

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DE-11-105

UNITIL ENERGY SYSTEMS, INC.

RIVERWOODS' MOTION TO DISMISS OR STAY

Intervenor RiverWoods Company at Exeter, New Hampshire (“RiverWoods”), by and through its counsel, Hinckley, Allen & Snyder LLP, moves to dismiss or stay any portion of this declaratory judgment action by which Unitil Energy Systems, Inc. (“Unitil”) seeks to adjudicate the scope of its liability to RiverWoods for damages caused by a defective Unitil electrical meter. In support of this Motion, RiverWoods states as follows:

I. INTRODUCTION

Unitil’s Petition for Declaratory Judgment concerns Unitil’s liability for damages arising from a defective Unitil electrical meter that caused RiverWoods to be billed and pay for more than \$1.8 million in electricity it did not receive or use. Unitil’s refusal to repay RiverWoods in full for the overpayments, despite conceding its responsibility for the defective meter, is the subject of a civil suit pending in Rockingham County Superior Court. RiverWoods has asserted claims for negligence, breach of contract and violation of the New Hampshire Consumer Protection Act, RSA chapter 358-A. Riverwoods seeks recovery of \$1.2 million, representing the unpaid balance of the overpayments, as well as interest, fees and costs, and double or treble damages pursuant to RSA chapter 358-A.

There is no question that the Superior Court has jurisdiction to adjudicate RiverWoods’ claims, which do not in any respect challenge the approved electrical rates charged by Unitil. It also is clear that RiverWoods seeks damages that are beyond the scope of the PUC’s jurisdiction to award. Simply put, this matter belongs in Superior Court. Further, Unitil’s attempt to use

RSA 365:29 to invoke the jurisdiction of the PUC is improper. This statute, which applies to requests for PUC reparation orders as the result of an unfair or discriminatory rates or charges, has no application to the fact of this case. The PUC should grant this Motion to Dismiss or Stay, and defer the adjudication of Unitil's liability to RiverWoods to the Superior Court.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The facts relevant to this Motion are set forth in RiverWoods' June 21, 2011 Petition to Intervene. In brief, RiverWoods operates a continuing care retirement community in Exeter which serves approximately 600 retired and elderly residents. In or about February 2011, Unitil first disclosed that an electrical meter installed at RiverWoods in 2004 had been calibrated incorrectly, and had overstated Riverwoods' electricity consumption by approximately 100% during the past six years. As a result of this metering defect, RiverWoods was billed and paid for approximately \$1.8 million in electricity that it did not receive or use.

Unitil initially represented to RiverWoods that it accepted complete responsibility for the meter defect and would pay full restitution for overpayments made by RiverWoods. Despite this Unitil paid only \$611,900, and to date it has refused to pay the balance owed, which totals nearly \$1.2 million. After efforts to resolve this matter with Unitil reached an impasse, on June 20, 2011, RiverWoods filed a Writ of Summons in Rockingham County Superior Court in a matter styled The RiverWoods Company at Exeter, New Hampshire v. Unitil Energy Systems, Case No. 218-2011-cv-701. RiverWoods asserts claims for negligence, unjust enrichment, violation of RSA chapter 358-A, and breach of contract. It seeks recovery for damages incurred as a result of Unitil's failure to properly install and maintain the electrical meter, together with interest, fees and costs, and double or treble damages.

On May 13, 2011, Unitil petitioned the PUC for a declaratory ruling regarding Unitil's liability for the overpayments. Unitil does not dispute its liability for the meter defect, or the fact that the defect caused RiverWoods to be overbilled in the amount of \$1,801,504. However, Unitil requests a ruling that RSA 365:29 limits the scope of its liability to RiverWoods, and it seeks authorization to recoup from other customers the amount of any payments it must make to RiverWoods. On June 24, 2011, the PUC granted RiverWoods' Petition to Intervene.

III. ANALYSIS

A. The Superior Court Has Jurisdiction To Adjudicate RiverWoods' Claims

The PUC should dismiss this declaratory action to the extent it seeks a ruling regarding the scope of Unitil's liability to RiverWoods.¹ This issue falls clearly within the jurisdiction of the Rockingham County Superior Court and should be resolved in that forum alone.

RSA 365:1 provides that "any person *may* make complaint to" the PUC concerning the actions of a public utility. (Emphasis added). The New Hampshire Supreme Court has held that while "this complaint method is the logical recourse for complaints because of the commission's expertise . . . the commission does not have exclusive jurisdiction over all matters concerning public utilities." Nelson v. Public Serv. Co., 119 N.H. 327, 330 (1979). The PUC only has exclusive jurisdiction over cases involving "complex issues of rates, fair return, distribution of rates among classes, or other matters better left to the commission." Id. In contrast, courts may decide cases "involving a claim by a ratepayer that he has been overcharged." Id.; see also Bacher v. Public Serv. Co., 119 N.H. 356, 357 (1979) (holding that courts have jurisdiction to address cases involving overcharges); Mountain Springs Water Co. v. Huber, 119 N.H. 676, 679

¹ RiverWoods does not contest, and does not have an interest in, Unitil's ability to obtain a ruling from the PUC on the entirely separate issue of whether Unitil may recoup from other customers any portion of the amount it owes RiverWoods.

(1979) (same). The rationale underlying those decisions is that cases involving overcharges do not fall within the PUC's "sole expertise." Nelson, 119 N.H. at 330.

For example, in Nelson, the New Hampshire Supreme Court held that the district court had jurisdiction to address a small claims action brought by a utility customer to recover a refund for a utility rate overcharge. Id. at 328-29. The customer alleged that his bill was incorrect because it was calculated using a rate increase "prior to the rate's legal effective date." Id. The Court rejected the public utility's argument that the district court lacked jurisdiction to address cases involving electric utility rates. Id. at 330. As the Court explained, "the permissive jurisdiction granted to the commission by the legislature does not deprive the district courts of their jurisdiction." Id.

Other jurisdictions likewise hold that courts are the proper forum in which to resolve disputes over a utility company's liability for improper billings, equipment defects, or similar errors. See, e.g., Summit Props., Inc. v. Public Serv. Co., 118 P.3d 716, 722 (N.M. Ct. App. 2005) (the general rule is that "jurisdiction over contract or tort claims made against a public utility usually rests with the courts"); Nev. Power Co. v. Eighth Judicial Dist. Court, 102 P.3d 578, 586 (Nev. 2004) (district court properly exercised jurisdiction over claims relating to tort, contract and consumer fraud resulting in an increased utility charge due to location of meter); Iowa Electric Light & Power Co. v. Lagle, 430 N.W.2d 393 (Iowa 1988) (claims involving meter errors are properly resolved by the courts); Oliver v. Iowa Power & Light Co., 183 N.W.2d 687, 689 (Iowa 1971) (same); Spintman v. Chesapeake & Potomac Tel. Co., 255 A.2d 304, 307 (Md. 1969) (same); 73B C.J.S. Public Utilities §§ 244-245 (discussing jurisdiction of courts in

advance of or pending proceedings before public utility commissions); Annotation, 34 A.L.R. 185 (collecting cases addressing claims between utility customers and utility customers).²

The Nevada Power Co. and Oliver cases are particularly instructive. In Nevada Power Co., an electric utility company was sued for breach of contract, breach of the covenant of good faith and fair dealing, and unfair practices. 102 P.3d at 581. The utility customer brought the civil suit claiming that that the utility had deceptively advised them that placement of the meters in a particular location would be in their best interest, when, in fact, the placement of the meters allowed the utility to charge a higher rate for the electricity used. Id. at 583. The Nevada Supreme Court rejected the argument that the Nevada Public Utilities Commission had exclusive jurisdiction, explaining that the general rule is that the courts have original jurisdiction “over claims sounding in tort, contract, and consumer fraud.” Id. at 586-87. In arriving at that decision, the Court noted that the utility customer was not challenging the reasonableness of the rates approved by the Commission. Id. at 586. It was instead challenging misrepresentations made by the utility that resulted in certain rates being charged to the customer. Id. at 587. Similarly, in this case, Riverwoods has not challenged the reasonableness of any rates established or approved by the PUC.

This case is also analogous to Oliver, in which a utility customer filed a claim in district court asserting an error in a meter reading. 183 N.W.2d at 689. In Oliver, the Supreme Court of Iowa rejected the argument that the Iowa Utilities Board had exclusive jurisdiction in such matters, explaining as follows:

Plaintiff’s action involves alleged overcharges for electricity. Two principal kinds of action of this type exist. In the first kind, the customer of the utility does not claim that the rates were unreasonable but claims he was charged the wrong amount - e.g., his meter was

² For the convenience of the PUC, copies of all out-of-state cases and secondary authorities are attached hereto as Exhibit A.

misread, the charge exceeds the filed tariff, or he was placed in the wrong rate class. The doctrine of “public utility duress” has evolved in such cases, allowing the customer to recover his overpayments and to have other relief, in an action in court.

In the second kind of action, the customer seeks to recover overcharges on the ground that the utility’s rates were unreasonable. These actions the courts will not entertain. The customer must proceed before the appropriate public utility regulatory body to have reasonable rates determined for the future; the utility’s filed tariffs govern rates for the past.

Id. (citations omitted). Similar to the Oliver case, RiverWoods is asserting claims that arise from overcharges caused by a defective meter.

Based on the foregoing, there should be no question that the Superior Court has jurisdiction to adjudicate Unitil’s liability and award full recovery on RiverWoods’ claims, which do not challenge the approved electrical rates charged by Unitil.

B. The PUC Lacks Jurisdiction to Award Full Recovery to RiverWoods

Whereas the Superior Court unquestionably has jurisdiction to resolve Unitil’s liability for the defective meter, and to award full recovery on RiverWoods’ claims, the PUC’s jurisdiction is far more limited. Accordingly, to avoid the prospect of simultaneous proceedings dealing with the same issue, and the risk of inconsistent decisions, the PUC should dismiss or stay any portion of Unitil’s declaratory judgment action which concerns Unitil’s liability to RiverWoods.

It is well established law that the PUC “is endowed with only the powers and authority which are expressly granted or fairly implied by statute.” Appeal of Public Service Co. of New Hampshire, 122 N.H. 1062, 1066 (1982). The PUC has been granted a number of powers to investigate a utility’s performance in regulation to its customers, but its ability to award a monetary remedy against a utility is limited to RSA 365:29 and RSA 365:41. See Complaint of

Guillemette, 2002 N.H.P.U.C. 116 (2001) (discussing PUC’s limited ability to award monetary damages); Petition for Approval of Proposed Carrier to Carrier Performance Guidelines and Performance Assessment Plan, 2002 N.H.P.U.C. 24 (2002) (same).

The PUC has recognized that it has “less than plenary authority to redress customer complaints” or render a verdict in which “the wronged party is made whole.” Complaint of Guillemette, 2002 N.H.P.U.C. 116. The PUC’s authority is limited because “[t]he Legislature appears to have made a policy choice, between vesting the Commission with the authority to make such aggrieved customers whole – a function traditionally reserved to courts – and giving the Commission only a mechanism for motivating utilities via administrative sanctions to comply with the relevant requirements.” Id. For those reasons, there is no preemption of lawsuits involving contract and tort claims, and a party may file a civil suit to obtain full redress.

Here, the PUC’s inability to fully redress RiverWoods’ claims weighs in favor of a determination that its civil action should be resolved by the Superior Court. See, e.g., Nev. Power Co., 102 P.3d at 586 (explaining that the PUC’s lack of power to grant relief sought by plaintiffs in their suit, which included a claim for unfair and deceptive practices based on alleged misrepresentation relating to equipment, supported conclusion that the case was appropriately resolved by the court). There is no question that, in this matter, the monetary relief that can be provided by the PUC is not equivalent to the full relief being sought by RiverWoods. The PUC’s lack of authority to redress RiverWoods’ damages supports a determination that the petition for declaratory relief should be dismissed.

C. The Request For Declaratory Judgment Regarding RSA 365:29 Should Be Dismissed Because That Statutory Provision Is Inapplicable

In instituting this administrative action, Unitil has relied on RSA 365:29. Unitil seeks a declaratory ruling from the PUC that its liability to RiverWoods is governed by the two-year

limitations period that RSA 365:29 places on reparation orders. Unutil's attempt to obtain such a ruling should be denied because RSA 365:29 does not apply to this matter.

First, RSA 365:29 is inapplicable because no petition or complaint has been filed with the PUC to obtain a reparation order as a result of an illegal or discriminatory rate or change. RSA 365:29 states 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 added.)

This language is clear that the statute only applies when a customer has filed a petition or complaint with the PUC regarding an illegal or discriminatory rate or charge, or, alternatively, when the PUC has filed such a petition on its own initiative. See, e.g., Legislative Util. Consumers' Council v. Public Utils. Comm'n, 118 N.H. 93, 97-98 (1978) (discussing manner in which a reparation order under RSA 365:29 may be requested under prior version of law). None of those threshold requirements exists here. This matter does not concern an illegal or discriminatory rate or change; it concerns a meter defect that caused RiverWoods to be billed for electricity it did not receive or use. Further, neither RiverWoods nor the PUC filed a petition or complaint under RSA 365:29, for the simple reason that the statute does not apply to this case.

Second, RSA 365:29 applies only to reparation orders issued by the PUC. It does not restrict a court's ability to award recovery for civil damages caused by a utility's negligence,

breach of contract, or other wrongful conduct. See Nelson, 119 N.H. at 330; Complaint of Guillemette, 2002 N.H.P.U.C. 116. Any time limit imposed on such a civil recovery is instead found in RSA 508:4, I, which establishes a three year statute of limitations for civil actions, and applies the discovery rule for determining when a claim accrues.

Unitil's argument that RSA 365:29 should limit any recovery ordered by the PUC militates in favor of dismissing or staying this proceeding. Although RiverWoods disagrees that RSA 365:29 applies to these facts, if Unitil is correct and the reverse is true, the PUC arguably would not be able to award full recovery to RiverWoods. Conversely, RSA 365:29 would not limit any recovery awarded by the Superior Court. Thus, this matter should be resolved in the Superior Court, which again has the ability to award full recovery to RiverWoods.

IV. CONCLUSION

For the foregoing reasons, RiverWoods respectfully requests the PUC to dismiss or stay the portion of this declaratory judgment by which Unitil seeks to adjudicate the scope of its liability to RiverWoods for damages caused by the defective Unitil electrical meter.

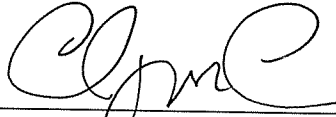
WHEREFORE, RiverWoods respectfully requests that the PUC:

- A. Dismiss or stay the instant proceedings to the extent they seek to adjudicate the scope of Unitil's liability to RiverWoods; and
- B. Grant such other and further relief as is just and reasonable.

Respectfully submitted,

THE RIVERWOODS COMPANY OF EXETER,
NEW HAMPSHIRE

By its attorneys,

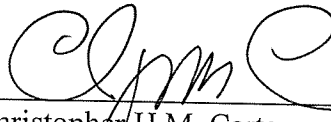


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CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the foregoing document was forwarded, via first class mail, postage pre-paid, to all counsel of record.



Christopher H.M. Carter

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