

THE STATE OF NEW HAMPSHIRE

Before the

PUBLIC UTILITIES COMMISSION

Docket No. DG 17-022

**CITY OF CONCORD'S PETITION FOR THE COMMISSION TO ESTABLISH
OVERSIGHT PROTOCOLS FOR CONCORD STEAM'S ABANDONMENT OF
MANHOLES AND PIPES AND FOR PAYMENT OF DAMAGE COSTS**

**CITY OF CONCORD'S OBJECTION TO
CONCORD STEAM CORPORATION'S MOTION TO DISMISS**

NOW COMES the City of Concord ("Concord"), by and through its attorneys, the Office of the City Solicitor, and respectfully moves that the New Hampshire Public Utility Commission ("Commission") deny Concord Steam Corporation's ("Concord Steam") motion to dismiss the above entitled Petition, and in support thereof, states as follows:

1. Concord Steam argues that Concord's Petition should be dismissed on the basis that: (1) the Petition is essentially a motion for rehearing regarding Commission Order No. 25,966, which time has passed to file such motion; (2) the doctrine of *res judicata* bars the Petition; and (3) the Petition does not contain a statutory provision of legal precedent under which relief is sought.

2. Concord Steam's arguments are incorrect and its motion should be denied.

3. Concord's Petition does not constitute a motion for rehearing of Commission Order No. 25,966. The Commission did not rule or make any findings relative to whether it should require Concord Steam to: (1) identify all of the manholes in its system which it plans to fill with concrete and the process by which it intends to fill those manholes; (2) establish Concord or other third party review of Concord Steam's abandonment process of its pipes and manholes in Concord; (3) establish an escrow account or bond to ensure that

the proffered abandonment work is completed; (4) maintain the requisite insurance policy to cover any damage it may cause during the abandonment process; and (5) pay damage costs it caused to Concord's property. Because the Commission did not rule upon these issues, Concord's instant Petition does not constitute a motion for rehearing under Docket DG 16-769.

4. Even if the Commission construes Concord's Petition as a motion for rehearing, which is disputed, the Commission is authorized to waive its thirty day motion for rehearing rule when: (1) the waiver serves the public interest; and (2) the waiver will not disrupt the orderly and efficient resolution of matters before the commission. N.H. Admin. Rules, Puc 201.05.¹

5. To the extent that waiver requirements need to be considered, a waiver should be granted. First, a waiver serves the public interest because establishing protocols for Concord Steam's abandonment of its manholes and pipes will help to ensure the safe and orderly abandonment of the public utility infrastructure. *See Claremont Gas Corporation*, Order No. 21,309 (August 5, 1994), 79 NH PUC 426, 430-431 (1994). Waiver also serves the public interest because establishing the appropriate financial securities ensures that Concord Steam's abandonment process will protect Concord's taxpayers and other property owners from any damage Concord Steam may cause during its abandonment process. Moreover, it serves the public interest in requiring Concord Steam to pay the costs associated with damaging Concord's property, which avoids having those costs absorbed by Concord's taxpayers.

6. Establishing protocols for Concord Steam's abandonment and payment of damage costs will not disrupt the orderly and efficient resolution of matters before the Commission. The

¹ Under N.H. Admin. Rule, Puc 203.33, the Commission has adopted RSA chapter 541 regarding motions for rehearing. However, as with any other rule, the Commission may waive this Rule in accordance with N.H. Admin. Rules, Puc 201.05.

Commission has retained jurisdiction over Concord Steam under Docket DG 16-769 until Concord Steam's shutdown is final. *See* Commission Order No. 25,966 (November 10, 2016). In fact, establishing protocols will better maintain an orderly and efficient abandonment process for Concord Steam.

7. Concord Steam's reliance on *In Re Carreau*, 157 N.H. 122 (2008) is misplaced. In *In Re Carreau*, the petitioner requested that the New Hampshire Supreme Court waive the statutory appeal period for an appeal to the New Hampshire Supreme Court. In denying the request, the Court noted that "[w]hile we have the discretion to waive our own procedural requirements 'for . . . good cause shown,' Sup.Ct. R. 1, we cannot use this concept to establish jurisdiction . . . in the first instance." *Id.* at 123. Like the New Hampshire Supreme Court, the Commission has discretion to waive its own procedural rules. N.H. Admin. Rules, Puc 201.05.

8. There is no question of the Commission's jurisdiction here and its authority to waive its own procedural rules. In *Re Statewide Elec. Utility Restructuring Plan*, Order No. 21,309 (July 22, 1996), 81 NH PUC 564 (1996), the Commission denied PSNH's request to enforce the requirements of N.H. Admin. Rules, Puc 203.04(c), which provides that objections to motions must be filed within 10 days of the date that the motion is filed. The Commission held that it would not relinquish its express authority under N.H. Admin. Rules, Puc 201.05 "to waive the provision of any of our rules except where precluded by statute . . ." *Id.*

9. There is no statutory preclusion relative to the Commission's authority to waive its rehearing rule. There is no dispute that the waiver is in the public interest, and that it will not disrupt the orderly and efficient resolution of this matter. Accordingly, based on the totality of the circumstances of this case, to the extent that it applies, granting waiver of the Commission's thirty day motion for rehearing rule is warranted.

10. The doctrine of *res judicata* does not bar Concord's Petition. For the doctrine to apply, three 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 in both instances; and (3) a final judgment on the merits must have been rendered on the first action. *Brzica v. Trustees of Dartmouth College*, 147 N.H. 443, 454 (2002).

11. Concord participated as an intervener in Docket DG 16-769. However, Concord did not bring a "cause of action" against Concord Steam. The New Hampshire Supreme Court describes a "cause of action" as "the underlying right that is preserved by bringing a suit or action." *In re Alfred P.*, 126 N.H. 628, 630 (1985) (quoting *MBC, Inc. v. Engel*, 119 N.H. 8, 11 (1979)). It is undisputed that Concord did not bring a suit or action against Concord Steam, and therefore, *res judicata* does not apply, as such same cause of action is not before the Commission in both instances.

12. In Commission Order No. 25,966, p.10, arising under Docket DG 16-769, the Commission recognized Concord's concerns regarding certain decommissioning activities for Concord Steam. However, the Commission only ruled upon Concord's concern regarding the payment of Concord Steam's property taxes. *Id.* at 17. In this regard, the Commission ruled that it did "not see a basis for granting the City's request to include fiscal year 2017-2018 city taxes into the emergency rate schedules contemplated here, at the present time." *Id.* The Commission did not render final judgment and made no other ruling regarding Concord's concerns or the other issues set forth in the instant Petition. In fact, Concord Steam admits that the Commission "did not address the City's other issues." Mot. to Dismiss at ¶6.

13. It is undisputed that the Commission has not rendered a final judgment on the merits concerning the issues Concord discussed in Docket DG-769 or the issues presented in this Petition. Accordingly, doctrine of *res judicata* does apply.

14. Concord Steam's argument that Concord's Petition does not contain a statutory provision or other legal precedent under which relief is sought is in error. Throughout Concord's Petition, Concord cites *Claremont Gas Corporation*, Order No. 21,309 (August 5, 1994), 79 NH PUC 426, 430 (1994) as the legal precedent in support of its Petition.

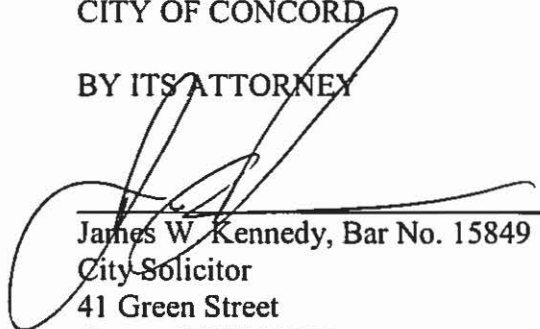
WHEREFORE, the City of Concord respectfully requests that this Honorable Commission deny Concord Steam's motion to dismiss, and, in the public interest, move forward with scheduling Concord's Petition for adjudication.

Respectfully submitted,

CITY OF CONCORD

BY ITS ATTORNEY

February 16, 2017

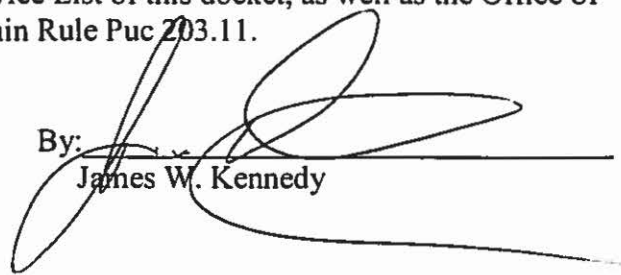


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by electronic mail or U.S. Mail, postage prepaid, to those parties listed on the Service List of this docket, as well as the Office of Consumer Advocate, pursuant to N.H. Code Admin Rule Puc 203.11.

February 16, 2017



By: _____
James W. Kennedy