

**STATE OF NEW HAMPSHIRE**  
**BEFORE THE**  
**NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION**

**Docket No. DG 17-022**

**CITY OF CONCORD**

**Petition to Establish Oversight Protocols for  
Concord Steam's Abandonment of Manholes and Pipes  
and for Payment of Damage Costs**

**CONCORD STEAM CORPORATION'S MOTION TO DISMISS**

NOW COMES Concord Steam Corporation ("Concord Steam" or "the Company"), by and through its undersigned attorneys, and respectfully moves the New Hampshire Public Utilities Commission ("the Commission") to issue an order dismissing with prejudice the City of Concord's Petition to Establish Oversight Protocols For Concord Steam's Abandonment of Manholes and Pipes and for Payment of Damage Costs ("Petition for Oversight Protocols and Payment of Damages"). In support of this Motion, Concord Steam states as follows:

1. On July 21, 2016, Concord Steam filed a Petition for Emergency Rates and to Discontinue Service. The Commission opened docket DG 16-769 to consider that Petition.

2. The City of Concord ("the City") filed a petition to intervene in docket DG 16-769, which the Commission granted. *See Concord Steam Corporation*, DG 16-769, Order No. 25, 947 (Sept. 28, 2016), p. 2.

3. On October 4, 2016, Concord Steam, the New Hampshire Department of Administrative Services and Commission Staff filed a Settlement Agreement for the purpose of resolving the outstanding issues in docket DG 16-769. Among other things, the Settlement

Agreement contains terms and conditions under which Concord Steam will discontinue service as a public utility. The City did not sign the Settlement Agreement and is therefore not a party to it.

4. The Commission considered the Settlement Agreement at a hearing held October 5, 2016. The City fully participated in said hearing; its attorney provided an opening statement, cross-examined the Company's witness, re-cross-examined the Company's witness, and made a closing statement. *See Concord Steam Corporation, Petition for Emergency Rates and to Discontinue Service*, DG 16-769, Tr. (10-05-16), pp. 9, 36-42, 65-70 and 117-121. The City also introduced into evidence at said hearing a memorandum dated September 15, 2016 from Laura M. Aibel, PE, Associate Engineer to Ed Roberge, PE, City Engineer. This memorandum was marked as Exhibit 7 at hearing and was also attached as Exhibit 1 to the City's Petition for Oversight Protocols and Payment of Damages.

5. The City raised the following issues at the October 5, 2016 hearing: 1) the Company should be required to hold sufficient funds for property taxes for 2016 and 2017; *Id.*, p. 117, lines 16-19; 2) the Company should hold sufficient funds to pay for repairs to manhole structures identified in Exhibit 7; *Id.*, p. 118, lines 23-24 and p. 119, lines 1-12; 3) the Company should go through the permitting process for filling manholes and such filling should be done in accordance with City's engineering guidelines; *Id.*, p. 119, lines 13-24; 4) there should be an escrow account/funds to pay for any damage caused to the City's infrastructure or associated water or sewer systems resulting from the manhole filling process or from the closure of the "Downtown Loop"; *Id.*, p. 120, lines 2-13; 5) the manhole filling process should be conducted with oversight in accordance with the City's Engineering Department; *Id.*, p. 121, lines 10-13;

and 6) the City is concerned about noise, emissions and aesthetics associated with new boilers that will serve Downtown State Buildings. *Id.*, p. 121, lines 14-24.

6. On November 10, 2016, the Commission issued Order No. 25, 966 in DG 16-769 authorizing emergency rates, approving the bulk of the Settlement Agreement's provisions and directing the Company to take additional steps relative to reporting and other requirements prior to discontinuing service as a public utility. The Commission's Order identified issues raised by the City at hearing, *see* Order No. 25, 966, p. 10, denied the City's request to include prospective taxes in the emergency rates, *id.*, p. 17, but did not address the City's other issues. Neither the City nor any other party moved for rehearing of Order No. 25,966.

7. On February 3, 2017, the City filed its Petition for Oversight Protocols and Payment of Damages seeking the following relief: 1) identification of all of the manholes that Concord Steam intends to fill; 2) establish the City or other third party as overseer of Concord Steam's pipe and manhole abandonment process; 3) require Concord Steam to establish an escrow account or bond to ensure the abandonment work is timely completed; 4) require Concord Steam to maintain insurance to cover any property damage during the abandonment process; and 5) require Concord Steam to pay the City for any damage Concord Steam caused to City property. *Petition for Oversight Protocols and Payment of Damages*, p. 3.

8. The requests for relief contained in the City's Petition for Oversight Protocols and Payment of Damages were either specifically or impliedly raised by the City at the October 5, 2016 hearing in DG 16-769, but were not granted. As such, the City's Petition for Oversight Protocols and Payment of Damages is essentially a motion for rehearing or reconsideration of Order No. 25, 966, and therefore, should have been made within 30 days of that order (i.e. on or

before December 10, 2016). *See* RSA 541:3. Accordingly, the City’s Petition must be denied as untimely.

9. Because the aforementioned 30 day deadline is prescribed by statute, the Commission lacks discretionary authority to extend it, and therefore cannot entertain the City’s Petition. *See, e.g., In Re Carreau*, 157 N.H. 122 (2008) (New Hampshire Supreme Court lacks authority to waive statutorily- prescribed time period for filing appeal; petitioner’s failure to file appeal within statutory time period deprives court of jurisdiction to hear the appeal).

10. Assuming, *arguendo*, that the City’s Petition may be construed as a “new” cause of action against Concord Steam, the doctrine of *res judicata* bars the City from pursuing the same issues that were or could have been litigated against Concord Steam in DG 16-769. *See Brzica v. Trustees of Dartmouth College*, 147 N.H. 443, 454 (2002) (“*res judicata* ‘precludes the litigation in a later case of matters actually litigated and matters that could have been litigated, in an earlier action between the same parties for the same cause of action.’” *quoting In re Alfred P.*, 126 N.H. 628, 629 (1985)). The doctrine of *res judicata* was “established to avoid repetitive litigation so that at some point litigation over a particular controversy must come to an end.” *Id. citing Eastern Marine Const. Corp. v. First Southern Leasing*, 129 N.H. 270, 273 (1987).

11. For *res judicata* to apply, the following elements must be met: “(1) the parties must be the same or in privity with one another; (2) the same cause of action must be before the court<sup>1</sup> in both instances; and (3) a final judgment on the merits must have been rendered on the first action.” *Brzica, supra* at 454. All three elements are satisfied here: (1) Concord Steam and the City were both parties to DG 16-769; (2) the cause of action raised in the Petition is the same as in DG 16-769, *i.e.*, the terms and conditions on which Concord Steam should be allowed to

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<sup>1</sup> *Res judicata* is not limited to court proceedings; the doctrine may also be applied by an administrative agency acting in an adjudicative capacity. *Meserve v. State*, 119 N.H. 149, 154 (1979).

discontinue service; and (3) a final order on the merits was issued in DG 16-769. Therefore, the City's Petition must be dismissed.

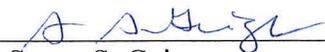
12. The City's Petition may also be dismissed for its failure to specify the statutory provision or legal precedent under which the relief is sought. *See* N.H. Admin. R. Puc 203.05 (a)(3). However, even if this defect were cured by construing the Petition as a "complaint" against Concord Steam under RSA 365:1 (the statute governing complaints against public utilities), the Petition must be dismissed because it fails to meet the requirements of that statute. RSA 365:1 provides that written complaints to the Commission about public utilities must set forth "any thing or act claimed to have been done or ...omitted by any public utility **in violation of any provision of law, or of the terms and conditions of its franchises or charter, or of any order of the commission.**" (Emphasis added.) Thus, to the extent that the City's Petition may be viewed as a "complaint", it must be dismissed as it contains no allegations that Concord Steam has violated any law, franchise, charter or Commission order.

WHEREFORE, in view of the foregoing, Concord Steam Corporation respectfully requests that the Commission:

- A. Dismiss the City of Concord's Petition with prejudice; and
- B. Grant such further relief as it deems appropriate.

Respectfully submitted,

**CONCORD STEAM CORPORATION**  
By its Attorneys,  
**ORR & RENO, P.A.**

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Dated: February 8, 2017

**Certificate of Service**

I hereby certify that on this 8th day of February, 2017, I caused a copy of this Motion to be delivered by electronic mail to persons named on the Service List in this docket.

  
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Susan S. Geiger

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