

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
NORTHERN DISTRICT

SUPERIOR COURT
2002

No. 02-E-39

Freedom Partners, LLC

v.

Public Service Company of New Hampshire

ORDER ON PLAINTIFF'S MOTION
FOR RECONSIDERATION AND CLARIFICATION [6]

The instant proceeding arises out of Freedom Partners, LLC's ("Freedom") unsuccessful petition to operate as a utility and participate in the retail electricity market in New Hampshire. Freedom asserts that, as a result of its petition to the New Hampshire Public Utilities Commission ("the Commission"), competition was introduced into the electricity industry. Freedom contends that it is entitled to a portion of the ensuing savings enjoyed by New Hampshire citizens because of the role it played in reducing the price of electricity in this state. On April 22, 2002, this Court granted a motion to dismiss filed by Public Service Company of New Hampshire ("Public Service Company"). Presently before the Court is Freedom's Motion for Reconsideration and Clarification of that order.

A motion for reconsideration "shall state, with particular clarity, points of law or fact that the Court has overlooked or misapprehended." Super. Ct. R. 59-A (1). The parties are not authorized to submit further evidence bearing on the motion.

Keshishian v. CMC Radiologists, 142 N.H. 168, 174 (1997)

(quotations and citation omitted). In this case, Freedom never

submitted an objection to Public Service Company's motion to dismiss. The Court did consider, however, the factual allegations and legal arguments articulated in the petition when ruling on the motion.

Freedom's Motion for Reconsideration and Clarification merely restates the allegations and arguments set forth in the petition. Freedom fails to identify any points of law or fact that the Court "overlooked or misapprehended." Freedom's Motion for Reconsideration and Clarification is therefore DENIED inasmuch as the Court need not reconsider its dismissal of Freedom's petition. The Court will, however, clarify its reasoning for granting Public Service Company's motion.

When ruling on a motion to dismiss, the Court must determine "whether the plaintiff's allegations are reasonably susceptible of a construction that would permit recovery." Langlois v. Pomerleau, 143 N.H. 456, 460 (1999). In doing so, the Court must "assume the truth of all well-pleaded facts alleged by the plaintiff, construing all inferences in the light most favorable to the plaintiff." Id. (citing Bohan v. Ritzo, 141 N.H. 210, 212-13 (1996)). However, the Court need not accept statements which are merely conclusions of law. Ronayne v. State, 137 N.H. 281, 283 (1993) (quoting Jay Edwards, Inc. v. Baker, 130 N.H. 41, 45 (1987)).

Generally, each party to litigation must bear its own attorney's fees. Tabor v. Town of Westmoreland, 140 N.H. 613, 615 (1996). There exist three recognized exceptions to the

general rule, however. First, the Court may award fees when the parties have an agreement providing for such. Second, a fee award is permissible when there is statutory authorization therefor. Third, a prevailing party may be awarded fees if a judicially created basis for fee-shifting applies. Id. at 614-15. Freedom seeks an award of fees under the third exception, asserting that judicially created bases for fee-shifting apply, but Freedom does not quantify the amount it actually expended on attorney's fees.

Rather, Freedom alleges that it is entitled to approximately \$40,000,000 from Public Service Company's customers on the basis that the petition Freedom filed with the Commission in 1994 allowed competition to enter the retail electric market. In Freedom's view, the competition made possible by its petition will save electricity customers over \$790,000,000. Freedom seeks five percent of the ostensible savings: nearly \$40,000,000.

Public Service Company argued in its Motion to Dismiss that Freedom's petition is untimely, that the Commission could not have awarded fees and, therefore, the Court cannot, and also that no judicially-created basis for fee-shifting applies to the facts this case. The Court does not address the timeliness of the petition because it concludes that Freedom's arguments are without merit.

First, the Court is not convinced that the restructuring of the electricity market in New Hampshire is solely attributable to Freedom's efforts. In addition to Freedom's 1994 petition to the

Public Utilities Commission, "federal legislation such as the Public Utility Regulatory Policies Act of 1978 and the Energy Policy Act of 1992 opened the door for such restructuring." See Doc. 5, Memorandum of Law in Support of Its Motion to Dismiss, at 2 n.1. The New Hampshire Legislature enacted RSA 374-F, the restructuring statute, in 1996. Much litigation transpired in implementing the restructuring. See, e.g. Appeal of Campaign for Ratepayers Rights, 145 N.H. 671, 679 (2001) (upholding settlement agreement permitting public utility to recover some "stranded costs" resulting from restructuring); In re N.H.P.U.C. Statewide Elec. Util. Restructuring Plan, 143 N.H. 233, 240 (1998) (addressing and ultimately remanding to Commission award of "stranded costs" under RSA 374-F). Consequently, the Court finds restructuring to have been a complex process which required the participation of all branches of state government, and not simply the culmination of Freedom's unsuccessful petition to operate as a utility.

However, even assuming arguendo that Freedom were entitled to sole credit for ending monopoly in the electric retail market, it would not be entitled to fees from this Court that it could not have recovered before the Commission. In New Hampshire, there is no statutory authority providing for fees arising from Public Utility Commission proceedings. Courts in other jurisdictions have held that a court cannot award attorney's fees in a case initiated before an administrative body when the administrative agency cannot award such fees. Cohn v. Department

of Corrections of the State of Washington, 895 P.2d 857, 861 (Wash. App. 1995); cf. World Cup Ski Shop, Inc. v. Ketchum, 796 P.2d 171, 172 (Idaho App. 1990) (vacating lower court's award of attorney's fees in case initiated before administrative agency and later appealed to district court). The Commission has no statutory authority to award fees to prevailing parties and, therefore, this Court is also unable to grant such an award.

Even if the Court had the power to award attorney's fees in this case, the judicially-created bases for fee-shifting cited by Freedom do not apply here. First, the Court finds no support for Freedom's assertion that Public Service Company is a "trustee" of funds allegedly saved by its customers as a result of lower electricity rates.¹ Any savings realized would necessarily be in each individual customer's possession, outside the control of Public Service Company. In view of these facts, there is no

¹ Public Service Company asserts that Freedom's petition to collect \$40,000,000 is essentially a trustee process action, which must fail because Freedom has not satisfied the requirements of RSA 512. Freedom responds that the instant proceeding concerns a petition in equity for fees, not a trustee process action, and that Public Service Company is a trustee only "in the lay sense of the word." See Doc. 6, Motion for Reconsideration and Clarification, at 2. The Court does not address the statutory argument because it finds that Public Service Company is not a trustee pursuant to any definition.

trust res and, consequently, there can be no trust. Restatement (Second) of Trusts ' 74 at 191 (1957) (discussing necessity of trust property).

Similarly, the "common fund" doctrine does not apply here because there is no "fund." "A common-fund or common-benefit case arises when the defendant, typically in a class action, has paid a specified sum for the benefit of the class members."

Caroline R. Krivacka, J.D., and Paul D. Krivacka, J.D., Annotation, *Method of Calculating Attorneys' Fees Awarded in Common-Fund or Common-Benefit Cases - State Cases*, 56 A.L.R. 5th 107, 107 (1998). In this case, there has been no underlying award paid by a defendant. In fact, there has been no suit against the electricity customers who remain in possession of the money sought. The common-fund doctrine is therefore inapplicable to this case and cannot support an award of fees.

Nor is Freedom entitled to the \$40,000,000 it seeks on the basis of the substantial benefit doctrine. See Claremont School Dist. v. Governor, 144 N.H. 590, 594-95 (1999) (discussing substantial benefit exception to general rule that each party bears its own attorney's fees). Freedom is not seeking the amount it actually expended in attorney's fees, or a percentage of an existing fund created as a result of the litigation. Freedom instead requests five percent of the \$790,000,000 New Hampshire electricity consumers will allegedly save as a result of its efforts to restructure the industry. Freedom has no entitlement to such a speculative award.

The Court also observes that Freedom brought its petition to do business as a utility primarily to benefit itself. Freedom sought permission to participate in the retail electricity market in order to make a profit, not to vindicate the public's interest in lower electricity rates. See Taber, 140 N.H. at 616 (reversing trial court's award of attorney's fees when plaintiffs' "primary purpose in litigating the case [was] for their own personal benefit"); cf. In re Dumaine, 135 N.H. 103, 110 (1991) (upholding trial court's refusal to grant attorney's fees when trustee's primary motive in litigating was her own personal benefit). New Hampshire courts have awarded fees pursuant to the substantial benefit doctrine in cases where plaintiffs benefitted themselves as well as the public. Claremont, 144 N.H. at 598; Town of Littleton v. Taylor, 138 N.H. 419, 424-25 (1994). Unlike Taber, however, those cases do not address situations in which the plaintiff's *primary purpose* is to serve his or her own self interest.

Furthermore, in cases applying the substantial benefit doctrine, the amount awarded is recoverable from one source. See Mills v. Electric Auto-Lite Co., 396 U.S. 375, 396 (1970) (allowing recovery from defendant corporation); Hall v. Cole, 412 U.S. 1, 8-9 (1973) (allowing recovery from union treasury); see also Claremont, 144 N.H. 590 at 594 (involving state government and therefore state treasury). In contrast, this case involves a rough estimate of projected savings to electricity consumers, which savings would be retained by each consumer individually.

This Court has no authority to order Public Service Company to raise its electricity rates in order to collect money on Freedom's behalf. Legislative Util. Consumer's Counsel v. Public Serv. Co, of New Hampshire, 119 N.H. 332, 339 (1979) (stating Public Utilities Commission retains exclusive authority over public utility rates in New Hampshire); see also RSA 374:2 (1995) (providing no change shall be made in any rate unless the Commission otherwise orders); RSA 378:3 (1995) (stating rates "shall be just and reasonable and not more than is allowed by law or by order of the public utilities commission"). The Court finds and rules that the substantial benefit doctrine does not entitle Freedom to the requested \$40,000,000 from Public Service Company.

Accordingly, Freedom's Motion for Reconsideration and Clarification is DENIED with respect to reconsideration and GRANTED as to clarification. The Court will not reconsider its order of April 22, 2002 and affirms its dismissal of Freedom's petition.

So Ordered.

Dated: June 14, 2002

CAROL ANN CONBOY
PRESIDING JUSTICE