

DE 05-150

ALDEN T. GREENWOOD d/b/a ALDEN ENGINEERING COMPANY

Petition for Declaratory Order

Order on Motion for Rehearing

ORDER NO. 24,638

June 22, 2006

On April 13, 2006, the New Hampshire Public Utilities Commission (Commission) issued Order No. 24,613, dismissing a petition filed by Alden T. Greenwood d/b/a Alden Engineering Company (Alden) that sought a declaratory order with respect to three hydroelectric projects owned by Alden in the service territory of Public Service Company of New Hampshire (PSNH). Pursuant to RSA 541:3, Alden filed a timely motion for rehearing on May 15, 2006. PSNH submitted a pleading in opposition to the rehearing motion on May 26, 2006.

The underlying petition sought a determination that a 30-year rate order approved by the Commission, governing purchases of power by PSNH from Alden under the federal Public Utility Regulatory Policies Act (PURPA), remained in full force and effect through its originally stated expiration date in 2015. The Commission rejected the request, invoking the doctrine of *res judicata* in light of *Lakeport Hydroelectric Corp.*, 73 NH PUC 504 (1988) (Order No. 19,257), that shortened the effective period of the rate order by ten years. Alden appeared as a party in the proceedings that led to the *Lakeport* order, conceding on the record that the Commission had acted within its authority by taking the very action Alden now seeks to avoid.

On rehearing, Alden contends that dismissal of the petition on *res judicata* grounds was inappropriate. According to Alden, invoking the same New Hampshire Supreme Court decision relied upon by the Commission in Order No. 24,613, *Osman v. Gagnon*, 152 N.H. 359 (2005),

the 1988 ruling of the Commission cannot be *res judicata* because the Commission lacked the subject matter jurisdiction to make the determination reflected in the *Lakeport* order. According to Alden, the fact that Mr. Greenwood appeared in 1998 and conceded that rescission of the rate orders was appropriate is of no consequence because parties cannot waive issues related to a tribunal's subject matter jurisdiction.

In opposition to the rehearing motion, PSNH concedes that, as noted in Order No. 24,613, the decision of the U.S. Court of Appeals for the Third Circuit in *Freehold Cogeneration Associates v. Board of Regulatory Commissioners*, 44 F.3d 1178 (3d Cir. 1995), established that once a state utility commission exercises its authority to enter a longterm PURPA rate order, it is not free to revisit the rate determination at a later date in light of changed circumstances. But, according to PSNH, the U.S. Supreme Court in *Federated Department Stores v. Moitie*, 452 U.S. 394, 398 (1981), has made clear that the consequences of a final judgment on the merits are not altered by the fact that the judgment may have been wrong or may have rested on a legal principle subsequently overruled in an unrelated case. PSNH also invokes the equitable doctrines of laches and estoppel in support of its position.

RSA 541:3 authorizes the Commission to grant rehearing of a previously entered order upon a showing of good cause for such relief. For the reasons that follow, Alden has not shown good cause for rehearing in this instance.

When the U.S. Court of Appeals for the Third Circuit held that our counterpart agency in New Jersey was preempted under PURPA from modifying a previously approved power purchase agreement between a generator and a utility, the Court pointed out that an independent power producer qualifying for a PURPA rate could waive its statutory rights and legally consent

to have disputes arising out of such a rate heard in a state as opposed to federal forum. *Freehold*, 44 F.3d at 1187 (citing 18 CFR § 292.301(b)(1)). The cited rule of the Federal Energy Regulatory Commission (FERC) states that nothing in the federal PURPA regulations “[l]imits the authority of any electric utility or qualifying facility to agree to a rate for any purchase, or terms or conditions relating to any purchase, which differs from the rate or terms or conditions which would otherwise be required” under the FERC regulations implementing PURPA.

What thus becomes clear is that the legal principle established in *Freehold* cannot have the effect of rendering null and void, because of the lack of subject matter jurisdiction, every determination of a state utility commission that changes or affects a previously approved PURPA rate. The New Hampshire statute that confers upon the Commission the authority to hear cases involving qualifying small power producers as a matter of state law, the Limited Electrical Energy Producers Act, RSA Chapter 362-A, explicitly provides that “[a]ny dispute arising under the provisions of this chapter may be referred by any party to the commission for adjudication.” RSA 362-A:5. Although, as *Freehold* subsequently made clear, Alden could have withheld his acquiescence and likely argued with success that he had a right to a federal forum, he also had the right under both state and federal law to let the Commission proceeding advance to binding final judgment. Accordingly, Alden’s present argument that the Commission lacked subject matter jurisdiction, rendering its 1988 ruling ineffective, is without merit.

Because it is clear that the Commission had subject matter jurisdiction in 1988, and that its *Lakeport* decision can appropriately have *res judicata* effect, we need not address PSNH’s other arguments. In particular, we express no view as to whether it is appropriate for an

administrative agency to invoke equitable doctrines like laches or estoppel to reject an otherwise legally sound petition.

Based upon the foregoing, it is hereby

ORDERED, that the motion of Alden T. Greenwood d/b/a Alden Engineering Company for rehearing of Order No. 24,613 is DENIED.

By order of the Public Utilities Commission of New Hampshire this twenty-second day of June, 2006.

Graham J. Morrison
Commissioner

Clifton C. Below
Commissioner

Attested by:

ChristiAne G. Mason
Assistant Executive Director & Secretary