

January 13, 1997

Douglas Patch, Chairman
Public Utilities Commission
8 Old Suncook Road
Concord, New Hampshire 03301

Re: PUC Opinion Request dated December 12, 1996 regarding RSA 374:3-a

Dear Chairman Patch:

This letter is in response to your request dated December 12, 1996 for an opinion of the Attorney General pertaining to RSA 374:3-a. Specifically, you request "an opinion as to whether the Commission's draft rules regarding alternative forms of regulation are contrary to RSA 374:3-a." Your inquiry questions whether the proposed rules:

1. are unlawfully discriminatory;
2. can provide that the PUC has authority to initiate alternative regulation proceedings on its own initiative;
3. can provide that the PUC can impose conditions on its approvals of utility initiated petitions for alternative regulation; and
4. provide, as required by RSA 374:3-a, that utilities will be afforded an opportunity to realize a reasonable return on their investments.

For the reasons set forth below, it is our opinion that the proposed rules do not unlawfully discriminate among similarly situated utilities and that the proposed rules conform with RSA 374:3-a and are otherwise lawful. This opinion is based on a review of the proposed rules, of the record before the Joint Legislative Committee on Administrative Rules (JLCAR), of the express language and legislative history of RSA 374:3-a and of other pertinent law.

RSA 374:3-a provides as follows:

Alternative Forms of Regulation; Incentive Regulation. Upon petition of a regulated utility or upon its own initiative and after notice and hearing, the public utilities commission may approve alternative forms of regulation other than the traditional methods which are based upon cost of service, rate base and rate of return, provided that any such alternative results in just and reasonable rates and provides the utility the opportunity to realize a reasonable return on its investment.

The proposed rules, set forth in Attachments A-1 and B, are generically worded, apply equally to all utilities, provide for applicable procedures and criteria pertaining to proceedings initiated either by the PUC or by a utility in accordance with RSA 374:3-a, and provide for an opportunity for an affected utility to 'realize a reasonable return on its investment.'" Attachment A-2, p.1.

1. The proposed rules treat like entities in a similar manner.

Both RSA 374:3-a and the proposed rules are on their face equally applicable to all utilities. You have asked whether the rules create an unlevel playing field for utilities. This concern relates to whether the PUC can initiate alternative regulation proceedings or if it can impose conditions on its approvals of utility proposals.

The statute expressly provides for proceedings initiated by the PUC. The rules, in conformance with the statute, expressly provide for PUC initiated proceedings.

It is also our understanding that certain utilities object to the rules because, under the rules, the PUC could either on its own initiative force a utility to accept alternative regulation or could impose conditions on a utility proposal (Att. C, pages 16-17). Despite this objection, both results are permissible under RSA 374:3-a, as set forth below.

A. Does the PUC have the authority to initiate proceedings pursuant to RSA 374:3-a?

This question is answered by the express wording of RSA 374:3-a. The statute provides, in pertinent part, that the PUC can initiate a proceeding on alternative regulation either upon "petition of a regulated utility or upon its own initiative".

In any case of statutory interpretation, the starting point of the inquiry is the language of the statute itself. *State v. Hart*, 130 N.H. 325, 326(1988). Words and phrases must be construed according to the common and approved usage of the language. *Id.*; RSA 21:2. Further, when the language of the statute is plain and unambiguous, one need not look beyond the wording of the statute itself for further indications of legislative intent. *Lemm Development Corp. v. Town of Bartlett*, 133 N.H. 618, 620 (1990); *Dover Professional Fire Officers Association v. City of Dover*, 124 N.H. 165, 169 (1983). The New Hampshire Supreme Court has consistently held that "the words in the statute itself are the touchstone of the legislature's intention," *State v. Dushame*, 136 N.H. 309, 314 (1992), quoting *Greenhalge v. Town of Dunbarton*, 122 N.H. 1038, 1040 (1982), and that "legislative intent is to be found not in what the legislature might have intended, but rather, in the meaning of what it did say." *Id.*, quoting *Psychiatric Institute v. Mediplex, Inc.*, 130 N.H. 125, 128 (1987). "When the language used in a statute is clear and unambiguous, its meaning is not subject to modification by judicial construction." *Id.*, quoting *Slovenski v. State*, 132 N.H. 18, 22, 561 A.2d 1072, 1075 (1989).

HB 1263 was initiated at the request of the PUC to clarify that its existing ratemaking authority extends beyond traditional cost-based regulation. The institution of alternative regulation provides the PUC with the flexibility required to address changes in the utility industry. We note that during the legislative process, a utility-proposed amendment was considered which, if adopted, would lead to a contrary conclusion. Specifically, New England Telephone proffered an amendment to HB 1263 to the House Science, Technology and Energy Committee to include the following language:

Acceptance of such alternative regulation shall be voluntary on the part of the utility.

As enacted, RSA 374:3-a does not include this proposed amendment or anything like it; it instead expressly provides, as we note above, that the PUC may undertake alternative regulation proceedings on its own initiative.

B. Does the PUC have the authority to place conditions on its approval of a utility's petition for alternative regulation?

Neither RSA 374:3-a nor its legislative history contains any reference to the PUC's ability to place conditions on utility requests for alternative regulation. However, it is well settled that the PUC has general power to place reasonable conditions on its approvals of utility requests. Appeal of Milford Water Works, 126 N.H. 127, 132 (1985)(conditions imposed by PUC in approving request by Milford Water Works held to be reasonable and lawful). Furthermore, the authority to impose conditions on utilities is implicit in the express authority granted to the PUC under RSA 374:3-a to commence proceedings on its own initiative. To conclude otherwise would require the PUC to initiate a new duplicative proceeding whenever it concluded that a utility's petition pursuant to RSA 374:3-a is approvable, but with conditions.

Accordingly, it is our opinion that the PUC is authorized under the doctrine set forth in Appeal of Milford Water Works and pursuant to RSA 374:3-a to place conditions on its approval of utility requests for alternative regulation.

2. The proposed rules implement the RSA 374:3-a requirement that a utility have the opportunity to realize a reasonable return on its investment.

You ask whether, contrary to the express mandate of RSA 374:3-a, the proposed rules would deny utilities an opportunity to earn a reasonable return on their investments. You note that the proposed rule paraphrased statutory language pertaining to "reasonable return" on utility investment rather than using the express statutory language. RSA 374:3-a requires that the PUC approve alternative forms of regulation only insofar as the "alternative results in just and reasonable rates and provides the utility the opportunity to realize a reasonable return on its investment." The original draft of the rules used the statutory terminology but the revised rule uses the common law definition of "reasonable return," as follows:

...the utility (shall have) the opportunity to realize a return on its investment which falls within a range that is neither confiscatory nor unduly profitable and that reflects that utility's investment risk.

It is our understanding that the PUC is reinstating the original wording, thereby addressing the concern insofar as it pertained to omission of the statutory language from the rule.

On the face of both the statute and proposed rule, the PUC can approve alternative regulation pertaining to any public utility only if the alternative results in just and reasonable rates and provides the utility the opportunity to realize a reasonable return on its investment. It must be noted in this regard that the utilities' rights are not absolute. They are entitled only to an opportunity, not a guarantee, to earn a reasonable return on their investments. Federal Power Comm'n v. Hope Gas Co., 320 US 591, 602-603 (1944). Regulation does not ensure that the business shall produce net revenues. Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n, 262 US 679, 692-693 (1923). A regulatory method passes constitutional muster if its total effect is just and reasonable. Id.; Duesne Light Co. v. Berasch, 488 U.S. 299, 314 (1989).

The PUC cannot lawfully deprive any public utility under its jurisdiction of either "just and reasonable rates" or an opportunity to earn a "reasonable return on its investment.". The proposed rules do not obviate any of these rights.

Conclusion

It is our opinion that the alternative regulation rules proposed by the public utilities commission conform with RSA 374:3-a. The rules implement the PUC's statutory authority to initiate alternative regulation proceedings and to impose conditions on its approvals of utility initiated petitions. They do not unlawfully discriminate among similarly situated entities, they preserve the rights of public utilities to an opportunity to earn a reasonable return on their investments, and are otherwise contrary to neither RSA 374:3-a nor other applicable law.

If you have any other questions, please feel free to contact me.

Very truly yours,

Wynn E. Arnold
Assistant Attorney General Civil Bureau

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