State of New Hampshire
Supreme Court

No. 2000-637

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NOVEMBER SESSION

APPEAL OF CAMPAIGN FOR RATEPAYERS RIGHTS
(PUBLIC UTILITIES COMMISSION)

APPEAL BY PETITION PURSUANT TO RSA 541 AND SUPREME COURT RULE 10

BRIEF OF APPELLANT, CAMPAIGN FOR RATEPAYERS RIGHTS

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QUESTIONS PRESENTED

1. Does the stranded cost recovery charge which the Public Utilities Commission imposed on customers' bills work an unconstitutional taking of ratepayers' property?

2. Does the stranded cost recovery charge, which pays for state obligations, violate the constitution because it is imposed on the electric bills of only PSNH ratepayers and not on all New Hampshire citizens?

3. Is the stranded cost recovery charge unconstitutional because the Legislature has no authority to foist contracts on unwilling private parties?

4. Does the settlement between PSNH and the state violate the requirement that lost revenues from special contracts not be recovered from other classes of ratepayers?

5. Does the stranded cost recovery charge violate RSA 374-F because, rather than approaching regional average rates, they are fixed for seven years and will climb higher and higher above declining regional rates?

6. Does the stranded cost recovery charge for residential customers, which is 17% higher than for industrial customers, violate RSA 374-F, which prohibits discriminatory stranded cost charges?

7. Do transition rates, which are set below market rates, create unlawful deferrals, because they are a new category of post-restructuring stranded costs that are disallowed by RSA 374-F?

STATEMENT OF FACTS AND STATEMENT OF THE CASE[1]

I. Historical Context

This case is not procedurally complex – it is merely an appeal of an order of the Public Utilities Commission (PUC). It arises, however, against an historical background.[2]

In 1972, Public Service Company of New Hampshire (PSNH) filed an application with the New Hampshire Site Evaluation Committee for approval to build two 1150 megawatt nuclear reactors (each larger than any then operating anywhere in the world) at Seabrook, New Hampshire, and to own 50% of the project. The project cost estimate was $973 million. By

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[1]In view of the expedited briefing schedule, citations to the record are omitted, but it is believed that all facts are accurate.

[2]This court has been involved in this history at virtually every step, and has produced perhaps the largest bulk of utility law of any jurisdiction. *In re New Hampshire Public Utilities Commission Statewide Electric Utility Restruct. Plan*, 143 N.H. 233 (1998); *Appeal of Campaign For Ratepayers Rights*, 142 N.H. 629 (1998); *Appeal of Public Service Company*, 141 N.H. 13 (1996); *Appeal of Campaign For Ratepayers Rights*, 137 N.H. 707 (1993); *Cushing v. Gregg*, 137 N.H. 429 (1993); *Appeal of Richards*, 134 N.H. 148 (1991); *Appeal of Campaign For Ratepayers Rights*, 133 N.H. 480 (1990); *Public Serv. Co. of N.H. v. Town of Seabrook*, 133 N.H. 365 (1990); *Town of Rye v. Public Serv. Co. of N.H.*, 130 N.H. 365 (1988); *Appeal of Public Serv. Co. of N.H.*, 130 N.H. 285 (1988); *Petition of Public Serv. Co. of N.H.*, 130 N.H. 265 (1988); *Appeal of Marmac*, 130 N.H. 53 (1987); *Appeal of Mccool*, 128 N.H. 124 (1986); *Appeal of Conservation Law Foundation*, 127 N.H. 606 (1986); *Appeal of Town of Hampton Falls*, 126 N.H. 805 (1985); *Appeal of Seacoast Anti-pollution League*, 125 N.H. 708 (1985); *Petition of Public Serv. Co. of N.H.*, 125 N.H. 595 (1984); *Appeal of Seacoast Anti-pollution League*, 125 N.H. 465 (1984); *Appeal of Easton*, 125 N.H. 205 (1984); *Appeal of Public Serv. Co. of N.H.*, 125 N.H. 46 (1984); *Appeal of Granite State Electric Company*, 124 N.H. 144 (1983); *Appeal of Public Serv. Co. of N.H.*, 124 N.H. 79 (1983); *Appeal of Public Serv. Co. of N.H.*, 122 N.H. 1062 (1982); *Appeal of Hollingworth*, 122 N.H. 1028 (1982); *Appeal of Public Serv. Co. of N.H.*, 122 N.H. 919 (1982); *Appeal of Society For Protection of Env. of S.E.. N.H.*, 122 N.H. 703 (1982); *Appeal of Legislative Utility Consumers' Council*, 120 N.H. 173 (1980); *State v. Koski*, 120 N.H. 112 (1980); *State v. Cushing*, 119 N.H. 777 (1979); *LUCC v. Public Serv. Co. of N.H.*, 119 N.H. 332 (1979); *State v. Cushing*, 119 N.H. 147 (1979); *State v. Dupuy*, 118 N.H. 848 (1978); *Cushing v. Thomson*, 118 N.H. 308 (1978); *Cushing v. Thomson*, 118 N.H. 292 (1978); *State v. Linsky*, 117 N.H. 866 (1977); *State v. Adams*, 116 N.H. 529 (1976).

1976, when both the groundbreaking and the first public demonstrations took place, the cost estimate was $2 billion. The next year there were large demonstrations in Seabrook, culminating in massive civil disobedience and the arrest of 1414 demonstrators, the largest such event since the Vietnam war.

In 1978, PSNH sought, and obtained, "CWIP" (Construction Work in Progress) financing from the PUC in order to continue with Seabrook. CWIP, for the first time, forced ratepayers to pay for the ongoing cost of a plant under construction. After a gubernatorial election that turned on the issue, the Legislature abolished "CWIP" in 1979. PSNH then attempted to sell down its ownership share to a maximum of 28%, with further hopes of reducing its share to 22%. It found limited buyers, however, and retained 36% of the project. The cost estimate had risen to $2.6 billion.

In 1984, PSNH's lenders closed their revolving credit lines. PSNH warned it may face imminent bankruptcy, suspended all construction work at Seabrook, and eventually canceled Unit 2. The cost estimate (for both units) had risen to $10 billion. A year later, PSNH sought and obtained approval for a huge, $425 million "junk bond" sale, at an annual financing cost of more than 22 percent.

In January 1988, after the denial of an emergency rate request, PSNH filed for bankruptcy. The Bankruptcy Court in 1989 ended PSNH's exclusive right to reorganize as a debtor-in-possession, resulting in various utilities bidding to acquire the company. Northeast Utilities (NU) of Connecticut, whose bid was the only one to include Seabrook, offered $2.3 billion to acquire PSNH. The key to the acquisition was a clause in the "Rate Agreement," entered into by the State of New Hampshire and NU, committing to seven years of 5.5% annual

rate increases for all customers. The PUC was authorized to consider and approve the agreement in a one day special legislative session.

In 1990, Seabrook unit 1 finally entered commercial service. Its cost was $6.9 billion.

The compounded rate increases drove New Hampshire electric rates to among the highest in the nation, with rates at the end of the seven-year period 46% above 1989 levels. Large industrial customers, led by Cabletron of Rochester, demand relief. Freedom Electric, an upstart company hoping to provide power to them, successfully petitioned the PUC in 1995 to declare that PSNH did not have a perpetual legal monopoly over its franchised service area so that others, like Freedom, could provide power there. This Court affirmed the PUC decision.

In 1995 the PUC established a "roundtable" of "stakeholders" to discuss implementing a pilot program for competition in electric generation. Eventually, some 17,000 customers, including all residents of one town (Peterborough) and one city (Nashua) were selected to participate in the program. PSNH agreed to provide a 10% "shopping credit" to encourage participation.

In 1996, after the pilot program's seeming success, the New Hampshire legislature overwhelmingly approved RSA 374-F, directing the PUC to prepare a plan for restructuring the utility industry, principally by providing for competition in electric generation. It declared that its primary purpose was to "harness the power of competitive markets" in order to reduce costs. The legislation authorized PSNH to recoup its poor investments that it otherwise could not expect to recover in a competitive market, so called "stranded costs," to the extent the PUC found them "equitable, appropriate and balanced." The legislation eliminated PSNH's obligation to serve as of the date competition begins (C-day), and also deemed that there was no longer a

monopoly in the market for generation of electricity in New Hampshire.

In 1997 the PUC published its order implementing electric competition in New Hampshire. The order allowed about 60% of PSNH's claimed $2 billion in stranded costs. PSNH and NU immediately filed suit in the federal court for an injunction. Due to PSNH retaining as counsel the former law firms of all New Hampshire's federal judges, the case was referred to Rhode Island, and the judge there, a former partner in a law firm representing the major Rhode Island utility, issued a temporary restraining order barring implementation of the PUC's plan. The Court also issued preliminary rulings indicating it was likely to find that the PUC's restructuring order violated the 1989 rate agreement and that the New Hampshire plan was preempted by federal law.

After various preliminary hearings in the Rhode Island district court, the Governor and PSNH agreed to attempt mediation of the issues. Despite mediation attempts involving former United States Transportation Secretary William Coleman in 1998, there was no resolution. In 1999 the Governor convened a small team, including the director of her energy office, some PUC staff, and an outside consultant. They arrived at a comprehensive settlement agreement with PSNH/NU, which was filed at the PUC in August 2, 1999. Shortly thereafter, Consolidated Edison of New York announced an agreement to acquire NU, including PSNH, thereby creating the largest distribution utility in the country. That is currently pending before the PUC.

The PUC held extensive hearings on the settlement proposal and, on April 19, 2000, approved it with modifications (other than as to transition service) not here relevant.

On June 12, 2000, at the end of the last legislative session, the General Court enacted Chapter 249 of the Laws of 2000 (RSA 369-B), which authorized the issuance of the

securitization bonds and made further modifications to the settlement. One modification requires PSNH to absorb the first $7 million in costs for the transition service above transition customers' payments; others specified the stranded cost recovery charge should be set at 3.4 cents per KWH, that the transition service period should be limited to 33 months for residential customers and 21 months for other customers, and that neither PSNH nor any affiliate should be permitted to bid at the auction of PSNH's existing generation portfolio.

On September 8, 2000, the PUC issued its order denying all motions for rehearing, except a motion filed by PSNH concerning tax effects of the settlement. This appeal followed.

II. Provisions of the Settlement Agreement

A. General Provisions

The settlement agreement implicitly acknowledges the right of PSNH/NU to recover approximately $2 billion in so called "stranded costs," principally consisting of Seabrook costs that were deferred under the 1989 rate agreement, the Seabrook-related balance of the $800 million "acquisition premium" created under that agreement, and the deferred costs of acquiring power from some small energy producers. (The latter were also Seabrook-derived, since the small power rate agreements were based on a projected extraordinarily high cost of oil, at $150 a barrel, which was used to justify continuing with the Seabrook project.)

After agreeing to a before-tax write-off of about $367 million of PSNH's claimed stranded costs, the balance was agreed to be recovered in three "buckets." The first bucket contains the rate charges to recover the entire cost of the securitization bonds, called "rate reduction bonds." These charges would have absolute priority and are to be paid first out of the stranded cost charges. The second bucket would include the charges to pay for Seabrook decommissioning, now estimated to cost $585 million in 2000 dollars, and costs for power obtained from small power producers not recovered through current rates. The third bucket comprises all other stranded costs.

All these costs add up to a stranded cost recovery charge (SCRC) of 3.555 cents per KWH for all residential consumers, or 3.4 cents on average for all customers. Because PSNH's stranded costs, as a percentage of the company's net worth, are by far the highest in the United States, the stranded cost charge is also the highest ever proposed, about one-third of a residential ratepayers' bill.

The agreement is intended to afford rate relief to PSNH customers. The rate reductions are provided in three ways. The first is through securitization, a refinancing of certain PSNH obligations at a lower rate due to the transfer of these obligations into irrevocable and unassailable bonds. A very small rate reduction, about 4%, is derived from the securitization. Another small portion comes from the write off, now valued at up to $450 million. The balance of the claimed 19% rate reduction, for residential customers, is the result of a so-called "transition service."

Under the transition service, industrial customers will be allowed to avoid choosing a new supplier for 21 months after C-day, and small commercial and residential customers can take up to 33 months to choose. The price for this power is set, not by the competitive market, but through the agreement at a price that it is now agreed is very likely to be substantially below the market cost for acquiring the power. Under the agreement, any difference between the cost of acquiring power and the transition service would be deferred and would be collected at a later time from customers, in effect creating a new stranded cost.

Thus, in a real sense, the customers are to pay for their own rate reduction. To mitigate against this possibility, one of the PUC's modifications is that the transition service, for the first 9 months after competition begins, be provided from the existing PSNH generators, instead of by holding a bidding process to select a supplier for the power. Thus, ironically, although the restructuring statute said that the primary reason for restructuring was to lower costs "by harnessing the power of competitive markets," the agreement lowers costs by providing a negotiated below-market price with power to be provided, as it always has been, through PSNH generation. It is universally acknowledged that substantially all small customers will remain on

the transition service for the entire 33 months it is available. Thus, the result of the entire effort to restructure the industry is, for at least several years, to retain the old system with customers relying on PSNH to both acquire and deliver their power. Meanwhile, customers have a new, irrevocable obligation to pay back the $500 to $600 million in securitization bonds over 12 years, with interest, and they have been turned into guarantors of Wall Street bonds rather than free agents in an open market.

Finally, while neither PSNH nor any of its affiliates cad bid on existing PSNH generation assets, Consolidated Edison, PSNH's acquirer, is under no such restriction. Indeed, Consolidated Edison is currently constructing a gas-fired generation plant in Newington.

B. Stranded Cost Recovery Charge

The settlement agreement contemplates the "stranded cost recovery charge" (SCRC), which is a surcharge that will added to bills of consumers who are geographically located in areas that will have formerly comprised the territory in which PSNH had an obligation to serve with electric service. As noted, the SCRC is intended to pay for existing PSNH generation assets, largely Seabrook and the Seabrook-derived small power contracts. Upon C-day, consumers will have the ability to chose their generation supplier. As of C-day, the Legislature has declared that a generation monopoly is no longer in the public interest.

SUMMARY OF ARGUMENT

CRR first stresses that this case does not challenge PSNH's right to recover stranded costs. CRR's arguments proceed from the assumption that PSNH is entitled to the money. This case challenges only the *method* by which stranded costs are collected and paid.

CRR then addresses the takings issue. It defines a taking, shows that utility takings law applies to ratepayers as well as utility companies, and notes that the stranded cost recovery charge is a taking of ratepayers' property. CRR then argues that because takings require a public purpose and a utility purpose, neither of which is fulfilled here, the stranded cost recovery charge is unconstitutional. CRR also focuses on the other end of the takings problem, and argues that because the taking is uncompensated it is unconstitutional.

Third, CRR notes that PSNH claims it incurred its stranded costs based on state law and the rate agreement which it entered with the state in 1989. CRR argues that the stranded costs are therefore state obligations, which must be paid by the state, but which are being billed to only PSNH ratepayers rather than to all the citizens of New Hampshire.

Fourth, CRR reviews the constitutional delegations of authority to the Legislature and shows that it has no authority to impose contracts between unwilling private parties. Because the stranded cost recovery charge is just that, CRR argues it is beyond the General Court's power to legislate.

Fifth, CRR renews its objection to the discounts enjoyed by PSNH's special contract customers, references its earlier appeal on this issue, alleges that the matter is now ripe for this court's consideration, and suggests that the lost revenues caused by the discounts are unlawfully being paid by other classes of customers.

Finally, although this appeal raises a number of statutory issues, CRR notes that it relies on the discussion of them contained in the brief of Granite State Taxpayers.

ARGUMENT

I. This Case Does Not Challenge PSNH's Right to Recover Stranded Costs

This case does not challenge PSNH's right to recovery of stranded costs. This brief is premised on the assumption, made by the Legislature, that PSNH is entitled to that money. The takings arguments made herein challenge only the *method* by which stranded costs are collected and paid.

II. Takings Defined

A taking is easily defined. It is "a law that takes property from A. and gives it to B." *Calder v. Bull*, 3 U.S. 386, 388 (1798). Our constitutions' takings clauses are "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

> The prohibition against government taking involves a principle that lies at the very foundation of civilized society as we know it. The principle that no man's property may be taken from him without just compensation reaches at least as far back as 1215, when on 'the meadow which is called Runnymede' the Barons of England exacted from King John the Magna Carta, which contains at least three references to this fundamental truth. . . . Our own constitution provides that 'no part of a man's property shall be take from him, or applied to public uses, without his consent . . . .'"

Appeal of PSNH, 122 N.H. 1062, 1070 (1982), *quoting Burrows v. City of Keene*, 121 N.H. 590, 595-96 (1981).

The New Hampshire and federal constitutions prohibit taking private property without payment for it. N.H. CONST., pt. I, art. 2; N.H. CONST., pt. I, art. 12; U.S. CONST., amd. 5; U.S. CONST., amd. 14. When there is a taking without payment, it violates constitutional due process also contained in the provisions cited. *Missouri Pac. Ry v. Nebraska*, 164 U.S. 403, 417 (1896); *Eyers Woolen Co. v. Gilsum*, 84 N.H. 1 (1929).

III. Takings Law Protects Ratepayers as Well as Utility Companies

It is long settled that takings law applies to utility rates. *See e.g., Smyth v. Ames*, 169 U.S. 466 (1898). Most utility takings cases involve an allegation by the utility that rates are too low. *See e.g. Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 313 (1989); *Company v. State*, 95 N.H. 353 (1949). Even in the short time since electric deregulation, most of the legal activity centers around whether utilities are takings victims. *See* J. Gregory Sidak and Daniel F. Spulber, *Deregulatory Takings and Breach of the Regulatory Contract*, 71 N.Y.U.L.REV. 851 (1996); William J. Baumol and J. Gregory Sidak, *Stranded Costs*, 18 HARV.J.L.&PUB.POL'Y 835 (1995). This case, however, does not challenge the right of PSNH to recover its stranded costs.

But the takings clause applies on behalf of consumers' interests too. *See e.g., Appeal of Richards*, 134 N.H. 148, 162 (1991); *Petition of PSNH*, 130 N.H. 265, 274 (1988) (rates are bounded by "ratepayer exploitation"); *Appeal of Conservation Law Foundation*, 127 N.H. 606, 638-640 (1986); *Appeal of PSNH*, 122 N.H. 1062, 1071 (1982) ("We see no greater right of the government to 'take' merely because a regulated utility is involved."); *LUCC v. Public Serv. Co. of N.H.*, 119 N.H. 332 (1979); *State ex rel. Spire v. Northwestern Bell Telephone Co.*, 445 N.W.2d 284, 297-98 (Neb. 1989) (ratepayer's right to fair and reasonable rate is a "property entitlement" protected by constitution); John N. Drobak, *From Turnpike to Nuclear Power: The Constitutional Limits on Utility Rate Regulation*, 65 B.U.L. L.REV. 65 (1985).

IV. The SCRC Is a Taking

The SCRC is a taking because it lifts money by governmental fiat from ratepayers' pockets and deposits it in PSNH's accounts. Accordingly, it must be analyzed through a constitutional lens.

But the appellees in this case may argue that the Stranded Cost Recovery Charge (SCRC) is no more than a surcharge legitimately added to consumers bills pursuant to the state's legitimate ratemaking authority. REHEARING ORDER, *CRR Pet. for Appeal* at 98 (The award of stranded cost recovery is an exercise in ratemaking, under legislative guidelines, not a taking.").

The argument is appealing, but hinges on the existence of a monopoly. *Every* known utility case has arisen in the context of a monopoly. *See e.g., Duquesne Light Co. v. Barasch*, 488 U.S. 299, 315 (1989) ("utilities are virtually always public monopolies"); *Slaughter House Cases*, 83 U.S. 36, 61 (1873) (Louisiana butchers' monopoly); *Alliance for Aff. Energy v. New Orleans,* 578 So.2d 949, 973 (La. App. 1991) ("A public utility is a monopoly which exists in a non-competitive market."); Leigh H. Martin, *Deregulatory Takings: Stranded Investments and the Regulatory Compact in a Deregulated Electric Utility*, 31 ARIZ. L. REV. 1183, 1186 (1997) ("courts have thus far analyzed utility takings claims only in the context monopoly").

Legislative authority to set rates is only relevant in the presence of a monopoly. The purpose of creating the PUC was to "'find a remedy against the evils of monopoly.'" *Appeal of Omni Communications, Inc.*, 122 N.H. 860, 862 (1982) (quoting a delegate to the 1902 constitutional convention). "The unique nature of gas, railroads, electricity and telephone service . . . as a practical matter, requires the existence of certain monopolies." *Omni*, 122 N.H. at 862.

"The role and duty of such a [public utilities] commission is to oversee and regulate those few necessary monopolies so that the constitutional rights of free trade and private enterprise are disrupted as little as possible." *Omni,* at 862-63.

In the absence of a monopoly, there is no authority to eclipse the constitutional preference for the free market. N.H. CONST. pt II, art. 83. If the Legislature began to regulate minimum and maximum prices for, say, blue jeans, it would be as shocking as it would be unconstitutional, as there is no monopoly in the blue jean market. *See e.g., Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (attempt to regulate coal prices); *Jersey Central Power & Light Co v. F.E.R.C.*, 810 F.2d 1168, 1189 (D.C. Cir. 1987) (*Starr*, J. concurring) ("The utility business represents a compact of sorts; a monopoly on service in a particular geographical area (coupled with state conferred rights of eminent domain or condemnation) is granted tot he utility in exchange for a regime of intensive regulation, including price regulation, quite alien to the free market").

Upon C-day, consumers will have the ability to chose their generation supplier. As of that date, the Legislature has declared that a generation monopoly is no longer in the public interest. RSA 374-F:1; RSA 374-F:3, II & III. On C-day, the generation side of the electric utility industry reverts to a free market, and the authority there once was to regulate prices of electric generation will have terminated. It is no longer possible to view electric generation somehow different from any one of innumerable products – such as blue jeans – in the normal competitive stream of commerce. *Deregulatory Takings*, 31 ARIZ. L. REV. at 1186 (suggesting a new judicial standard that abandons the embedded assumptions of regulated monopolies because these assumptions no longer apply in a deregulated electricity market").

The appellees may also argue that the SCRC is merely a temporary surcharge during the

period it takes to move from a regulated to unregulated market. But if there is an unconstitutional taking, the fact that it is temporary does not somehow make it constitutionally acceptable. *First English Evangelical Luth. Church v. Los Angeles County*, 482 U.S. 304 (1987)

As the SCRC plainly "takes property from A. and gives it to B," there is no cogent way to argue that it is not a taking which must be analyzed in accordance with constitutional takings law.

V. The SCRC Is an Unconstitutional Taking of Ratepayers' Property

The scope of the government's takings power is narrower than governmental power generally, and some otherwise legitimate governmental actions may give rise to takings that are not allowed. In order for the government to take property, there must be a public purpose for the taking, which must be directly related to the public's benefit. In the utility context this means that the taking must have a purpose directly related to serving the public with the utility's commodity. To justify any taking, those from whom the property is taken must be able to enjoy a commensurate, definite, and prospective obligatory benefit from the private party to whom the property is given. Secondary or incidental benefits to the public are not sufficient to justify a taking, and bailing out a failed business is not a public purpose. Because the SCRC does not measure up to these constitutional standards, it is a taking beyond the authority of the state.

Takings must also be compensated. The SCRC takes money from ratepayers and gives it to PSNH, without compensating the ratepayers. It is a taking without compensation, and thus barred by our constitutions. It is important to note that this argument is based on the assumption that PSNH is entitled to recovery of its stranded costs, and that it is only the method by which they are recovered that is being challenged.

A. Takings Require a Public Purpose

In order for the government to take private property, there has to be a public purpose for the taking. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 245 (1984); *Thompson v. Consol. Gas Utilities Corp.*, 300 U.S. 55, 80 (1937), ("one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid").

1. New Hampshire's Takings Power Is Narrower than its Police Power

In New Hampshire, a public purpose for takings is narrower than the state's general police powers. Under the federal constitution, the Supreme Court has determined that anything within the police powers of the legislature is, by definition, a public purpose in the takings context. *Hawaii Housing*, 467 U.S. at 240 (takings power is "coterminous with the scope of a sovereign's police powers"); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1014 (1984); *Berman v. Parker*, 348 U.S. 26, 32-33 (1954).

But this court has stressed on any number of occasions, however, that New Hampshire's constitution is more protective of property rights than the federal constitution. *L. Grossman & Sons, Inc. v. Town of Gilford*, 118 N.H. 480, 482 (1978) (takings provisions "are limitations upon the so-called police power of the State"). Thus, the takings power and police power are not coterminous in New Hampshire. *Appeal of Meserve*, 120 N.H. 461, 464 (1980). On this issue this court wrote:

> Because [the takings clause] limits all subsequent express grants of power, it necessarily limits the so-called police power, which is only an implied power. "The right to just compensation is likewise a constitutional restriction on the police power and is therefore superior to it." Indeed, we have specifically stated that both N.H. CONST. pt. 1, art. 2 and N.H. CONST. pt. 1, art. 12 "are limitations on the so-called police power of the State and subdivisions thereof."

Burrows v. City of Keene, 121 N.H. 590, 596-97 (1981) (brackets omitted) (quoting respectively, *Robbins Auto Parts, Inc. v. City of Laconia*, 117 N.H. 235, 237 (1977), and *L. Grossman & Page Sons, Inc. v. Town of Gilford*, 118 N.H. 480, 482 (1978)).

Thus, there is not necessarily a public purpose for the SCRC takings in this case just because the legislature has said the settlement with PSNH is in the public interest. RSA 374-F;

RSA 369-B. The purpose of the SCRC is to reimburse PSNH for its poor past investments, and to settle the lawsuit which PSNH filed in federal court. While these may be laudable goals which the legislature may have authority to undertake pursuant to its police powers, they are not justifications for a taking private property from ratepayers.

2. Utility Takings Must Directly Benefit the Public, and Must Be for a Utility Purpose

For any taking to be constitutional, there must be a nexus between the taking and the justification for it. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987) (constitution requires "essential nexus" between the identified governmental purpose and the taking); *Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994) (constitution requires reasonable relationship, or "rough proportionality," between the identified governmental purpose and the taking); *see also City of Monterey v. Del Monte Dunes*, __ U.S. ___, 119 S.Ct. 1624 (1999).

Moreover, the alleged public purpose used to justify a taking must directly benefit the public. In *Merrill v. City of Manchester*, 127 N.H. 234 (1985), the government attempted to condemn land that had been put in a conservation easement for the purpose of an industrial park. This court said that the state may condemn the land "only if it is to be put to use which *directly* benefits the public, such as for a school, a playground, or a utility line." *Merrill*, 127 N.H. at 237 (emphasis added). *See also Concord Railroad v. Greely*, 17 N.H. 47 (1845).

In the electric generation context, the direct benefit means that ratepayers must pay only for that which has an "essential nexus" to a *utility* purpose. If a charge on a consumer's utility bill is for a purpose other than a utility purpose, the charge is an unconstitutional taking. *Denver Union Stock Yard Co. v. United States*, 304 U.S. 470, 475 (1938). In New Hampshire:

> "It is well settled that special assessments upon property for the cost of public services are in violation of our constitution if they are in substantial excess of the benefits received. There must be special benefits which compensate for the . . . assessments, and there must be a rational nexus between costs and benefits. It is these benefits that constitute the just compensation required by part I, article 12.

Chasan v. Village District of Eastman, 128 N.H. 807, 818 (1986) (internal citations omitted).

In *Chasan*, the Court held that the assessment on consumers water bills were not arbitrary or unreasonable in relation to the benefits received because, the court found, the "benefit obtained from having the water system available for *future use*, and the benefit derived from the presence of the water facilities in the village district, are benefits upon which the charges may be based." *Chasan v. Village District of Eastman*, 128 N.H. at 819 (emphasis added). Thus, a utility purpose must create *future* benefits for ratepayers.

For this reason, for example, before a facility can be put into ratebase, it must be found "used and useful" for a utility purpose. This rule has a constitutional basis. *See e.g., Appeal of Conservation Law Foundation*, 127 N.H. 606, 637 (1986); *Jersey Central*, 810 F.2d at 1190 (*Starr*, J. concurring) (used and useful rule is "designed to assure that the ratepayers, whose property might otherwise of course be 'taken' by regulatory authorities, will not . . . be required to pay for that which provides the ratepayers with no discernible benefit"); John N. Drobak, *From Turnpike to Nuclear Power: The Constitutional Limits on Utility Rate Regulation*, 65 B.U.L. L.REV. 65 (1985). This standard "has been applied to utility investments for the last century." *Re Public Service Company of New Hampshire*, 83 NH PUC 40, 41 (1998).

The state may claim that the public benefit to charging ratepayers the SCRC is that it will ensure the financial health of PSNH and thereby ensure a healthy economy for New Hampshire.

While the truth of such a claim is itself doubtful, any such nexus is far too attenuated and indirect to justify the taking. Indeed, one cannot identify a benefit, beyond the general public interest of settling PSNH's lawsuit, to a consumer from paying the SCRC. The SCRC is for the purpose of paying for past debts on generation assets – it does not pay for the wires that come to a customer's door, and it does not pay for any future benefit which can be directly enjoyed by a ratepayer forced to ante up.

The state may also claim that the SCRC is the price New Hampshire must pay for a return to a market economy in the electricity industry. But competition is not something that must be bought from PSNH. In fact, unlike the delivery of electricity, which involves wires on public streets, there is nothing "natural" about the generation monopoly. It sprung instead from the belief that only government or large conglomerates protected by the government could amass the amount of money necessary to build generation facilities. Richard Rudolph and Scott Ridley, POWER STRUGGLE: THE HUNDRED YEAR WAR OVER ELECTRICITY (Harper & Row, 1986) (setting forth the history and arguing for public ownership of generation). But with advances in technology allowing smaller and more diverse power sources, and with development of financing vehicles capable of giving even small companies access to large-scale capital, the public and decision-makers realized that the generation monopoly was an anachronism, and that generation of electricity (although not its delivery) could be treated just like any other commodity in the market place. *See Deregulatory Takings*, 31 ARIZ. L. REV. at 1204 (and sources noted there This court has recognized that the PUC has always had the power to unilaterally order competition. *Appeal of PSNH*, 141 N.H. 3 (1996).

Even if the SCRC is *de minimus*, it is substantially in excess of the benefits received.

(And the SCRC is not *de minimus*; it is nearly one-third of consumers' utility bills.) Moreover, there is no "future use" as required by *Chasan*. The SCRC is for the purpose of paying past debts. It has no utility purpose.

An example illustrates the issue. Suppose that the State allows PSNH to issue bonds to fund schools. The bonds are backed by utility ratepayers, with a "school cost recovery charge" assessed on consumers' electric bill. While schools are clearly in the public interest, funding them is not related to a utility purpose, that is, a school is not "used and useful" for a utility ratepayer. Thus, even though such bonds would be in the public interest, their costs cannot be taken from utility ratepayers.

Accordingly, the SCRC does not serve a utility purpose, or any justifiable public purpose pursuant to takings law, and it is therefore unconstitutional.

3. To Have a Public Purpose, the Utility Must Create a Benefit For Those From Whom Property is Taken

"[T]o justify public aid to a private enterprise serving a public purpose, there must be some obligation to the public assumed by the enterprise in consideration for the aid." *Opinion of the Justices*, 88 N.H. 484, 487 (1937). The use to the public must be in the future. *Chasan v. Village District of Eastman*, 128 N.H. at 819. In *Rockingham Light & Power Co. v. Hobbs*, 72 N.H. 531, 537-38 (1904), a utility wanted to exercise its statutory eminent domain power to build a new set of wires mostly to serve a railroad, and the owner of the land through which the wires would go complained. The court held that takings are proper only when the utility has an obligation to use the facility for the future benefit of those from whom the land is taken. In upholding the constitutionality of the taking, the court read into the utility's corporate charter

such an explicit obligation.

Thus, in order to be a constitutional taking, the person from whom property is taken must be capable of enjoying a commensurate, definite, and prospective obligatory benefit from the party to whom the property is given. If there is no such obligation, the taking is unconstitutional.

In this case, however, there is no obligation by the utility to use the generation facilities, for which the SCRC pays, for those whose property is taken. The SCRC pays for Seabrook, which already exists, and whose power can be (and is) sold anywhere. As of C-day, the Legislature will have deregulated electricity generation, explicitly renouncing any obligation of the utility to provide generation services. Because there is thus no commensurate obligation by the utility to provide any service to those who must pay the SCRC, the taking is unconstitutional.

4. Secondary Effects Cannot Create a Public Purpose

The New Hampshire constitution contains a specific ban on using government grants to benefit private parties. N.H. CONST., pt. I, art. 10 ("Government being instituted for the common benefit, protection, and security, of the whole community, and not for the private interest or emolument of any one man, family, or class of men.").

But even the takings clauses alone demand that although it might have spillover benefits to the public, a taking to primarily benefit a private party is not constitutional, even if the taking is compensated. *Hawaii Housing*, 467 U.S. at 245; *Merrill v. City of Manchester*, 127 N.H. at 237 (no public purpose when condemnation "has only an incidental public benefit, such as for [a] private industrial park"). *Appeal of Meserve*, 120 N.H. 461 (1980) (PUC order that railroad pay for underpass so delivery trucks could access a Manchester laundry company unconstitutional because its benefit was primarily private); *cf. Exeter & Hampton Electric Co. v. Harding*, 105

N.H. 317 (1964) (condemnation for electric transmission lines constitutional even though immediate purpose was to serve private industrial plant, because it was part of master plan to loop city with high voltage lines to serve public).

The constitution allows public money to be given to private parties, but only if the purposes are public. Secondary benefits, such as the economic well-being of the community, do not transform a private benefit into a public purpose. In *Eyers Woolen Co. v. Gilsum*, 84 N.H. 1 (1929), for example, the town of Gilsum proposed a tax benefit to build a mill. This Court held that "[a]iding a private manufacturing corporation is not a public purpose." *Eyers*, 84 N.H. at 16. The Court wrote:

> "The nature of the business undertaken is in no sense public. It is a private undertaking for private business and profit. The use of it to the public is secondary to that, and tributary to that; the benefit to the public is remote and consequential. . . . Any such enterprise tends indirectly to the benefit of every citizen by the increase of general business activity, the greater facility of obtaining employment, the consequent increase of population, the enhancement in value of real estate and its readier sale, and the multiplication of conveniences. But these are not the direct and immediate public uses and purpose to which money taken by tax may be directed."

Eyers, 84 N.H. at 12 (quotations and citations omitted). *See also Southwestern Ill. Dev. Auth. v. National City Envtl. L.L.C.*, 710 N.E.2d 896 (Ill. App. 1999) (government agency cannot condemn merely because its view of who would put property to more productive use); *Lansing v. Edward Rose Realty, Inc.*, 481 N.W.2d 795 (Mich. App. 1992) (taking of easement for a television cable company not a public use); *Brannen v. Bulloch County*, 387 S.E.2d 395 (Ga. App. 1990) (no public use to build a road for convenience of lumber company); *Denver West Metro. Dist. v. Geudner*, 786 P.2d 434, 436 (Colo.App. 1989) (existence of incidental pubic benefit not prevent court from invalidating a condemnation decision made to advance private

interests); *Center of Center Line v. Chmelko*, 416 N.W.2d 401 (Mich. app. 1987) (taking to facilitate private parking not a public use); *Cantu v. Pacific Gas & Electric Co.*, 234 Cal.Rptr. 365 (Cal. App. 1987) (gas and electric line extension to serve a private party not for a public use).

The SCRC primarily benefits, in the amount of nearly $2 billion, PSNH's investors. Because the amount is so large, because the SCRC actually raises rates, and because settling PSNH's lawsuit against the state is imperceptible to most ratepayers, whatever public purpose the SCRC serves is secondary. Taking ratepayers money does not primarily serve the public, and is thus unconstitutional.

5. Bailing Out a Failed Business Is Not a Public Purpose

Bailing out a failed business is not a public purpose. In *Opinion of the Justices*, 103 N.H. 281 (1961), a bank was being liquidated, and the Legislature proposed having all other banks pay the expenses of liquidation, such that the money collected would be deposited in the accounts of the depositors of the liquidated bank. The Court found that the proposal "would appropriate public funds to reimburse private depositors for losses sustained," and would thus be unconstitutional.

The purpose of the SCRC is to allow PSNH to recover costs it expended on generation facilities. The expenditures were unwise, and caused PSNH to incur high interest rates. These failed investments are the business of PSNH's stockholders and bondholders. They are not, however, the proper place for ratepayers' money.

6. The SCRC Is Not For a Public Purpose

The purpose of the SCRC is not public. It is intended to pay for past poor generation investments of the utility. It will not be used to build or purchase any new machine or facility that will have a future benefit to the public; rather, it is largely a pay-off for the company to settle its lawsuits against the state. The investments for which the SCRC is intended to pay were made a long time ago. Any benefit that might have been gained from PSNH's investments are already being enjoyed. While a stable electric company may have intangible benefits for the state, the massive private spending mandated by the SCRC will mostly benefit shareholders and bondholders far from the community paying it. PSNH is not obligated to generate power for the people paying the SCRC. There is excess generation capacity in New Hampshire and no requirement that the power produced by PSNH's generation facilities remain in-state, or in any way directly benefit New Hampshire citizens. If there ever were a public purpose in aiding PSNH to build electric generation facilities, the terms of the deregulation statute mooted it by deregulating electric generation, and there can be no prospective or future benefit to the public.

Accordingly, the SCRC serves no public purpose for takings analysis, and it is therefore unconstitutional.

In *Opinion of the Justices*, 88 N.H. 484 (1937), the New Hampshire Supreme Court decided a case that is strikingly similar to the situation presented by the SCRC here. The Court was faced with a proposal by which the Legislature would authorize bonds to pay for a hydro-electric facility on the Connecticut River in Pittsburg. The opinion is worth quoting at length.

> "In the case of a utility, the enterprise is primarily undertaken by reason of the profit motive. A venture involving service to the public is regarded prospectively by its promoters as one of financial success to its owners. It is as a

money making business that it is entered into and engaged in. Service to the public is thought to be sufficiently promising of a return on the investment to induce it. Whatever direct aid it receives from the public helps it. The public is benefitted from the aid it grants because the aid helps to obtain or improve or maintain the service. But the public need of the creation, maintenance or increase of the service must exist to justify the aid therefor. It must be given for the public use and purpose, and if the public is already adequately served, its aid is essentially for a private purpose. The indirect public advantage of industrial welfare and general prosperity is not a valid reason for the aid. Even if the public advantage takes specific form, such as work for those in need of employment and without employment dependent on public assistance, public aid to the employer is a violation of the constitutional principle against taxation for private purposes. . . .

"The woolen mill in the small town of Gilsum may have been as much needed for the town's healthy economic life as the Manchester and Keene Railroad was for the city of Keene, in proportionate equality. But public aid to the mill was forbidden by reason of its wholly private character. No public service was to be rendered in return for the aid. So, with the railroad and the utility, if the aid does not impose the obligation of the service, it is improperly granted. Aid to a utility is forbidden except in protection of the public welfare and interest. And the protection must be in a needed service furnished the public by the utility as a condition of the aid. Without the condition the protective principle is inapplicable. Unconditional aid is not a proper charge of government to be met by the taxpayers.

"It appears here that the three utilities with which it is proposed to make contracts all transmit electric energy outside the state. They produce more than is needed for local use. In such transmission beyond the state they are serving no public purpose, but are engaged in private industry. Their obligation to furnish adequate local service is already secured. Their need of further facilities and development, at present at least, is wholly private. In this state of matters our opinion is that specific aid to them is at this time forbidden. The constitutional provision that government is "instituted for the common benefit . . . of the whole community, and not for the private interest or emolument of any one man, family, or class of men" (Const., Pt. I., Art. 10), is controlling.

"As a corollary to the prohibition against taxation to aid a private purpose, legislation resulting in or leading to taxation therefor is also invalid. The legislature may not exercise or delegate its taxing power for private benefit through the indirect expedient of an exemption. Eyers Woolen Co. v. Gilsum, supra."

"An appropriation of public money for a private purpose is forbidden,

> whether the money therefor is to be raised in the first instance by borrowing or by a tax levy. If the money is borrowed, there is the obligation of ultimate taxation for the payment of the loan. No less is the pledge of the public credit, or its guaranty, for a private obligation void. An obligation which may require money to be raised eventually by taxation to meet it stands on equal footing with one that is certain to do so.

Opinion of the Justices, 88 N.H. at 488-489 (citations as in original).

In the first paragraph above quoted, the Supreme Court required that the service to the public be "prospective." Thus, there can be no public purpose if the taking is for facilities already existing. Here, the generation facilities for which the SCRC is intended to pay all already exist.

The court also required that takings must be to "obtain or improve or maintain the service." Here the SCRC is a pay-off to buy relief from PSNH's law suit. It does not obtain, improve, or maintain any service.

The Supreme Court further said that if the supposed public purpose is already served – if there is no public need "of the creation, maintenance or increase of the service" – there can be no public purpose. In PSNH's case, the Legislature has explicitly found that there are many sources of adequate alternative electric service; the purpose of the deregulation statute is to take advantage of them.

In the second paragraph above quoted, the Supreme Court noted that unconditional aid – aid not contingent upon an obligation to serve those who pay – is unconstitutional. In the PSNH case there is no such obligation, and the SCRC is unconditional aid.

In the third paragraph above quoted, the Supreme Court further defined what constitutes an adequate obligation. When the electricity is bound for places beyond our border, and there is

adequate in-state service, there is not the required commensurate obligation. In the PSNH case, Seabrook power is sold everywhere. It produces power for people all over New England, not just in New Hampshire, a fact which the company used to justify building it and of which it has been proud for years.

In the fourth paragraph above quoted, the Supreme Court noted that the method of giving the property to the private concern, whether by direct grant, tax expenditure, bonding, or another method, is not relevant to the constitutional takings analysis. In the PSNH case, the fact that property is taken by a surcharge on ratepayers bills does not mitigate the constitutional violation.

B. For the Taking to Be Constitutional, There Must Be Compensation

Even supposing that this court finds that the taking is for an allowable purpose, the constitution demands that it be compensated.

As noted, the takings clauses are intended to prevent the government from singling out some people to bear burdens that should be borne by the community. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The principle has no want of authority. *Eastern Enterprises v. Apfel*, __ U.S. __, 118 S.Ct. 2131, 2154 (1998) (*Kennedy*, J., dissenting) ("at the heart of the [takings] Clause lies a concern . . . with providing compensation for legitimate government action that takes 'private property' to serve the 'public good'"); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470 (1987); *Pennsylvania Coal Co v. Mahon*, 260 US 393 (1922); *Transmission Access Policy Study Group, v. Federal Energy Regulatory* 225 F.3d 667, 690 (D.C. Cir. 2000) (upholding FERC's *wholesale* electric deregulation plan against attack by utilities: "When the action of the federal government effects a taking for F purposes, there is no inherent constitutional defect, provided just compensation is ava

bottom, . . . the petitioners Fifth Amendment claims turn not on whether open access is a taking, but whether FERC's cost-based transmission pricing policies in the end provide just compensation.); *Purdie v. Attorney General*, 143 N.H. 661 (1999); *Opinion of the Justices (Public Use of Coastal Beaches)*, 139 N.H. 82 (1994); *Burrows v. City of Keene*, 121 N.H. 590, 597 (1981) (because the constitution prohibits any taking of private property by whatever means without compensation, the just compensation requirement applies whenever the exercise of the so-called police power results in a "taking of property"); *Robbins Auto Parts, Inc., v. City of Laconia*, 117 N.H. 235 (1977); *Ash v. Cummings*, 50 N.H. 591 (1872); *Great Falls Manu. Co. v. Fernald*, 47 N.H. 444 (1867); *Crosby v. Hanover*, 36 N.H. 404 (1858); *Petition of Mount Washington Road Co.*, 35 N.H. 134 (1857); *Piscataqua Bridge v. New Hampshire Bridge*, 7 N.H. 35 (1834).

During the construction of Seabrook, when the PUC placed conditions on the issuance of securities by PSNH because of its poor financial condition, PSNH claimed that the conditions were a taking of its property, and it appealed. This court there found that the conditions were unconstitutional and wrote: "Because the constitution prohibits any taking of private property by whatever means without compensation, the just compensation requirement applies whenever the exercise of the so-called police power results in a taking of property." *Appeal of PSNH*, 122 N.H. 1062, 1070 (1982) (quotations omitted)

Compensation must be paid regardless of the method by which the property is taken. *First English Evangelical Luth. Church v. Los Angeles County*, 482 U.S. 304, 316 n.9 (1987) (fifth amendment self-executing); *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621 (1981) (owner may recover for diminution in value caused by down-zoning, even though no

formal condemnation proceeding); *United States v. Clarke*, 445 U.S. 253 (1980) (owner may recover even though no formal condemnation proceeding).

When a legislative act confers authority to take private property for public use without providing for compensation, the act itself is unconstitutional. *Goodrich Falls Electric Co. v. Howard*, 86 N.H. 512 (1934). There is consequently no need to await a suit by an aggrieved ratepayer.

The PUC's requirement that ratepayers pay to PSNH money for which they get no electrical power or other direct benefit is a taking. There is no provision for compensation from the state. It is clear, however, that if the taking of their property is legitimate, ratepayers must be compensated by the government for their forced contribution to PSNH's coffers. That the taking is accomplished through a mandated utility surcharge rather than through some other method does not eliminate the right to compensation. In the absence of compensation here, the SCRC is an unconstitutional taking.

C. New Hampshire's Condemnation Statute

New Hampshire has a nearly century-old utility condemnation statute, whereby a utility may take private property for the purpose of providing electric power. The statute provides for compensation, and a procedure for condemnation. RSA 371. *See Barrilleaux v. NPC, Inc.*, 730 So.2d 1062 (La.App. 1999) (if a non-government party takes property, it must be pursuant to a grant of authority that both permits expropriation proceeding and ensures compensation paid to the owner). When a utility applies for condemnation, there must be a hearing in which all burdens and social costs suffered by *every affected property owner* are considered. *Petition of Bianco*, 143 N.H. 83 (1998).

No condemnation proceeding has occurred, and no such hearing has been conducted.

D. The SCRC Is an Unconstitutional Taking

This court in *Appeal of PSNH*, 122 N.H. 1062 (1982), noted the deep historical roots of the prohibition against takings, and also the extraordinary circumstances necessary to justify governmental involvement in setting prices for products in a market economy. The court wrote:

> "As Justice Oliver Wendell Homes reminded us, courts are 'in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

PSNH, 122 N.H. at 1071 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922)).

There is little doubt that the Legislature and the PUC have a laudable desire to improve the provision of electrical service in New Hampshire, and to lower its price. But there is "no greater right of the government to 'take' merely because a regulated utility is involved." *PSNH*, 122 N.H. at 1071.

The takings here is unconstitutional, and this court should issue an order barring the PUC from collecting the SCRC from ratepayers. If PSNH is owed the money, the state must pay it by some other means.

VI. Takings for Public Purposes Must be Paid by Everybody

It is presumed here that PSNH has a right to recover its stranded costs. But even so, PSNH's stranded costs are *state* obligations, which must be paid by everyone, and not by some special subset of citizens.

The New Hampshire Constitution provides that "The public charges of government, or any part thereof, may be raised by taxation." N.H. CONST., pt. II, art. 6.

Any law that provides for an unequal division of public expense is unconstitutional. *State v. U.S. & Canada Express Co.*, 60 N.H. 219 (1880); *Claremont School District v. Governor*, 142 N.H. 462 (1997). If a person is billed for another person's share of a state burden, it is an unconstitutional taking, and a due process violation under the State and federal constitutions. *Opinion of the Justices*, 103 N.H. 281 (1961) ("Under the provisions of Part I, Article 12th, New Hampshire Constitution, every member of the community must contribute his share in the cost of the protection afforded by the State of his life, liberty and property. But this obligation extends no further than the payment of a just share."). It is also a violation of New Hampshire's requirement of equal taxation.

During the civil war, the federal government allowed men who were drafted to escape military service by paying $100 to a substitute soldier. After the war, several towns enacted ordinances allowing men from that town who had paid a substitute to get reimbursement from the town. In *Gould v. Raymond*, 59 N.H. 260 (1879), the New Hampshire Supreme Court found that service in the military benefitted all the citizens of the state, and not just the citizens of particular towns. It was thus an unconstitutional taking to force citizens of the town alone to bear the cost of reimbursement. Chief Justice Doe wrote:

> "If the federal service of the New Hampshire militia in the late war can be assumed as a public obligation of tax-payers, it can be assumed only as a common debt of all the tax-payers of the state. It is not a local debt, to be incurred at the option of municipal bodies exercising a power of local legislation. If it could be and were assumed as a public expense, and a common burden of all the tax-payers of the state, it could not be divided by local legislation compelling some of them to perform their duty, and releasing others without performance. The obligation of every member of the community to contribute his share of the public expense, is a part of the foundation which neither branch of the government is authorized to remove."

Gould v. Raymond, 59 N.H. at 278.

While the facts of *Gould v. Raymond* seem quaint and dated, the principle it states – that it is unconstitutional for a broad public benefit to be paid by a taking from only a subset of the beneficiaries – is still current.

In *Rollow v. City of Ada*, 794 P.2d 1211, 1213 (Okla. 1990), for example, a city parking authority was created to operate four parking lots, and the authority sold bonds to acquire them. Meters were installed, but use was scarce, and the bondholders lost money. Years later, the city created an improvement district, which bought the lots for a price far above market value, inflated so that the old parking authority's bondholders could be paid. The improvement district imposed special assessments on the abutters so that it could make the bond payments, so it could afford to maintain and improve the lots, and so parking would be free for shoppers who the district was trying to lure from a nearby shopping mall into downtown shops. Many other business and property owners, in addition to the abutters, naturally benefitted by the free parking and resulting greater downtown shopping traffic. The abutters claimed that the special assessments were an unconstitutional taking, and the Oklahoma Supreme Court agreed because:

> A substantial amount of property, which directly benefitted by the improvement district, was selectively excluded from [the assessments]. Only businesses whose property abuts the improvements were assessed. Other businesses which would realize an equal benefit were excluded."

As demonstrated by these decisions, public obligations must be paid for by the entire community, and not by some convenient subset.

In this case, the proponents of the settlement contend that the SCRC is a payment for debts incurred by the state, and CRR proceeds on that assumption. Stranded costs arose, according to PSNH, from its duty to serve customers, which duty it claims was created by state statute. They also arose, according to PSNH, from the "rate agreement" which the State entered with PSNH after its late bankruptcy, and which was approved by the governor and the attorney general, on behalf of the entire state. In a monopolistic regulatory regime, payments for such past investments may be allowed to be included in ratebase. But upon the legislative finding that a generation monopoly is no longer in the public interest, and the commensurate repeal of PSNH's obligation to serve and customers' obligation to buy from it, there is no longer any benefit PSNH ratepayers can expect from PSNH's generation assets. If there is any duty to alleviate PSNH's "stranded costs," it is a state duty.

Because stranded costs presumably owing to PSNH are a state duty, they must be paid from state resources, and not by some unlucky subset of citizens. *Houk v. Little River Drainage Dist.*, 239 U.S. 254, 264 (1915) (government power to tax and to take are separate and distinct, "each governed by its own principles"); *Cole v. City of La Grange*, 113 U.S. 1, 8 (1885) (same); *see also e.g., Mlade v. Finley*, 445 N.E.2d 1240, 1248 (Ill. App. 1983) ("'just compensation' provisions . . . apply only to exercises of the power of eminent domain, not to applications of the

authority to raise revenue for public purposes").

The SCRC, however, will only be collected from ratepayers who live in PSNH territory. Accordingly, the SCRC is an unconstitutional taking of their property.

VII. The Legislature Has No Constitutional Power to Create the SCRC

The New Hampshire Legislature has those powers delegated to it by the people through their constitution. While the federal 10th amendment allows states to have plenary police powers, the New Hampshire constitution does not go that far.

The New Hampshire constitution provides, "[A]ll government of right originates from the people." N.H. CONST., pt. I, art. 1. It also provides, "The people of this state have the sole and exclusive right of governing themselves." N.H. CONST., pt. I, art. 7. If further provides, "All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents." N.H. CONST., pt. I, art. 8.

Our Supreme Court has made apparent the New Hampshire approach to government. In *Trustees of Phillips Exeter Academy v. Exeter*, 90 N.H. 472 (1940), the school claimed that its tax exemption, granted by the legislature, could not be undone by a future legislature. The court found that one legislature cannot impair a later's sovereign power to change its mind regarding taxation. The court wrote: "The powers of government granted by the people to their representatives to administer are defined by the Constitution, and the courts may validate no action not within the powers." *Exeter*, 90 N.H. at 487. The court said of legislative power that, "Power not granted may not be assumed" *id.*, and called this view the "American theory of government." *Id.* at 488. "A body delegated to exercise the powers of sovereignty may exercise only such as it has received grant of authority to exercise." *Id.* at 493. "The mere election or appointment of agents, public or private, does not hold them out to possess more authority than is actually bestowed upon them." *Id.* at 495.

Similarly, in *State v. U.S. & Canada Express Co.*, 60 N.H. 219 (1880), this court wrote:

> "It must not be forgotten that the constitution enforces the idea that the sovereignty is in the people, and that all the power not expressly delegated to the legislature was reserved to the people. The provisions of the constitution must be regarded in the light of a grant to the legislature, and as conferring no power except what is expressly granted, or is indispensable to the exercise and enjoyment of those powers which are expressly granted."

Canada Express, 60 N.H. at 235. *See also Dow v. Northern Railroad*, 67 NH 1, 48-49 (1886).

If the Legislature takes action beyond its delegated authority, the action is *ultra vires*, and is as though no action were taken. *Exeter*, 90 N.H. at 495.

When the Court has discussed the Legislature's plenary power, it has done so in the context of powers expressly delegated by the constitution. *Sundeen v. Rogers*, 83 N.H. 253, 258 (1928) (zoning within police power of the state; noting that police power extends only as far as the legislature's "constitutional grant of power"); *State v. Griffin*, 69 N.H. 1 (1896) (legislative power to regulate clean water is within "the power vested in the legislature by the constitution"). Thus, the state's sovereign power acts something like a state-level necessary and proper clause, allowing the legislature to carry out *all* those powers that have been delegated to it.

The Legislature's power is broad and deep, but not infinite. The list of things it can do is contained largely in Part II of the Constitution, in Articles 5, 6, and 83.

> "And farther, full power and authority are hereby given and granted to the said general court, from time to time, to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions, and instructions, either with penalties, or without, so as the same be not repugnant or contrary to this constitution, as they may judge for the benefit and welfare of this state, and for the governing and ordering therefor, and of the subjects of the same, for the necessary support and defense of the government thereof."

N.H. CONST., pt. II, art. 5. The Legislature may also:

> "impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and residents within, the said state; and upon all estates within the same; to be issued and disposed of by warrant, under the hand of the governor of this state for the time being, with the advice and consent of the council, for the public service, in the necessary defense and support of the government of this state, and the protection and preservation of the subjects thereof, according to such acts as are, or shall be, in force within the same."

N.H. CONST., pt. II, art. 5. Thus, for instance, the New Hampshire Legislature does not have the power to authorize the coining of money, and not just because the federal constitution forbids it, *Legal Tender Case*, 110 U.S. 421 (1884), but also because the People have not delegated to the Legislature the power to do it.

The Legislature has the power to discharge the State's obligations by taxation, N.H. CONST., pt. II, art. 6. The SCRC is not a tax,[3] however, nor is it in the nature of a license. *Opinion of the Justices*, 116 N.H. 351 (1976).

The Legislature can, of course, regulate electric rates when conditions do not allow the market to work, such as when there is a natural monopoly. *Appeal of Richards*, 134 N.H. 148 (1991). The SCRC is not a price for a commodity, which a customer enjoys, however, but payment of failed past investments which on the market could never be recovered and which is intended to mainly indemnify investors. *Richards*, 134 N.H. at 172. The price of the commodity is clearly lower. Moreover, the Legislature has explicitly repealed PSNH's monopoly upon C-day, making the *Richards* analysis inapplicable.

There is nothing in the New Hampshire Constitution's delegation of powers that allows the Legislature to foist binding contracts onto unwilling private parties, or to order transfers of

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[3]Because the SCRC is in no sense a tax, and because the issue is not here presented, CRR takes no position as to whether the PSNH service territory is an appropriate taxing district for purposes of the constitution's various tax provisions.

property from one private party to another Accordingly, except by taxation with the limitations that normally apply to it, the New Hampshire Legislature does not have the constitutional power to create the SCRC as set forth by the PUC, to collect it from ratepayers, or to order its payment to PSNH.

VIII. The Settlement Unlawfully Favors Special Contracts

Not long after the approval of the 1989 rate agreement, large industrial customers of PSNH began to seek special, discounted rates.[4] The PUC began approving rate discounts in 1992, via special contracts, but only for industrial customers on the theory that, without rate relief, these customers would generate their own power and exit the PSNH system. This, the argument went, would increase the burden on the remaining customers for the large deferred costs, such as the acquisition premium, created under the rate agreement. Therefore, it was said to be in the public interest to grant these discounts. Eventually, about one third of PSNH's industrial load, some 75 industrial accounts, ended up on special discounts.

From the very beginning, CRR opposed the granting of these special, discounted rates, for two reasons. The first was simple equity. These "special contracts" were only available to industrial customers, whereas one of the main purposes of utility regulation was to insure non-discriminatory service to all customers. The second was CRR's continuing concern that the revenues not recovered from the special contract customers would eventually be recovered from other customers, including residential customers who could never themselves obtain discounted special contracts.

This latter concern has been addressed both by the legislature and by this court. In 1996,

[4] This development clearly gave the lie to the claim that the rate increases in the 1989 rate agreement would be acceptable. The claim that the rates would be broadly acceptable was in turn based on the theory that they would not be particularly onerous because they would only be in line with the general rise in prices from inflation, and that they would not cause New Hampshire rates to be significantly higher than rates in other neighboring jurisdictions. As it turned out, neither of these assumptions proved to be valid, and the clamor for rate relief ensued.

the legislature enacted amendments to New Hampshire's utility ratemaking statute. RSA 378:11-a through 378:18-b.

Under RSA 378:11-a, in place of individual special contracts, discounted rates were allowed, with a very limited exception, only on the basis of new, limited tariffs for business retention or economic expansion. In addition, and of primary importance here, a utility is not allowed to recover "from other ratepayers the difference between the regular tariffed rate and the special contract rate, unless and only to the extent that the commission determines that it is in the public interest and equitable to other ratepayers." RSA 378:18-a. There is a similar but more stringent prohibition on recovery of lost revenues from any special contracts authorized after the passage of the statute. RSA 378:18-b.

Several years ago CRR, along with the Office of Consumer Advocate (OCA), urged this court to find that the granting of several special contracts was contrary to the requirements of RSA 365-C, the legislation authorizing approval of the rate agreement, and had argued that its members were at risk for the revenues lost as a result of the discounted rates. This court rejected the argument, but wrote:

> Any injury suffered by ratepayers represented by CRR is neither immediate nor direct because any potential injury would arise only through increased rates imposed during a subsequent ratesetting proceeding. Likewise, while the legislature has granted OCA statutory standing, we find that the interests of residential utility customers are not presently involved.

Appeal of Campaign for Ratepayers' Rights, 142 N.H. 629, 632 (1998).

It is important to point out that the PUC itself has held that, in approving special contracts, it was not in any way impliedly approving recovery of the lost revenues from other customers. In its 1997 implementation plan, the Commission said:

> "It would be inequitable to require noncontract customers to pay not only their allocated share of stranded costs but also the discount afforded special contract customers. As a result, the difference between the regular unbundled tariffed rate and the special contract rate will not be recovered fro non-contract customers.

Re Statewide Electric Restructuring Plan, 82 PUC NHPUC 122, 138 (1997)

Now, indeed, "interests of residential utility customers"are "presently involved," because, under the PUC's approval of the settlement, non-special contract customers will in fact pay more than they otherwise would due to the special contracts. In other words, the very future eventuality that led this court to declare in 1998 that CRR lacked standing to complain about the special contracts because its complaint was premature, has now arrived.

The PUC has in fact conceded this issue. In its April 19, 2000 order, the Commission wrote:

> In the context of this complex Settlement Agreement, we will not adjust the Company's revenue requirements for alleged shortfalls in receipts associated with Special Contract customers during the initial [30 month] delivery service period.

PUC ORDER NO. 23,443 (April 19, 2000) at 260-61.

The cost shifting is manifested in the stranded cost charge to be collected from special contract customers: 0.98 cents, compared to the 3.555 cent rate paid by residential customers. The cost to other customers is also higher as a result of the fact that the special customers are getting discounted rates. *1/18/00 Trn*. at 69-70; *1/12/00 Trn*. at 214-24.

It is true that the Commission holds out the possibility that, in a subsequent rate case after the 30 month period, "there will be ample opportunity to examine the extent to which non-special contract customers are being put at risk of making up a shortfall in revenues as a result of the rates being paid by such customers." PUC ORDER NO. 23,443 at 261.

But this is no answer. The fact is that, as CRR has long anticipated, the PUC has now approved a rate scheme under which general customers, and not PSNH or NU and its shareholders, are to make up for the revenue shortfall that has resulted from the plethora of special contracts granted to industrial customers. The prospect that this may, perhaps, be addressed at a later time is not the equivalent of barring this recovery now. The very eventuality that this court implied might warrant a justiciable complaint about the granting of special contracts has now occurred.

This allowance of special contract revenue recovery is contrary to the requirements of RSA 378:18-a. There has been no determination by the PUC that such cost shifting is either "in the public interest" or "equitable to other ratepayers." The Commission's decision to permit this cost shifting to standard tariff customers is contrary to law, and must be reversed. Even more important, even if one deems the PUC to have impliedly concluded that this cost shifting is "in the public interest and equitable to other ratepayers," there has been no record basis to establish that either of these requirements has been met.

The refusal to adjust PSNH's revenue requirement, by removing from that requirement the revenues that would have otherwise been charged to the industrial special contract customers, may be claimed to be justified because the PUC has concluded that the entire settlement, as modified, is in the public interest. The statute, however, requires more than a general "public interest" declaration. It requires a finding that permitting the recovery of the foregone revenues from the granting of these discounts is in the public interest; not merely that a complex and multifaceted settlement that includes this recovery, is in the public interest. It also requires a finding that the recovery is "equitable" to other ratepayers, and there is no such finding here. The fact that the settlement is structured so as to provide certain targeted rate reductions to the

various customer classes does not make the shifting of costs not borne by special contract customers onto other customers, including residential customers, equitable. Indeed, the PUC's own chart shows that the residential class pays the highest stranded cost recovery charge of any customer class: 3.555 cents per KWH, compared to the average 3.4 cents. EXECUTIVE SUMMARY, *Pet. for Appeal* at 25.

The failure to adjust the revenue requirement is also contrary to the direction of this court in *Appeal of Campaign for Ratepayers Rights*. There, this court said:

> The legislature recently addressed the same issue of future harm to ratepayers that might result from shifting the burden of lost revenue from special contracts issued during the fixed rate period to ratepayers after the fixed rate period. It enacted legislation that prevents the utility companies from recovering from other ratepayers the difference between the regular tariffed rate and the special contract rate for special contracts entered into before June 3, 1996. *To the extent that PSNH would propose such a revenue recovery from the special contracts here involved, or other special contracts, the PUC must give careful consideration to the nature of special contracts and their relation to rates of general applicability.*

Appeal of Campaign for Ratepayers Rights, 142 N.H. at 633 (brackets and quotations omitted, emphasis added).

In the face of this admonition, the PUC has now, with no consideration whatever, permitted the recovery of the lost revenue from these special contract customers to those that pay rates of general applicability.

Moreover, only certain rate classes, principally industrial, were ever eligible to apply for special contract rates. No residential customer ever could. It is therefore inequitable to now impose some of the costs of the granting of those contracts on the residential customers, at least without an offsetting benefit. The settlement agreement, as a whole, provides no such offsetting benefit.

Accordingly, this court should set aside the PUC's treatment of special contracts.

IX. Statutory Issues

For the various statute-based issues raised in this appeal, CRR and NHPIRG rely on the arguments made by Granite State Taxpayers in its brief.

CONCLUSION

In accordance with the foregoing, the Campaign for Ratepayers Rights and the New Hampshire Public Interest Research Group respectfully request that this court find that the settlement entered into by PSNH and the state works an unconstitutional taking upon the ratepayers in PSNH's former service territory, that the settlement unlawfully favors special contract customers, and that the settlement violates its enabling statute.

Respectfully submitted,

Campaign for Ratepayers Rights, and
N.H. Public Interest Research Group,
By their Attorney,

Law Office of Joshua L. Gordon

Dated: November 15, 2000

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for the Campaign for Ratepayers Rights requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument.

I hereby certify that copies of the foregoing will be forwarded to the parties listed in this court's November 13, 2000 order.

Dated: November 15, 2000

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