction" over claims against the state not exceeding $5,000); RSA 281-A:5-c & 11 (providing the department of labor with "exclusive jurisdiction" over private and public self-insuring employer's workers compensation coverage). Admittedly, RSA 374:34-a, VII provides the commission with authority to hear and resolve complaints concerning voluntary agreements, but the statute contains no reference to primary or exclusive jurisdiction that would prevent this Court from maintaining concurrent jurisdiction over contract disputes. Moreover, PUC Rules 1304.02-1304.05, to the extent they apply here, merely provide a party the option ("**may** petition the commission") to petition the PUC, not the sole and exclusive remedy.

PSNH does not dispute that RSA 541 provides the exclusive remedy for appeals from PUC orders, but no such order is being challenged here. This collection action for unpaid attachment fees and charges does not implicate judicial review of an agency determination; rather, it properly seeks original judicial determination of a contract dispute.

Further, PSNH does not dispute that TW has the regulatory right to seek PUC action to *prospectively* establish ratemaking, but for TW to attempt to *retrospectively* challenge its contractual Pole Rent obligations at the PUC in the face of this litigation is inappropriate.

The primary jurisdiction doctrine is intended to serve as a means of coordinating administrative and judicial machinery and promoting uniformity. *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 580 (1st Cir. 1979). The three-factor test for applying the doctrine of primary jurisdiction includes:

a. whether the agency determination lies at the heart of the task assigned the agency…

b. whether agency expertise is required to unravel intricate, technical facts; and

c. whether, though perhaps not determinative, the agency determination would materially aid the court. *Pejepscot Indus. Park, Inc. v. Maine Cent. R. Co.*, 215 F.3d 195, 205 (1st Cir. 2000) (internal citations and quotations omitted).

These factors do not weigh in favor of deferral to the PUC. The reasonableness of pole attachment rates is legitimately an issue of agency importance, but the issue before this Court is not one of reasonable ratemaking. A determination of TW's contractual obligation to pay past due Pole Rent does not "lie at the heart of the task assigned to the agency." *Id.*

Nor does this case contain issues of fact outside the conventional experience of the federal court. This Court is well-familiar with disputes that require contract interpretation and analysis. PSNH alleges that TW failed to pay Pole Rents due and owing under its Agreement and further failed to timely dispute those Pole Rents. This Court need only determine the contractual obligations of the parties. No agency expertise is required to unravel intricate, technical facts

associated with the Agreement. *See Far East Conference v. United States*, 342 U.S. 570, 574 (1952).

Finally, a decision by the PUC would not aid the federal court, but may in fact create inconsistencies in the body of law governing contracts. TW confuses its contractual obligation to pay unpaid Pole Rent pursuant to the Agreement with TW's separate right to establish ratemaking before the PUC. The body of law on contracts is well-established in the judiciary and does not require PUC intervention. The FCC has similarly held that collection of unpaid fees is a matter to be pursued in state court. *In the Matter of Mile Hi Cable Partners, L.P.*, 14 F.C.C.R. 3244 (1999).

In *Reiter v. Cooper*, 507 U.S. 258 (1993), a collection action was brought by a motor carrier's bankruptcy trustee after the motor carrier negotiated with a shipper for rates less than the tariff rates required by the Interstate Commerce Act. *Id.* at 261. After shipments were delivered and paid for, the bankruptcy trustee sued the shipper to recover the difference between the negotiated rates and the tariff rates allegedly required by the Act. *Id.* The shipper raised a counterclaim that the tariff rates were unreasonably high and contended that the doctrine of primary jurisdiction required the Interstate Commerce Commission to adjudicate the unreasonable-rate claim rather than the court. *Id.* at 268. The U.S. Supreme Court held that a court's determination whether to refer a matter to the commission or retain the matter for judicial determination turned on the equities of the case. *Id.* at 270. "Referral of the issue to the administrative agency does not deprive the court of jurisdiction; it has discretion either to retain jurisdiction or ... to dismiss the case without prejudice." *Id.* at 268-69 (internal citations omitted). The Supreme Court found that "referral of the unreasonable-rate issue could produce substantial delay, and tariff rates not disapproved by the [Interstate Commerce Commission] are legal rates,

binding on both the shipper and the carrier." *Id.* at 270. The Supreme Court could not find that the Act required a commission determination on the reasonable-rate issue *before* the filing of a civil action because the limitations period for filing actions began running at the time of delivery of the shipments and the period could expire before the commission acted. *Id.* at 269-70.

Such is the case here where referral of the ratemaking issue could produce substantial delay in the adjudication of an otherwise straightforward collection issue. If PSNH were forced to wait for final resolution of the ratemaking issue before pursuing its contract/debt action, the statute of limitations would prevent PSNH from pursuing all available judicial remedies for the collection of unpaid Pole Rent. Neither RSA 374:34-a nor Puc 1304.02-1304.05 contain a so-called prior-agency-determination requirement and this Court should not find one implicit in the law or regulations. *See id.* at 270. This Court should retain jurisdiction over PSNH's claims.

IV. Exhaustion of administrative remedies is not required for this contract dispute.

The rule requiring administrative remedies to be exhausted prior to appealing to the courts is based on the reasonable polices of encouraging the exercise of administrative expertise, preserving agency autonomy, and promoting judicial efficiency. *Metzger v. Town of Brentwood*, 115 N.H. 287, 290 (1975) (internal citations omitted). On both the state and federal levels, however, the rule as applied by the courts has evolved into a flexible one which recognizes that exhaustion is unnecessary under some circumstances. *Id.* (*citing* K. Davis, Administrative Law Text § 20.01, at 382 (1972)); *Konefal v. Hollis/Brookline Co-op. School Dist.*, 143 N.H. 256 (1998). A party is not required to exhaust administrative remedies where the issue is a question of law rather than a question of the exercise of administrative discretion. *Pheasant Lane Realty Trust v. City of Nashua*, 143 N.H. 140, 141-42 (1998) (internal quotations and citations omitted); *see also Bedford Residents Group v. Town of Bedford*, 130 N.H. 632, 639 (1988) (exhaustion not

required where issue was interpretation of a statute); *Londonderry v. Faucher*, 112 N.H. 454, 456 (1972) (exhaustion not required where issue was interpretation of an ordinance). In *Metzger*, where the constitutionality of an ordinance was in question, the court held that adherence to a statute requiring an application for rehearing prior to appealing to the superior court was unnecessary because the only issue was a narrow legal one. Such is the case here where the enforcement of the Agreement between PSNH and TW is a question of law for this Court to decide, rather than one of administrative discretion requiring PUC oversight.

In an attempt to create ratemaking issues where none exist, TW alleges that the Federal Court will be required to determine a "just and reasonable" rate. The Court will have to do no such thing. PSNH's claims are simply an effort to collect unpaid Pole Rent, not to invoke the PUC's ratemaking jurisdiction. The issue in this case is *whether* the existing Agreement requires TW to pay the presumed-accepted Pole Rent it was charged and failed to pay, not *what* the correct Pole Rent is. TW's allegation that PSNH must exhaust administrative remedies is disingenuous given TW's own failure to exhaust the contractual dispute-resolution processes available to it.

In *Williston Basin Interstate Pipeline Co. v. ARCO Oil & Gas Co.*, 41 FERC ¶ 61063 (Oct. 22, 1987), the Federal Energy Regulatory Commission ("FERC") dismissed a complaint by Williston Basin against ARCO which alleged that ARCO was attempting to improperly collect retroactive payments under ARCO's contract with Williston Basin. In denying a motion to rehear the matter, FERC held that whether or not a contract authorized or required retroactive payments was a question of contract interpretation, not interpretation of commission regulations, which the courts, not the commission, should determine. *Id.* Likewise, PSNH need not exhaust administrative remedies before this Court addresses the purely legal contract/debt dispute.

V. This Court has proper jurisdiction over this contract/debt action and no "exceptional circumstances" exist for stay or dismissal.

The U.S. Supreme Court in *Colorado River* established a narrow basis for district courts to stay or dismiss federal lawsuits in deference to parallel state proceedings. The Court held that, in "exceptional" circumstances, 424 U.S. 800, 818 (1976), a federal court could decline jurisdiction based on " 'considerations of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation," ' " *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U.S. 1, 15 (1983) (*quoting Colorado River,* 424 U.S. at 817 (*quoting Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.,* 342 U.S. 180, 183 (1952))). While admittedly there is no parallel state court action pending here, the *Colorado River* abstention doctrine is relevant in the instant case where there exists a pending state agency petition.

In *Colorado River,* the Supreme Court emphasized that the stay or dismissal authorized there should be used sparingly and spoke of the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," 424 U.S. at 817. The Court cautioned that "[o]nly the clearest of justifications will warrant dismissal." *Id.* at 819. The Court in *Colorado River* mentioned four illustrative factors for determining whether "exceptional circumstances" exist: (1) whether either court has assumed jurisdiction over a *res;* (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation, and (4) the order in which the forums obtained jurisdiction. *See, generally, id.* at 800. In *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.,* 460 U.S. 1 (1983), the Court added two additional factors: (5) whether state or federal law controls, and (6) the adequacy of the state forum to protect the parties' rights.

First, to the extent that the contract constitutes the "*res*" in this matter, this Court, not the PUC, has already taken jurisdiction by addressing the choice of law provisions of the Agreement and adjudicating the remand issue. Second, the federal forum, with its expertise in contract disputes, poses no subject matter inconvenience and TW's removal to this forum suggests that geographical inconvenience is not a factor. Third, while the avoidance of piecemeal litigation is a factor, it is not applicable here. The parties agree that the PUC is better suited to address prospective ratemaking issues. This action is more analogous to a bifurcated matter requiring the adjudication of disparate claims (often requiring different evidence) than to piecemeal litigation that should be avoided.

Fourth, the order in which this Court and the PUC obtained jurisdiction weighs in favor of this Court maintaining jurisdiction. PSNH properly chose the state court forum for its contract dispute prior to TW filing its PUC petition. While the order in which jurisdiction was taken is not a mechanical concept automatically favoring the party who files first, it does favor the case that is the more advanced at the time the *Colorado River* balancing is being done. *Elmendorf Grafica, Inc. v. D.S. Am. (E.), Inc.*, 48 F.3d 46, 52 (1st Cir. 1995). The PUC has not yet decided the issue of jurisdiction over the contract dispute, but the parties and the PUC have agreed to address the prospective ratemaking issue. This Court, on the other hand, has already addressed the Agreement's choice of law provisions and ruled on remand issues. This forum is more advanced in addressing the contract dispute than is the PUC.

As to the fifth and six factors, both weigh in favor of this Court retaining jurisdiction. The judiciary has greater expertise than does the PUC in resolving contract disputes. The PUC's undecided status regarding jurisdiction over the contract dispute leaves this Court as the forum most able to adequately protect PSNH's rights.

Colorado River and its progeny describe the balance of these factors as "heavily weighted in favor of the exercise of [federal court] jurisdiction. *Moses H. Cone,* 460 U.S. at 16. Those cases that warrant stay or dismissal require an affirmative showing of "the clearest of justifications," *Colorado River,* 424 U.S. at 819, or some "exceptional basis," before a federal court properly defers to a state court proceeding. *Burns v. Watler,* 931 F.2d 140, 146 (1st Cir. 1991). Because the issue before this Court is one of contract with which this Court is more familiar and has already initially addressed, this Court must retain jurisdiction.

VI. If the Court chooses to defer both the Pole Rent collection dispute and the ratemaking issue to the PUC, it should stay, rather than dismiss, the contract/debt dispute.

PSNH does not invoke the PUC's ratemaking jurisdiction. PSNH was forced to file this action when no payment by TW was forthcoming for past-due Pole Rent. Were the Court to dismiss this collection action in favor of the PUC's jurisdiction over ratemaking, PSNH would be prejudiced in its collection action. Should this matter be dismissed, the statute of limitations on contract collections would continue to run, forcing PSNH to lose subsequent months of past-due Pole Rent with no timely opportunity to collect. Such dismissal would prejudice PSNH's collection attempts. At the least, this Court should stay the instant collection action pending PUC resolution of TW's ratemaking issue.

CONCLUSION

The action pending in this Court is a contract dispute seeking collection of unpaid Pole Rent. PSNH does not seek to impinge on the PUC's ratemaking authority. TW has sat on its rights and only now, when it faces a breach of contract action for defaulting on its contractual obligations, does TW raise an issue of ratemaking and challenge the terms and conditions of the Agreement. Just as this Court should not get involved in ratemaking decisions, the PUC should

not get involved in this contract dispute. This Court should retain jurisdiction over this contract dispute, or, in the alternative, stay this action pending resolution of the proceedings at the PUC.

Respectfully submitted,

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

By Its Attorneys,

GALLAGHER, CALLAHAN & GARTRELL, P.C.

Dated: June 6, 2012

By: */s/ Charles P. Bauer*
Charles P. Bauer, Esq. (NH Bar #208)
214 N. Main Street, P.O. Box 1415
Concord, NH 03302-1415

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded this date by ECF filing to counsel.

Dated: June 6, 2012

By: */s/ Charles P. Bauer*
Charles P. Bauer, Esq. (NH Bar #208)