

DE 01-088

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Petition of 5 Way Realty Trust for Declaratory Ruling

Order Regarding Applicability of RSA 369-B:4, IV

O R D E R N O. 24,065

October 11, 2002

I. **BACKGROUND AND PROCEDURAL HISTORY**

Peter Horne, in his capacity as trustee of 5 Way Realty Trust (Trust) of Londonderry, instituted this proceeding on April 14, 2001 by filing a petition with the New Hampshire Public Utilities Commission (Commission) requesting a declaratory ruling with regard to certain aspects of the Trust's business plan. The Trust averred that it is the owner of a certain parcel of land in the service territory of Public Service Company of New Hampshire (PSNH), that it wished to develop a commercial subdivision on this land, located in Hudson, and that it desired to generate electricity on site to offer electric service directly to businesses within the subdivision without using the services of PSNH. As originally framed, the petition sought a declaratory ruling by the Commission (1) that the trustee would not thereby become a public utility within the meaning of RSA 362:2, that if the Trust were to interconnect with the PSNH transmission and distribution system, then backup delivery service from PSNH

under the Company's Rate B would be available to a tenants' association in the subdivision, if such were created, and (2) that in the event the Trust connected its generation facilities only to the PSNH transmission system, then backup service pursuant to Rate B would not be applicable but that electricity users in the subdivision would be subject to PSNH's stranded cost recovery charges.

PSNH submitted an objection to the petition on May 18, 2001. The Company's position was that (1) the Commission did not have the authority to issue a declaratory ruling as requested by the Trust, and (2) that the petition did not describe the Trust's plans in sufficient detail to permit a determination of whether any entity arising out of the Trust's development plans would be a public utility in light of the applicable case law, specifically, *Appeal of Zimmerman*, 141 N.H. 605 (1997).

The Trust filed a written reply to PSNH's objection on May 25, 2001. The reply contended that (1) the references to declaratory rulings in RSA 541-A:16 make clear the Commission's authority to provide the requested determination, (2) the Trust "simply seeks a Commission ruling that the abstract legal rulings articulated in *Appeal of Zimmerman* are good law with respect to the electric utility industry" as well as the

telephone industry that was at issue in the *Zimmerman* case, and (3) that the Commission should provide the requested ruling because the Trust would otherwise face risk and uncertainty with regard to its development plans.

By secretarial letter issued on June 21, 2001, the Commission determined that it would be in the public interest for an effort to be made to mediate the dispute between the Trust and PSNH. Accordingly, the Commission appointed its General Counsel, Gary M. Epler, to serve as mediator in the case. Mr. Epler was instructed to meet with the parties and, thereafter, to report his findings and recommendations to the Commission.

Mr. Epler submitted his report on June 12, 2002. He noted that the Trust and PSNH were in direct contact through early September of 2001 and that, on September 21, 2001, the Trust advised him that those discussions, including written correspondence, no longer served any useful purpose. Thus, the Trust requested on September 21, 2001 that Mr. Epler commence active mediation. Mr. Epler thereafter conducted discussions with the parties, ultimately deciding to submit his findings and recommendations without their concurrence.

II. GENERAL COUNSEL'S RECOMMENDATIONS

It was Mr. Epler's recommendation that the Commission reach the merits of the petition, but only in part. According to Mr. Epler, RSA 541-A:16 clearly contemplates that state agencies may issue a declaratory ruling on the applicability of any statutory provision, rule or order. Citing *Delude v. Town of Amherst*, 137 N.H. 361 (1993), Mr. Epler noted that the relevant question is whether the petitioner has demonstrated a present legal or equitable right and an adverse claim that is definite and touching the legal relations of the parties having adverse interests. He further noted that *Delude* makes clear that the action cannot be based on a set of hypothetical facts.

According to Mr. Epler, the Trust had not set forth a sufficient set of facts on which the Commission could issue a declaratory ruling with regard to whether the Trust's development plans would create a public utility within the meaning of RSA 362:2. Mr. Epler noted that the petition consists of unattested claims with regard to several possible development plans, each sketched out in barely more than one paragraph. In Mr. Epler's opinion, these assertions are inadequate to allow an investigation of the central inquiry required by *Zimmerman*: whether the service provider would be offering its services to the general public, and whether the

provider would enjoy an underlying relationship with users of the services that would be sufficiently discrete as to differentiate them from other members of the relevant public.

However, Mr. Epler determined that the Trust had raised an important and discrete question of statutory interpretation that he believed the Commission should resolve at this time, with regard to electric rate reduction financing.¹ Specifically, the question pertains to whether the Rate Reduction Bond (RRB) charge paid by PSNH's customers must also be collected from retail customers of an electric service provider that is not a public utility within the meaning of New Hampshire law. According to Mr. Epler, the answer to this question may have a significant impact on the development of transition or default service options. See RSA 374-F:2, I-a and V (defining default and transition service, respectively), as

¹ Electric rate reduction financing was a key provision of the PSNH Restructuring Settlement Agreement (Restructuring Agreement) approved by the Commission in Docket No. DE 99-099. Under the Restructuring Agreement, certain of PSNH's otherwise unrecoverable costs (sometimes referred to as stranded costs) associated with generation facilities or power purchase obligations were securitized, i.e., financed through Rate Reduction Bonds comprising irrevocable obligations recoverable from PSNH retail delivery customers. See *Public Service Co. of N.H.*, 85 NH PUC 154 (approving Restructuring Agreement), *on reh'g*, 85 NH PUC 536 and 85 NH PUC 645 (2000); see also *Public Service Co. of N.H.*, 85 NH PUC 567 (2000) (ruling on financing issues) and RSA 369-B:3 (legislative approval of Rate Reduction Bond financing). But for the Restructuring Agreement, these costs would be unrecoverable because PSNH's customers are now free to choose energy suppliers other than PSNH. Securitizing these stranded costs has the effect of guaranteeing their recovery, thus reducing the risk associated with them and, thus, their carrying costs.

well as the recovery and amortization of the Rate Reduction Bonds themselves.

Mr. Epler recommended that the Commission conclude that such customers would be subject to the RRB charge. In so doing, he rejected the Trust's interpretation of RSA 369-B:2, XII in conjunction with RSA 369-B:2, IV.

These two statutes are part of RSA Chapter 369-B, enacted by the Legislature in 2000 subsequent to the Commission's approval of the PSNH Restructuring Agreement. A key purpose of RSA 369-B is to provide a legislative endorsement of the Restructuring Agreement, including the so-called securitization provisions whereby certain of PSNH's stranded costs were financed through RRBs, thereby reducing them but making them binding on PSNH's customers. See generally RSA 369-B:1 (legislative declarations and findings) and Footnote 1, *supra*.

Section 2 of RSA 369-B defines certain terms appearing throughout the chapter. "Retail electric service" is defined in relevant part as "the delivery of electric power through the provision of transmission and/or distribution service by an *electric utility* to a retail customer, regardless of such retail customer's source of electric power." RSA 369-B:2, XII (emphasis added). "Electric utility," in turn, is defined as "a

public utility as defined in RSA 362:2 that provides retail electric service."²

As Mr. Epler noted, the Trust's position is that an entity not meeting the RSA 362:2 definition of a public utility would not be required to assess RRB charges to its customers because it would not be providing retail electric service as that term is defined in RSA 369-B:2, XII. See RSA 369-B:4, I (requiring Commission to establish an RRB charge "that shall provide for the collection of revenues from *retail customers of electric utilities*") (emphasis added). Mr. Epler disagreed with this view, relying on RSA 369-B:4, IV, which reads in relevant part as follows:

If a retail customer purchases or otherwise obtains retail electric service from any *person* other than the electric utility in whose service territory the retail customer is located . . . the servicer or such new electricity service provider or successor shall collect all such charges, including, without limitation, such RRB charge, from the retail customer by or on behalf of the first electric utility with revenues from such RRB charge remitted solely for the benefit and repayment of rate reduction bonds as a condition to the provision of retail electric service to such retail customer.

RSA 369-B:4, IV (emphasis added). In Mr. Epler's view, the use of the word "person" in RSA 369-B:4, IV clearly evidences a legislative intent to make the RRB charge payable not simply by

² RSA 362:2 recites the general definition of a public utility that is subject to the Commission's rate regulation and plenary jurisdiction.

customers of public utilities but also by customers taking electric service from entities that are not utilities within the meaning of RSA 362:2 in circumstances where the customer obtains back-up, maintenance, emergency or other delivery service from its former public utility provider.

According to Mr. Epler, the interpretation of these provisions offered by the Trust omits consideration of a key phrase (the reference to "persons" in RSA 369-B:4, IV), would result in an interpretation of RSA 369-B:4 that fails to give meaning to the section in its entirety, and is contrary to the overwhelmingly clear directive of Chapter 369-B to establish an RRB charge that is non-bypassable. In support of these conclusions, Mr. Epler relied on *Powell v. Catholic Medical Center*, 145 N.H. 7 (2000) (requiring use of plain and ordinary meaning of words when interpreting statute), *Marcotte v. Timberline/Hampstead School District*, 143 N.H. 331 (1999) (noting that Legislature is not presumed to waste words or enact redundant provisions and requiring that, where possible, every word of a statute should be given effect), and *McKay v. New Hampshire Compensation Appeals Board*, 143 N.H. 722 (1999) (noting that a statute should be interpreted to lead to a reasonable result and that a particular provision should not be read in isolation but together with associated sections).

In Mr. Epler's view, the requirement that the RRB Charge be non-bypassable for all retail customers is consistent with the overall purpose of Chapter 369-B, which he characterizes as providing financing options that allow electric industry restructuring to be implemented in the PSNH service territory with retail service being obtained at lower costs. Mr. Epler pointed out that the lower-cost securitization financing is obtainable only via the state's willingness to provide a higher level of certainty regarding the collection of the financing costs. In this regard, Mr. Epler pointed to RSA 369-B:1, IV ("The state agrees that its pledge, contract, and agreement and the pledge of the commission not to impair the rights or remedies of holders of rate reduction bonds creates a secure expectation of repayment on the part of such holders."). According to Mr. Epler, the requirement of non-bypassability is essential to this agreement. He noted that RSA 369-B:4, IV provides that the collection of the RRB charge by the electricity service provider or successor is a condition to the provision of retail electric service to the retail customer, and that the customer is subject to disconnection for failure to pay the charge. Mr. Epler cited RSA 369-B:5 (requiring that the RRB charge shall be assessed and collected "from retail customers for such period as prescribed in the finance order), noting that

it includes no exceptions to this requirement. He pointed out that specific provisions require the Commission to set the RRB charge and adjust it as necessary in order to provide for full recovery of the principal, interest and credit enhancement as well as all other fees, costs and charges. See RSA 369-B:4, II and III. And Mr. Epler noted that RSA 369-B:6, II contains the state's "pledge, contract and agreement": that neither the state or any of its agencies shall "limit, alter, amend, reduce or impair the RRB charge." Thus, in Mr. Epler's view, given the Legislature's express pledge and contract not to impair the RRB charge in one section of Chapter 369-B, it would require a strained and inconsistent gloss on another section of the statute to permit retail electric customers such an obvious manner of avoiding these charges.

Mr. Epler's final point concerns the Trust's express agreement that if its own generation and distribution system were interconnected directly to PSNH's transmission system under the Open Access Tariff of PSNH's parent company, then the Trust's end-use retail customers would be required to pay "applicable stranded cost recovery charges, RRB charges, system[] benefits charges, and taxes" pursuant to RSA 369-B:3, IV(b) (8). Mr. Epler concluded that it would be contrary to the purpose of the statute to determine that the RRB charge is non-

bypassable for retail end-users of non-public utility providers with connections to the transmission system but by-passable for retail end-users of non-public utility service providers with connections only to the distribution system.

III. PETITIONER'S OBJECTIONS

The Trust submitted its objections to the General Counsel's recommendations on July 29, 2002. As of that date, the Trust's statement of the issue before the Commission was as follows: "whether Petitioner, a real estate developer, would be required to collect the RRB charge and remit it to PSNH if Petitioner were to sell electric generation service through a private distribution system to one customer."

Beyond that, the Trust indicated its disagreement with Mr. Epler's recommendations to the extent they would embrace the conclusion that RSA 369-B:4, IV requires "any person," as opposed simply to any electric utility, to collect the RRB charge and remit it to PSNH. According to the Trust, general principles of statutory construction lead to the determination that only public utilities are required to collect such charges. In the Trust's view, the General Counsel's interpretation of Chapter 369-B "emasculates" the terms "retail electric service" and "electric utility" as carefully and intentionally defined by the Legislature in enacting the statute. According to the

Trust, only a public utility can render "retail electric service" within the meaning of Chapter 369-B, and to conclude otherwise would be to violate the cautions in *Marcotte* that the Legislature be presumed not to waste words or enact redundant provisions and that whenever possible every word of a statute should be given effect. See *Marcotte*, 143 N.H. at 331.

It was the Trust's contention, based upon the notion that one must apply the plain and ordinary meaning of words when interpreting a statute, that the commonsense view of RSA 369-B, IV is that only third parties providing "retail electric service" - i.e., public utilities - are required to collect the RRB and remit it to PSNH.

Finally, the Trust contended that the General Counsel is being inconsistent in his recommendations by suggesting that the overall purpose of RSA 369-B requires that the RRB charge be non-bypassable for all electric customers in the relevant service territory. According to the Trust, the General Counsel's report appears to concede that this is not always so, and that the RRB is indeed by-passable when the retail customer does not obtain delivery service from its former public utility provider of energy. Moreover, the Trust suggested, it appears that the General Counsel would not require the collection and remittance of RRB charges by a provider of only generation

service in a situation where the customer receives distribution service via a private line owned by the customer.

The Trust's written objection to the General Counsel's recommendations concludes by making the point that Mr. Epler did not address the issue of whether a person providing transmission and distribution service to only one customer would be a public utility within the meaning of RSA 362:2 as analyzed in *Zimmerman*. The Trust requested that, in the event the Commission agrees with its view of RSA 369-B:4, IV, it further issue a declaratory ruling that providing distribution service only to one customer would not render the provider a public utility under RSA 362:2.

We note that PSNH did not submit any objections to or comments on the General Counsel's recommendations.

IV. COMMISSION ANALYSIS

At the outset, we note the appropriateness of addressing the question as the General Counsel as framed it. No party has objected to the General Counsel's threshold determinations that the question, as posed, is ripe for adjudication, within the Commission's jurisdiction and at least among the issues raised by the Trust's petition. Thus we treat any objections to our reaching the issue as having been waived.

Upon a careful review of the pleadings submitted in this proceeding, including the objections filed by the petitioner on July 29, 2002, we adopt the General Counsel's recommendations and the supporting analysis contained in his report.

In its objection, the Trust additionally requests a determination that a person providing distribution service to only one customer would not be a public utility within the meaning of RSA 362:2. However, the Trust indicates that it requests such a determination only in the event the Commission adopts its view of the legal issue resolved *supra*. Since we did not adopt this view, we understand the Trust's additional query to be moot and we need not reach either that issue or the preliminary question of whether it would be appropriate to address such a matter in the circumstances.

Based upon the foregoing, it is hereby

ORDERED, that the report and recommendations of the Commission's General Counsel, submitted in this docket on June 12, 2002, are hereby APPROVED.

By order of the Public Utilities Commission of New
Hampshire this eleventh day of October, 2002.

Thomas B. Getz
Chairman

Susan S. Geiger
Commissioner

Nancy Brockway
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary