

State of New Hampshire

Public Utilities Commission

Docket No. DE-11-105

**Unitil Energy Systems, Inc.**

(Petition for Declaratory Ruling and Adjustment to Certain Account Balances)

**Objection of Unitil Energy Systems, Inc. to Motion to Dismiss or Stay**

Now comes Unitil Energy Systems, Inc. (“UES” or the “Company”), Petitioner in the above-captioned matter, and by and through its attorneys, Gary Epler, Chief Regulatory Counsel, and Pierce Atwood LLP, presents the following Objection to the Motion to Dismiss or Stay of Intervenor RiverWoods Company at Exeter, New Hampshire (“RiverWoods”):

**Introduction**

1. UES commenced this proceeding upon the filing of a Petition for Declaratory Ruling (the “Petition”), dated May 13, 2011. *See* N.H. Code Admin. Rule 207.1 [Declaratory Rulings]. The Petition requests that the Public Utilities Commission (“PUC”): (i) determine the time period to be used for the calculation of a refund due RiverWoods, under RSA 365:29 [Orders for Reparation], on account of collected overcharges for electric service during the period September 10, 2004 through January 19, 2011; and (ii) in connection with that determination, approve an adjustment to the account balances in the Company’s External Delivery Charge, Stranded Cost Charge, System Benefits Charge, and Non G1 Default Service Charge – that is, so that it may recover from those customers who, as a consequence of the RiverWoods overcharge, received the benefit of roughly corresponding undercharges. These twin interdependent issues fall squarely within the PUC’s jurisdiction.

2. RiverWoods urges that the PUC decline to exercise jurisdiction over the matter of reparations due RiverWoods, and that it cede authority for making that determination to a justice of the Rockingham County Superior Court, while leaving the PUC to adjudicate the matter of the Company's request for an adjustment to the foregoing account balances (an issue that depends, in large part, upon the calculation of reparations due). RiverWoods seeks to avoid PUC consideration of reparations for overcharges, casting the issue as a dispute over defective equipment better suited to examination by the Superior Court. Of course, the PUC's exercise of jurisdiction does not depend upon the cause of the overcharges. RiverWoods ignores the statutory scheme that designates the PUC as "the arbiter" of disputes between public utilities and their customers concerning the subject matter of Title XXXIV [Public Utilities] (RSA 362 through RSA 382), including but not limited to charges imposed for electric service. *See* RSA 363:17-a [Commission as Arbiter].

3. The PUC has the broad statutory authority to rule on all questions presented by the Petition. There is no basis for declining to exercise that authority. As explained in more detail below, the Motion to Dismiss or Stay should properly be denied.

**I. The PUC Has Exclusive Jurisdiction to Determine the Questions Presented by Unitil's Petition for Declaratory Ruling.**

4. "[T]he PUC is legislatively empowered to be the arbiter between the interests of the customer and the interests of the regulated utilities." *In re Appeal of Verizon New England, Inc.*, 153 N.H. 50, 64 (2005) (citing RSA 363:17-a). By statute, the scope of the PUC's jurisdiction is broad, and its jurisdiction, with limited exceptions not relevant to the instant case, is exclusive. RSA 363:17-a [Commission as Arbiter], which RiverWoods' pleading conspicuously overlooks, provides:

The commission *shall be the arbiter* between the interests of the customer and the interests of the regulated utilities as provided by this title and all powers and duties provided to the commission by RSA 363 or any other provisions of this title shall be exercised in a manner consistent with the provisions of this section.

(emphasis supplied).

5. “It is the general rule that in statutes the word . . . ‘shall’ is mandatory.” *In re Liquidation of Home Ins. Co.*, 157 N.H. 543, 553 (2008) (quoting *Appeal of Rowan*, 142 N.H. 67, 71 (1997)). Thus, RSA 363:17-a mandates that the PUC act as “the arbiter.”

6. “An ‘arbiter’ is a ‘person with power to decide a dispute: judge.’” *Appeal of Conservation Law Foundation of New England, Inc.*, 127 N.H. 606, 654 (1986) (citation omitted).

7. Another well-established rule of statutory interpretation provides that terms following the definite article “the” – as in “the arbiter” – have an exclusive meaning. *See, e.g., Am. Bus. Assoc. v. Slater*, 231 F.3d 1, 4-5 (D.C. Cir. 2000) (“By preceding the words ‘remedies and procedures’ with the definite article ‘the,’ as opposed to the more general ‘a’ or ‘an,’ Congress made clear that it understood § 2000a-3(a) remedies to be exclusive . . . .”); *Fairbrother v. Adams*, 135 Vt. 428, 430 (1977) (“The hunting and fishing rights are exclusive. The language of the deed used the definite article ‘the,’ which implies exclusivity.”); *Brooks v. Zabka*, 168 Colo. 265, 269 (1969) (citation omitted) (“It is a rule of law well established that the definite article ‘the’ particularizes the subject which it precedes. It is a word of limitation as opposed to the indefinite or generalizing force of ‘a’ or ‘an.’”).

8. RSA 363:17-a, known as “[t]he ‘PUC as arbiter’ statute, thus emphasizes that the commission has an *affirmative duty* to decide disputes between utilities and their customers.” *Appeal of Conservation Law Foundation of New England, Inc.*, 127 N.H. at 654 (emphasis supplied).

9. That duty extends to consideration of “the interests of the customer and [those] of the regulated utilities as provided by . . . [T]itle [XXXIV] [Public Utilities],” *see* RSA 363:17-a, which Title embraces RSA 362 through RSA 382 and certainly includes within its ambit the matter of determining the compensable overcharge (*i.e.*, the refund) due RiverWoods *and* the undercharges realized by *other* UES customers at RiverWoods’ expense. *See, e.g.*, **RSA 374:2 [Charges]** (“All charges made or demanded by any public utility for any service . . . shall be just and reasonable and not more than is allowed by law....”), **RSA 378:10 [Preferences]** (“No public utility shall make or give any undue or unreasonable preference or advantage to any person....”) and **RSA 378:14 [Free Service, Etc.]** (“No public utility shall . . . charge or receive a greater or lesser or different compensation for any service rendered to any person, firm or corporation than the compensation fixed for such service by the schedules on file with the commission and in effect at the time such service is rendered.”).

10. **RSA 365:29 [Orders for Reparation]**, in turn, fashions the contours of a remedy (*i.e.*, a refund) that the PUC may impose on account of the failure of a public utility, whether willfully or, as in this case, not, to scrupulously observe the foregoing prohibitions (*i.e.*, RSA 374:2, RSA 378:10 and RSA 378:14) against unauthorized, unsanctioned or otherwise invalid customer charges. The Supreme Court has construed the PUC’s jurisdiction to issue refunds broadly. In *Granite State Gas Transmission, Inc. v. State of New Hampshire*, 105 N.H. 454 (1964), the Supreme Court upheld a PUC order that required a public utility to extend 100% of a refund from its supplier to its customers, explaining that RSA 378:10 [Preferences], read “together with RSA 365:29[,] gives the Commission authority to prevent unreasonable prejudice or disadvantage to customers.” *Id.* at 456-57 (citations omitted).

11. RSA 365:29 [Orders for Reparation] provides as follows:

On its own initiative or whenever a petition or complaint has been filed with the commission covering any rate, fare, charge, or price demanded and collected by any public utility, and the commission has found, after hearing and investigation, that an *illegal or unjustly discriminatory rate, fare, charge, or price has been collected for any service*, the commission may order the public utility which has collected the same *to make due reparation to the person who has paid the same*, with interest from the date of the payment. Such order for reparation shall cover only payments made within 2 years before the earlier of the date of the commission's notice of hearing or the filing of the petition for reparation.

(emphasis supplied).

12. The collected overcharges to RiverWoods were “illegal” within the meaning of RSA 365:29 [Orders for Reparation]. *See State v. Farrington*, 161 N.H. 440, 20 A.3d 291, 295 (2011) (rule of statutory construction requiring that we “examin[e] the language of the statute and ascribe the plain and ordinary meaning to the words used.”); *see* Black’s Law Dictionary 598 (7th ed. abridged 2000) (defining illegal as “forbidden by law” or “unlawful”); *id.* 1246 (defining “unlawful” as “not authorized by law”).

13. Indeed, the collected overcharges were “illegal” by virtue of the foregoing statutory prohibitions, to wit: **RSA 374:2 [Charges]** (“All charges made or demanded by any public utility for any service ... shall be just and reasonable and not more than is allowed by law....”), **RSA 378:10 [Preferences]** (“No public utility shall make or give any undue or unreasonable preference or advantage to any person....”), and **RSA 378:14 [Free Service, Etc.]** (“No public utility shall ... charge or receive a greater or lesser or different compensation for any service rendered to any person, firm or corporation than the compensation fixed for such service by the schedules on file with the commission and in effect at the time such service is rendered.”).

14. The corresponding undercharges that benefited other customers were likewise “illegal” in that they were prohibited by RSA 378:10 [Preferences] and RSA 378:14 [Free Service, Etc.].

15. Further, it should suffice to say that both the overcharges and the undercharges were “charge[s]” within the meaning of RSA 365:29 [Orders for Reparation] (“rate, fare, charge, or price demanded and collected...”). *See* Merriam-Webster (Online) Dictionary, <http://www.merriam-webster.com/dictionary/charge> (defining charge as “the price demanded for something”); Black’s Law Dictionary 184 (7th ed. abridged 2000) (defining charge as “[p]rice, cost, or expense”).

16. That the PUC has jurisdiction and authority, under RSA 365:29 [Orders for Reparation], to “order the public utility which has collected [an illegal charge] to make due reparation to the person who has paid the same ...” is beyond reasonable dispute.

17. The underlying cause of the overcharge (here, a manufacturer’s mislabeling of a current transformer) bears no relevance to whether the PUC is obliged, under RSA 363:17-a [Commission as Arbiter] (“The commission shall be the arbiter ...”), to exercise jurisdiction over the issues raised by the Petition – that is, (a) the scope of reparation and (b) the funding of such reparation, in significant part, by recovery from customers who enjoyed undercharges at RiverWoods’ expense. Indeed, RiverWoods ostensibly disregards N.H. Code Admin. Rule Puc 305.05 [Customer’s Bill Adjustments] which, although not strictly applicable here, provides for billing adjustments in the event of certain meter errors. The point is, the PUC’s jurisdiction plainly extends to cases of overcharges, whether caused by an equipment defect or otherwise.

18. RiverWoods’ Motion to Dismiss or Stay boils down to an effort to avoid the statutory limits imposed on its right to a refund under RSA 365:29 and the PUC’s broad

jurisdiction to determine the extent of that refund. Its narrow interpretation of RSA 365:29 (this is a “meter defect” case, not an “illegal overcharge” case), which thoroughly ignores the remainder of the statutory scheme under Title XXXIV [Public Utilities], should be rejected. *See Farrington*, 161 N.H. 440, 20 A.3d at 295 (“We interpret a statute in the context of the overall statutory scheme and not in isolation.”). Put differently, the suggestion that the PUC shed itself of jurisdiction so that RiverWoods may enjoy a more complete remedy (*i.e.*, > 2 years) is contrary to the statutory scheme fashioned by the Legislature. *See, e.g., Appeal of Ashland Electric Dep’t (New Hampshire Public Utilities Comm’n)*, 141 N.H. 336, 340 (1996) (rejecting interpretation of statutes that would allow the utility to “bypass the entire statutory procedure. Because ‘[i]t is not to be presumed that the legislature would pass an act leading to an absurd result and nullifying to an appreciable extent the purpose of the statute. . . .’”) (citation omitted).

19. Through the foregoing statutory scheme, the PUC is charged with “protect[ing] the rate paying public’s interest in adequate utility service at reasonable rates.” *Appeal of Conservation Law Foundation of New England, Inc.*, 127 N.H. at 653. The “public’s interest” includes an interest in preserving the financial viability of public utilities. *See, e.g., Boston & M.R.R. v. State*, 102 N.H. 9, 10 (1959) (stating that the public good includes “the needs of the public at large and the general welfare of the utility involved”). The two-year period of limitation contained in RSA 365:29 [Orders for Reparation] reflects a balance duly struck by the Legislature. Indeed, presented with a customer’s claim for recovery of fourteen years’ worth of overcharges, the Maine Public Utilities Commission stated:

[W]e do not find that a waiver of the six-year liability period contained in Chapter 815, § 8(E)(2) is warranted in this case. The six-year liability period strikes a careful balance between the interest of the consumer in remuneration for improper past billings, and the interest of the utility in not being exposed to potential open-ended liabilities.

*Appeal of Consumer Assistance Order Division Decision by Customer # 2010-28271*, Maine Public Utilities Comm’n, Docket No. 2010-86, Order, dated April 7, 2010, at 3-4.

## **II. The Authorities Cited By RiverWoods Do Not Advance Its Position.**

### **A. *Nelson***

20. RiverWoods contends that the “courts may decide cases ‘involving a claim by a ratepayer that he has been overcharged,’” Motion to Dismiss or Stay at 3, relying largely on *Nelson v. Public Serv. Co.*, 119 N.H. 327 (1979). *Nelson* is inapplicable. It involved an appeal by a public utility of a small claims court award of \$21.73 to an individual customer who was charged a new rate prior to the effective date for that rate. In a 3-2 decision, the Supreme Court held that the district court acted within its power, as the “simple” issue before that court “did not involve the type of rate case that is usually within the commission’s sole expertise. . . . [and] [did] not involve the complex issues of rates, fair return, distribution of rates among classes, or other matters better left to the commission.” *Id.* at 330.

21. The instant case hardly involves the sort of “simple” issue presented in *Nelson*. The Petition asks complex questions, calling on the PUC’s expertise and experience in interpreting the statutes that it is charged with enforcing, to determine the proper time period of an overcharge refund and the concomitant adjustment of account balances to recover from undercharged customers. *See, e.g., Win-Tasch Corp v. Town of Merrimack*, 120 N.H. 6, 9-10 (1980) (observing the long-standing principle of deference given by courts to agency interpretations of statutes they are responsible for enforcing).

22. Moreover, nowhere in *Nelson* does the Supreme Court suggest that the PUC would not have had jurisdiction over the disputed electric charge (that is, had the customer



petitioned that agency in the first instance).

**B. *Complaint of Guillemette***

23. In *In re Public Service Co. of New Hampshire*, 86 N.H. P.U.C. 407, 2001 WL 1939689 (June 28, 2001) (DE 01-023) (Order No. 23,734) (“*PSNH*”) (cited in RiverWoods’ Motion to Dismiss or Stay as *Complaint of Guillemette*), PSNH customers Ann and Tim Guillemette “allege[d] that voltage fluctuations in the service provided to their residence by PSNH [had] resulted in extensive damage to their personal property [*i.e.*, home appliances].” That is to say, the Guillemettes sought to advance what Staff described as “tort claims against PSNH [for property damage] over which the Commission lacks jurisdiction.” *Id.* at \*1.

24. *PSNH* did not concern a “‘rate, fare, charge or price demanded and collected’ by a utility” under RSA 365:29 [Orders for Reparation] which, as the Commission remarked, is “[t]he only ... provision” of RSA 365 [Complaints to, and Proceedings Before, the Commission] “that speaks to a monetary remedy against a utility” (*e.g.*, a reparation or refund order for overcharges) that is payable to a complainant customer. *Id.* at \*\*4-5.

25. Unlike the Guillemettes, RiverWoods is due a refund for compensable overcharges, as determined by the PUC under RSA 365:29 [Orders for Reparation]. As noted above, Riverwoods’ desire for a more extensive remedy (*i.e.*, > 2 years), outside the statutory scheme fashioned by the Legislature under RSA 365:29, is unavailing. *See, e.g., Appeal of Ashland Electric Dep’t*, 141 N.H. at 340 (rejecting interpretation of statutes that would allow the utility to “bypass the entire statutory procedure. Because ‘[i]t is not to be presumed that the legislature would pass an act leading to an absurd result and nullifying to an appreciable extent the purpose of the statute. . . .’”) (citation omitted).

**C.     *Petition for Approval of Proposed Carrier to Carrier Performance Guidelines and Performance Assessment Plan***

26.     In *In re Verizon New Hampshire*, 87 N.H. P.U.C. 172, 2002 WL 730738 (Mar. 29, 2002) (DT 01-006) (Order No. 23,940) (cited in RiverWoods' Motion to Dismiss or Stay as *Petition for Approval of Proposed Carrier to Carrier Performance Guidelines and Performance Assessment Plan*), the PUC addressed a host of issues bearing no relation to those presented in the instant case, other than as follows:

RSA Chapter 365 expressly grants the Commission a number of powers to investigate a utility's performance in relation to its customers, and to take specific actions against the utility for inadequate service and for violations of laws of Commission orders. For example, RSA 365:29 in conjunction with RSA 378:10 grants the Commission authority to order a utility to pay refunds to prevent unreasonable prejudice or disadvantage to customers. *Granite State [Gas] Transmission, Inc. v. State*, 150 N.H. 454, 202 A.2d 236 (1964)[.] \* \* \*

In *Guillemette*, we reviewed the parameters of authority provided under RSAs 365:1, 365:2, 365:3, and 365:41. In that case, a customer sought compensation for alleged harm to home appliances caused by voltage fluctuations. In our order defining the scope of our investigation, we concluded that we lacked authority to award an individual utility customer civil damages for harm caused when a utility has supplied deficient quality service. *Id.* at 11-12. Our reparations authority under RSA 365:29, we noted, is limited to ordering return of payments made within the preceding two years. *Id.* at 11. \* \* \*

Applying the above tenets to the instant case, we can readily observe that the Commission possesses authority to order reparations in the form of bill refunds for substandard wholesale service, up to the full value of bill payments made by the affected CLECs to Verizon over the preceding two years. RSA 365:29.

*Id.* at \*24.

27.     Further, and perhaps most importantly, *In re Verizon New Hampshire* goes on to state as follows:

To the extent a performance assurance plan contemplates payments to CLECs in amounts above their bill payments to Verizon over the preceding two years, there appears to be no express authority to require such compensation. However, we believe RSA 365:3 permits us to accept a proposal by Verizon to pay CLECs beyond the level of their recent billings.

*Id.* (emphasis supplied). Indeed, the centerpiece of the instant Petition is the declared “willing[ness] [of UES] to pay the full amount of the overcharge, from September 10, 2004 forward” (*i.e.*, > 6 years), “provided that the Company is authorized to adjust account balances for that entire period.” See Petition at ¶ 7. Of course, this is an outcome that could *not* be achieved were the PUC, by some stretch, to shed itself of jurisdiction and cede its authority over the subject matter of the Petition to a justice of the Rockingham County Superior Court.

**D. The New Mexico, Nevada, Iowa, and Maryland Cases**

28. RiverWoods devotes much of its Motion to Dismiss or Stay to snippets of text drawn from case law interpreting the statutory schemes established by the New Mexico, Nevada, Iowa, and Maryland legislatures on the activities of public utilities and the agencies constituted to regulate them. Not one of these cases holds that the administrative agency is without jurisdiction to serve as arbiter of a customer/utility dispute.

**III. UES has a Right to Petition the PUC for a Declaratory Ruling That Invokes RSA 365:29 [Orders for Reparation].**

29. Finally, RiverWoods asserts that RSA 365:29 [Orders for Reparation] “only applies when a *customer* has filed a petition or complaint with the PUC ... or, alternatively, when the *PUC* has filed such a petition on its own initiative.” Motion to Dismiss or Stay at 8 (emphasis supplied). RiverWoods cites *Legislative Util. Consumers’ Council v. Public Utils. Comm’n*, 118 N.H. 93, 97-98 (1978) for this proposition. In fact, the cited case can in no way be deemed to stand for that proposition. As noted at the outset of the Company’s Petition for Declaratory Ruling, this case is brought pursuant to N.H. Code Admin. Rules Puc 207.01 [Declaratory Rulings] and RSA 365:29 [Orders for Reparation]. The language of RSA 365:29 does not limit the class of petitioners to “customers.” “Had the legislature intended” to exclude

public utilities from the class of petitioners under RSA 365:29, “it would have included such [exclusionary] language.” See *State v. Addison*, 159 N.H. 87, 92 (2009); *Correia v. Town of Alton*, 157 N.H. 716, 719 (2008); *In re Liquidation of Home Ins. Co.*, 157 N.H. 543, 554 (2008); *State v. Doyle*, 156 N.H. 306, 309 (2007). Put differently, “[w]e will neither consider what the legislature might have said nor add words that it did not see fit to include.” *Lally v. Flieder*, 159 N.H. 350, 352 (2009).

### **Conclusion**

For all of the foregoing reasons, the Motion to Dismiss or Stay should properly be denied.

Wherefore, Unitil Energy Systems, Inc. respectfully requests that the PUC:

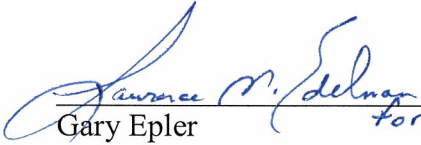
- A. Deny the Motion to Dismiss or Stay of Intervenor RiverWoods Company at Exeter, New Hampshire; and
- B. Grant such other and further relief as justice may require.

Respectfully submitted,

**Unitil Energy Systems, Inc.**

By its attorneys,

Date: July 21, 2011

  
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**Certificate of Service**

I hereby certify that on this 21<sup>st</sup> day of July, 2011, the original and seven (7) copies of the foregoing Objection to Motion to Dismiss or Stay were hand delivered and mailed electronically to:

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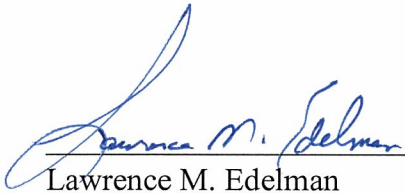
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