DE 00-066

NEW HAMPSHIRE ELECTRIC COOPERATIVE

Investigation into Applicability of Restructuring Charges to Special Contract Customers

Order After Written Briefing

O R D E R N O. 23,667

March 29, 2001

I. BACKGROUND AND PROCEDURAL HISTORY

On March 24, 2000, the New Hampshire Electric Cooperative (NHEC) petitioned the New Hampshire Public Utilities Commission (Commission) for a ruling that the NHEC may continue to enforce and implement special contracts with six ski areas in the NHEC service territory. *See* RSA 378:18 (authorizing utilities to make special contracts with customers upon Commission determination that "special circumstances exist which render such departure from the general schedules just and consistent with the public interest"). NHEC agreed to submit the petition as part of a Settlement Agreement resolving issues in connection with its revised Restructuring Act compliance filing in Docket No. DR 98-097. *See* Order No. 23,369 (December 20, 1999). As noted in that docket, the question requiring resolution is whether the six ski areas should be required to pay system benefits charges, stranded cost charges and any other charges imposed

on ratepayers under the Restructuring Act, RSA 374-F.

Following a duly noticed prehearing conference, the Commission approved intervention petitions from Public Service Company of New Hampshire (PSNH), the Governor's Office of Energy and Community Service (GOECS), Representative Jeb Bradley and four of the six subject ski areas, appearing jointly: Loon Mountain Recreation Corp., Waterville Company, Inc., Mount Attitash Lift Corp. and Mount Cranmore, Inc. (collectively, the "Ski Area Intervenors"). Order No. 23,450 (May 1, 2000), slip op. at 2. The Commission also granted a request from counsel to the Ski Area Intervenors for limited intervention by SKI NH, a trade association of 17 New Hampshire ski areas. *Id*. The Office of Consumer Advocate entered an appearance on behalf of residential ratepayers.

The Commission agreed with the parties and Commission Staff ("Staff") that the docket raises certain threshold legal issues, the resolution of which might obviate the need to develop a full factual record. *Id*. at 5-6. Accordingly, the Commission requested written briefs of the parties and Staff. Those asserting that the ski areas should or must impose restructuring charges on the ski areas were invited to submit initial briefs, and those opposed to such positions were then given an opportunity to respond. We noted

that we would make a determination as to the subsequent course of the docket upon completion of the briefing. We asked the parties to address the effective date of any restructuring charges to be applied in the event they were deemed to be appropriate.

II. POSITIONS OF THE PARTIES AND STAFF

A. Staff

Staff asks the Commission to determine that the ski areas should be required to pay Restructuring Charges. According to Staff, the language in the Restructuring Act requiring such charges to be nonbypassable, *see* RSA 374-F:3, VI and XII(d), should be read in such a way that the Commission may not permit the ski areas to avoid such charges. In the alternative, Staff contends that the Commission should exercise its discretionary authority to reopen the special contracts and determine that it is the public interest for these NHEC customers to pay the restructuring assessments.

Staff noted that the Ski Area Intervenors had taken the position at the prehearing conference that such action by the Commission would render the special contracts voidable. According to Staff, such a position is inconsistent with both the terms of the special contracts themselves and New Hampshire contract law generally. Taking exception to a

position asserted by NHEC in its initial filing, Staff contended that the contract-law doctrines of frustration, impracticability and failure of implied condition do not require the Commission to reach a different result.

B. Ski Area Intervenors

The Ski Area Intervenors noted that the Commission approved their special contracts with NHEC in 1994 and 1995 upon a determination that each of the ski areas would otherwise have had a viable self-generation option and that, by implication, it was in the public interest to keep these four customers on the grid. They further noted that the terms of the special contracts run through December 2003. According to the Ski Area Intervenors, applying NHEC's currently effective Restructuring Charges ($0.02987 per kWh for stranded costs, $0.00154 per kWh as a restructuring surcharge and $0.00041 per kWh for the interim energy assistance program) would raise their energy charges 41 percent, from $0.077 per kWh to $0.10882 per kWh.

The Ski Area Intervenors aver that they do not object to having a portion of their existing rates recharacterized as restructuring or stranded cost charges. However, they contend that the Commission may not impose *additional* charges for several reasons.

First, the Ski Area Intervenors rely on RSA 369-B:3, IV(b)(10), effective on May 31, 2000. The cited language provides that

> [t]he commission shall not order changes in the total rates of customers taking service under special contracts approved pursuant to RSA 378:18 for the duration of those special contracts in effect as of May 1, 2000. Special contract customers selecting option 2 of the original proposed [PSNH Restructuring] settlement shall have the energy charges under the contract reduced by the initial transition service price.

RSA 369-B:3, IV(b)(10). According to the Ski Area Intervenors, although RSA 369 was "occasioned and addressed to the State's restructuring settlement agreement with Public Service Company of New Hampshire," the first sentence of the provision "represents a clear policy choice by the Legislature that was intended to be applied and should be applied to all New Hampshire special contract customers." Ski Area Intervenors' Brief at 4.

Next, the Ski Area Intervenors contend that to impose Restructuring Charges on them would be to impose a substantial impairment on their contractual relationship with NHEC, in violation of the Contracts Clause of the United States Constitution and the analogous provision of the New Hampshire Constitution. The Ski Area Intervenors concede that, under *Midland Realty Co. v. Kansas City Power & Light*

Co., 300 U.S. 109 (1937), a state generally does not run afoul of the federal Constitution when the state supercedes rates previously established by contract. However, they contend that the New Hampshire Supreme Court's decision in *Richter v. Mountain Springs Water Co.*, 122 N.H. 850 (1982), precludes the imposition of Restructuring Charges against them on Contracts Clause grounds. In *Richter*, the New Hampshire Supreme Court concluded that, notwithstanding the principle articulated in *Midland Realty*, the Commission could not constitutionally use its ratemaking power to supercede express water-supply covenants that "were part of the express basis of the bargain for the purchase of real estate." *Id*. at 852. The Court distinguished this from the "usual situation," which "involves a contract only for the utility services rendered." *Id*. According to the Ski Area Intervenors, the question of whether to impose Restructuring Charges on them is closer to the problem confronted by the *Richter* plaintiffs than what the Court called the "usual situation."

The Ski Area Intervenors further contend that certain principles of statutory construction favor their view of the Restructuring Act. Specifically, they note that RSA 378:18 has been on the books since 1913, that the Legislature was actively considering amendments to this statute at the

same 1996 session that led to the passage of the Restructuring Act, and that the 1996 Legislature's silence on the subject of special contracts requires a conclusion that the Legislature intended RSA 374-F to have no effect on the terms of special contracts then in effect.

The Ski Area Intervenors disagree with Staff's interpretation of the provisions of the Restructuring Act that refer to "nonbypassable" system benefits and stranded cost charges. They point out that RSA 374-F:3, VI, dealing with system benefits charges, does not contain the word "must" and they contend that this provision does not define the universe of customers who should pay any system benefits charges or otherwise imply that "special contract customers taking service under a completely different statute are to be included in that universe." Ski Area Intervenors' Brief at 9. The Ski Area Intervenors also point to the language in RSA 374-F:3, IV specifying that "[r]estructuring of the electric utility industry should be implemented in a manner that benefits all consumers equitably and does not benefit one customer class to the detriment of another." With regard to RSA 374-F:3, XII(d), concerning stranded cost charges, the Ski Area Intervenors again stress that the provision lacks the word "must," and also point out that the final sentence of the

provision recites that stranded cost charges "should not apply to wheeling-through transactions." According to the Ski Area Intervenors, although the special contracts at issue here are not technically wheeling arrangements, they are substantially the same as wheeling transactions because the special contracts call on NHEC to supply the ski areas with power from PSNH without making any profit.

The concluding argument in the brief of the Ski Area Intervenors concerns the language of the contracts itself. Article 14 of the contracts makes the agreements "subject to state and federal statutes and regulations, as they may be amended from time to time, and to valid orders of any regulatory agencies or other government authorities having jurisdiction over the subject matter thereto." In relevant part, Article 7 of the contracts reads as follows:

> **Article 7 - Effective Date and Contract Term**
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> This Agreement shall be effective for all bills rendered on or after the later of October 1, 1994, or the effective date established by the NHPUC in any requisite approval, or the date upon which the FERC permits the Public Service Company of New Hampshire's Interruptible Power Supply Service Agreement . . . filed with the FERC on August 1, 1994, to become effective. If the NHPUC or any other reviewing agency with regulatory authority over this Agreement modifies, conditions or otherwise restricts this agreement in a way that has not been agreed to by the parties, and if

> such modification, conditions or restriction materially adversely affects either any party to either agreement, then the party so affected shall have the right, within sixty (60) days following the order requiring such modification, condition or restriction, to terminate this Agreement without penalty or further cost hereunder.

It was Staff's view that the appropriate way to harmonize the quoted language from Article 14 with the terms of Article 7 would be to conclude that Article 7 governs only the situation in which one of the regulatory agencies with the authority to condition approval of the original arrangement among NHEC, PSNH and the ski areas did not simply approve the agreements as drafted. Under this view, to the extent that the subsequently enacted RSA 374-F makes the ski areas subject to Restructuring Charges, it is part of the law, as it is amended from time to time, to which Article 14 makes the contracts subject.

The Ski Area intervenors reject this view of the contractual language. In their view, Article 14 is a mere "boilerplate provision" designed simply to acknowledge that the negotiated terms of the special contracts were agreed to within the framework of the totality of all federal and state laws and regulations concerning electric power. Ski Area Intervenors' Brief at 10-11. In contrast, the Ski Area Intervenors describe Article 7 as a key provision of the

contracts. They point out that Article 7 elsewhere contains an explicit reference to PSNH's Interruptible Power Supply Service Agreement (under which PSNH supplies the necessary power to NHEC) as well as this language:

> If the NHPUC or any other reviewing agency with regulatory authority over this Agreement modifies, conditions or otherwise restricts this agreement in a way that has not been agreed to by the parties, and if such modification, conditions or restriction materially adversely affects either any party to either agreement, then the party so affected shall have the right, within sixty (60) days following the order requiring such modification, condition or restriction, to terminate this Agreement without penalty or further cost hereunder.

According to the Ski Area intervenors, the reference here both to the special contract itself as well as the PSNH-NHEC agreement is "telling in terms of what the parties bargained for and the interdependence of the two contracts." *Id*. at 11. In the view of the Ski Area Intervenors, this language expressly reserves to PSNH, NHEC or the signatory ski areas, respectively, the right to walk away from their obligations under the arrangement if any significant term of either contract was modified through regulatory intervention. The reason, according to the Ski Area Intervenors, was that "the economics of the agreements were so tight that there was no

room for play in the price term of either contract." *Id*. at 11-12.

According to the Ski Area Intervenors, Staff's view of the contract is contrary to plain English, common sense and basic contract law. They contend that Article 7, by its terms, plainly does not limit regulation-triggered termination rights to initial government review. They further take the position that it would make no sense for the parties to have bargained for the right to terminate based on initial governmental review but not retain the right to terminate based on subsequent governmental intervention. Finally, they take the position that the contract-law doctrine of frustration supports their view that the plain meaning of the agreements reserves the right of the ski areas to terminate the agreement if the government intervenes in a manner that alters the basis of the bargain.

C. New Hampshire Electric Cooperative

According to NHEC, nothing in Staff's brief causes it to reexamine or withdraw any of the assertions made in NHEC's initial petition. In that petition, NHEC took the position that there is simply nothing in the special contracts that permits NHEC to impose additional charges on the ski areas. According to NHEC, the "fundamental purpose" of the

contracts is to provide the ski areas with known and defined rate obligations that they considered to be competitive with their self-generation alternatives, and that "it would have been inconsistent with the fundamental purpose of the contract to create a mechanism by which additional charges could be unilaterally imposed by NHEC upon the ski areas." Petition at 12.

According to NHEC, the Commission has the statutory authority under RSA 365:28, RSA 378:7 and RSA 374-F to order the amendment or nullification of the special contracts at issue here. However, according to NHEC, the *Richter* case, discussed *supra*, "casts some doubt" on whether such action would withstand constitutional scrutiny by the New Hampshire Supreme Court. Petition at 16. Petition at 16.

It is NHEC's position that if the Commission were to impose restructuring charges on the ski areas, they would have the right to void the special contracts unilaterally. Like the Ski Area Intervenors, NHEC relies on the doctrine of frustration of purpose as well as the doctrines of impracticability[1] and failure of implied condition.

[1] As Staff points out, the contract doctrine of "impracticability" is more accurately referred to, under New Hampshire law, as "impossibility of performance." *See Appeal*

The next point made by NHEC in its petition is that, assuming the Commission made Restructuring Charges applicable to the ski areas and the ski areas voided the special contracts in consequence, the result would be that NHEC would discontinue the corresponding wholesale power purchases from PSNH. According to NHEC, the contract under which this power is purchased from PSNH is different from the Amended Partial Requirements Contract (APRA) that formerly existed between PSNH and NHEC.[2] Thus, according to NHEC, while the Federal Energy Regulatory Commission concluded that the APRA required NHEC to pay demand charges to PSNH even as to retail customer/members purchasing power from alternate suppliers, there is no such impediment here to NHEC simply walking away from the relevant wholesale agreement with PSNH should the ski areas successfully terminate the retail arrangement.

The final argument made in the NHEC petition is that it would not be in the public interest for the Commission to impose Restructuring Charges on the ski areas. According to NHEC, it entered into these contracts because, had the ski areas opted for self-generation, the resulting loss of revenue

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of Vicon Recovery Systems, Inc., 130 N.H. 801, 805-06 (1988).

[2] We approved NHEC's negotiated resolution of its APRA-related dispute with PSNH in Order No. 23,369, referenced *supra.*

to NHEC would not have been fully offset by the corresponding reduction in its costs. Thus, according to NHEC, it is in the interest of its other member/customers for these special contracts to remain in place.

At the time NHEC filed its brief, it noted that its members were in the process of deciding whether to opt for the partial deregulation of NHEC authorized under RSA 301:57, I. Subsequent to the briefing, NHEC has indeed filed a certificate of deregulation as permitted by the statute. NHEC therefore advised the Commission in writing, on June 19, 2000, of its view that the deregulation of NHEC pursuant to RSA 301:57, I deprives the Commission of jurisdiction over the interpretation or enforcement of NHEC's special contracts. However, NHEC takes the position that the Commission retains the jurisdiction under RSA 374-F to determine whether Restructuring Charges should be applicable to the ski areas.

D. Public Service Company of New Hampshire, Governor's Office of Energy and Community Services, and Office of Consumer Advocate

PSNH, GOECS and OCA opted not to file briefs, nor did they respond to NHEC's subsequent filing relative to the effect of the deregulatory election made by NHEC under RSA 301:57, I.

III. COMMISSION ANALYSIS

We begin with the threshold question raised by NHEC's filing of June 19, 2000. In relevant part, RSA 301:57, I authorizes NHEC to "elect to become exempt from regulation by the commission and be removed from the definition of 'public utility' as provided in RSA 362:2." The filing of a Certificate of Deregulation "shall cause the Commission to terminate the involvement of the cooperative in any proceeding to the extent that such involvement is no longer under the jurisdiction of the Commission." RSA 301:58, I. Commission orders antedating the filing of such a certificate "shall not be rendered invalid" but are not "enforceable as against the cooperative while a certificate of deregulation is on file with the commission." RSA 301:58, II.

Pursuant to RSA 362:2, I, a rural electric cooperative for which a Certificate of Deregulation is on file is not considered a "public utility" for purposes of the Commission's enabling statutes. RSA 362, II enumerates certain specific exceptions, among them the provisions of the Restructuring Act, RSA 374-F. Thus, NHEC correctly notes that the Commission retains jurisdiction over the extent to which NHEC must impose Restructuring Charges on all NHEC members, including the ski areas, pursuant to RSA 374-F:3, VI and XII(d).

We also agree with NHEC that its filing of a Certificate of Deregulation has the effect of suspending our jurisdiction over the terms of its special contracts. Our authority to regulate special contracts is a subset of the general ratemaking authority contained in RSA 378, which explicitly governs only public utilities. As noted, *supra*, NHEC is not a public utility for this purpose so long as a valid Certificate of Deregulation is on file.[3]

This legal reality significantly narrows the range of issues we confront in this proceeding. It is no longer appropriate for us to rule on whether the imposition of Restructuring Charges would have the effect of voiding the special contracts in question. The terms of the contractual relationship between NHEC and its ski area members is no longer a matter for Commission concern here, except to the extent that such relationship may deviate from the requirements of RSA 374-F.

We agree with Staff that, at very least, the relevant provisions of the Restructuring Act vest us with the discretion to determine that the public good requires all NHEC

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[3] We have opened a separate docket, DE 00-133, to consider the full range of issues raised by the NHEC's filing of a Certificate of Deregulation. To the extent not enumerated here, we reserve judgment on all such issues.

customers, including those taking service under non-tariffed rates, to pay the stranded cost and system benefits charges imposed under the Restructuring Act. Further, we believe it is appropriate to make such a determination here, without the need of an evidentiary hearing because the relevant facts are not in dispute.

Among the interdependent policy principles enumerated in the Restructuring Act is the concept that "[r]estructuring of the electric utility industry should be implemented in a manner that benefits *all* consumers equitably and does not benefit one customer class to the detriment of another." RSA 374-F:3, VI. "Costs should not be shifted unfairly among customers." For the very reasons that the six ski areas at issue entered into special contracts with NHEC - the importance of energy supply to their business and their ability to pursue alternative sources of such energy – these customers are as well poised as any in NHEC's service territory to take advantage of the benefits of electric restructuring. Under the Restructuring Act, system benefits charges and stranded cost assessments are the quid pro quo for achieving the advantages of restructuring that will presumably inure to all users of electricity in New Hampshire. Permitting the ski areas to avoid such charges in these

circumstances would be to award them the benefits of restructuring while allowing them to escape its burdens purely because of their size and attendant ability to negotiate successfully with NHEC. This would clearly be inconsistent with the public interest.

The Ski Area Intervenors' arguments to the contrary are unconvincing. As they point out, RSA 369-B:3, IV(b)(10) instructs us to order no changes in the rates paid by PSNH's special contract customers under agreements in effect as of May 1, 2000. In fact, this provision does not enshrine such a prescription as a general matter of New Hampshire law, either as to PSNH special contract customers or generally, but as a legislative condition to the implementation of the PSNH Restructuring Settlement Agreement we approved in Docket No. DE 99-099. *See generally* RSA 369-B:3, IV (enumerating conditions to Commission issuance of finance order implementing securitization aspects of Restructuring Settlement Agreement). Under the PSNH Restructuring Settlement Agreement, PSNH's pre-existing special contract customers do indeed experience no rate increases – but PSNH will apply the special contract revenues toward stranded cost and system benefits charges first and only then apply the balance to charges that will have no direct impact on rates

paid by other customers. Thus, contrary to the suggestion of the Ski Area Intervenors here, the situation applicable to the PSNH special contract customers supports rather than militates against imposition of Restructuring Charges on NHEC's ski areas. Nothing in the language of RSA 374-F:3, IV(b)(10) suggests that the Legislature intended to shield these ski areas from such charges.

Further, we are unable to agree with those parties contending that *Richter* creates a constitutional barrier to the imposition of Restructuring Charges on the ski areas. We read *Richter* narrowly, because the Supreme Court was careful to base its holding on "special factors," i.e., the existence of real estate deed covenants that, in effect, made the relationship at issue more than just a contract between a utility and its customers. *Richter*, 122 N.H. at 852. Strictly speaking, the Supreme Court's holding speaks not to the Contracts Clause or its New Hampshire analogue, but rather to the conclusion that it is "inequitable" to allow principles of rate regulation to allow an owner burdened by a real estate covenant to avoid such obligations. *Id*. Absent such circumstances, we revert to the general proposition that "the PUC has the power to alter or amend rates charged by public utilities, RSA 378:7, and that such action may not violate the

contract clause." *Id*.

We next take up the Ski Area Intervenors' contention regarding the Legislature's failure to amend RSA 378:18 (governing special contracts) during the same session in which it created the Restructuring Act. The governing principle of statutory construction has already been explicitly reaffirmed by the New Hampshire Supreme Court in the context of construing RSA 374-F in relation to laws that antedate the Restructuring Act: Two statutes that deal with the same subject matter must be construed "so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statute." *In re New Hampshire Public Utilities Comm'n Statewide Restructuring Plan*, 143 N.H. 233, 240 (1998) (citations omitted). Such statutes should be construed as consistent with each other where reasonably possible. *Id*. No principle of statutory construction of which we are aware suggests that a valid aid to the construction of a statute is the Legislature's contemporaneous failure to amend another related statute.

Finally, we reject the Ski Area Intervenors' position that we should treat the special contracts at issue here as wheeling arrangements and apply the language in RSA

374-F:3, XII(d) precluding stranded cost charges from applying to such transactions. We believe that the plain meaning of this language is that a New Hampshire utility may not be required to impose stranded cost charges on customers outside its service territory simply by virtue of participating in an arrangement to wheel power to those customers. The instant contractual relationships do not in any way resemble the wheeling transactions referenced in RSA 374-F:3, XII(d).

We conclude, therefore, that the six ski areas with which NHEC has entered into special contracts are obligated to pay Restructuring Charges to NHEC. As Staff noted in its brief, this conclusion is not necessarily dispositive of the extent of such charges because circumstances may make it inappropriate for these customers to pay the same charges as those customers paying NHEC's tariffed rates. We therefore order the parties to submit written positions within ten days concerning this issue, at which time we will take such further action as is appropriate in the circumstances.

In concluding that the Restructuring Act makes it necessary for all NHEC customers, including the ski areas, to pay Restructuring Charges, we stress that we take no position on the question of what overall rates the NHEC should charge any of its member-customers for services other than energy

provided under Transition or Default Service. Because we no longer have the statutory authority to determine the reasonableness of NHEC's delivery service rates, *see generally* RSA 301:57, I, the question of whether the ski areas should pay different rates than other NHEC members is a matter that is beyond our jurisdiction. If the NHEC wishes to provide additional discounts to the ski areas to offset their incurrence of Restructuring Charges, this is a matter that is entirely between the NHEC and its members.

We note that no party complied with our instructions to brief the question of the temporal applicability of any Restructuring Charges ordered to be paid in connection with this docket. We therefore direct the parties to address, as part of their filings to be made within ten days, the issue of how NHEC should account for Restructuring Charges that should have been paid by the ski areas as of the date NHEC began collecting such charges from its other customer-members.

Based upon the foregoing, it is hereby

ORDERED, that the six ski areas currently taking service from the New Hampshire Electric Cooperative are liable for stranded cost and system benefits charges under the Restructuring Act; and it is

FURTHER ORDERED, that any party may submit a brief outlining its position on the extent of such charges within ten days.

By order of the Public Utilities Commission of New Hampshire this twenty-ninth day of March, 2001.

Douglas L. Patch Chairman	Susan S. Geiger Commissioner	Nancy Brockway Commissioner

Attested by:

Thomas B. Getz
Executive Director and Secretary