NO. 119 ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STATE OF CONNECTICUT,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS, Plaintiffs

v.

STATE OF NEW HAMPSHIRE, Defendant

MOTION ON BEHALF OF THE CONNECTICUT OFFICE OF CONSUMER COUNSEL FOR LEAVE TO INTERVENE, FOR LEAVE TO FILE COMPLAINT, AND BRIEF IN SUPPORT OF MOTION TO INTERVENE

JOHN F. MERCHANT
CONNECTICUT CONSUMER COUNSEL
Counsel of Record

PHYLLIS J. TROWBRIDGE
Office of Consumer Counsel
136 Main St., Suite 501
New Britain, CT 06051
(203) 827-7887

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MOTION FOR LEAVE TO INTERVENE AS PLAINTIFFS

Pursuant to Rule 9 of the Rules of the United States Supreme Court, and Rules 24(a) and 24(b) of the Federal Rules of Civil Procedure, the Connecticut Office of Consumer Counsel ("COCC"), by its attorneys, asks leave of this Court to intervene as a party plaintiff and to

file the complaint against the State of New Hampshire submitted herewith.

As is fully set forth in the accompanying brief in support of this Motion for Leave to Intervene and File Complaint, the Connecticut Office of Consumer Counsel ("COCC") respectfully submits:

1. The COCC, the State statutorily mandated representative of Connecticut utility ratepayer interests, Connecticut General Statutes ("Conn. Gen. Stat.") Section 16-2a, moves for leave of this Court to intervene in the above-referenced action in original jurisdiction, State of Connecticut, et. al. v. State of New Hampshire. No. 119, Original.

2. That action, brought by the Attorneys General of the States of Connecticut, Massachusetts and Rhode Island, challenges the New Hampshire Nuclear Station Property Tax, 1991 N.H. Laws c.354, ("Seabrook Tax") as violative of the Supremacy, Commerce, Equal Protection and Privileges and Immunities Clauses of the United States Constitution. Plaintiffs' Brief in Support of Motion for Leave to File Complaint, ("Plaintiffs' Brief"), p.2. That action also claims the Seabrook Tax violates 15 U.S.C. Section 391, which prohibits taxes which "discriminate against out-of-state...producers...or consumers of electricity." Id.

3. As indicated in Plaintiffs' Brief:

> [B]y imposing a tax on owners of "nuclear station property" and concurrently repealing the "Franchise Tax" on gross receipts from retail sales of electricity in New Hampshire, and allowing the full amount of the tax to be credited against such owner's liability for "Business Profits Tax" (in a manner which can be expected to benefit New Hampshire consumers in a grossly disproportionate fashion, relative to out-of-state consumers), New Hampshire has effectively protected its own residents from the impact of the tax and has exported nearly the entire burden of the tax to consumers living in the neighboring plaintiff States.
>
> Id.

4. The Plaintiffs' Motion for Leave to File Complaint and the above-quoted Plaintiffs' Brief were filed seeking the invocation of this Court's original jurisdiction on October 29, 1991. This Motion to Intervene is timely

filed, having been filed with this Court only 58 days after the Court agreed to exercise its original jurisdiction and hear the case. Order Granting Plaintiffs' Motion, January 27, 1992.

5. If allowed to stand, the Seabrook Tax will increase consumers' rates in the three plaintiff states by an additional $14 million annually, for a total of nearly half a billion dollars over the life of the facility. Plaintiffs' Brief, p. 18.

6. The amount of the increase in Connecticut electric utility rates resulting from the Seabrook Tax has been estimated by the Connecticut Department of Public Utility Control ("DPUC"), the State Utility Regulatory Authority, as at

least $5 million per annum. Application of the Connecticut Light and Power Company for an Increase in Rates, Conn. DPUC Docket No. 90-12-03 (1991), p. 18.

7. The Plaintiffs' Brief represents that under its rate-setting policies, the Connecticut DPUC has determined that the Seabrook Tax is "unquestionably" a cost which would be included in customer rates. Plaintiffs' Brief, p. 17, n.7.

8. The COCC is the only State agency expressly mandated and authorized by statute to represent utility ratepayer interests in any and all Court proceedings affecting those interests. Thus, the COCC is uniquely best situated to represent specific ratepayer interests

in the present action before this Court. See Conn. Gen. Stat. 16-2a. Thus, the specific interests of Connecticut electric utility ratepayers will be adequately represented only if the COCC is granted intervenor status in this action.

9. Allowing the COCC's intervention will create a precedent which would allow only limited participation by other statutorily mandated advocates from the plaintiff states, because Massachusetts has not established a separate state office of utility consumer counsel. While the Plaintiff State of Massachusetts provides a similar function to that of the COCC through its Public Advocacy Bureau of the Office of the Attorney General, that

function is expressly established within the Massachusetts Office of the Attorney General. To the contrary, the COCC was expressly legislated to exist outside of the Connecticut Attorney General's office and control. The COCC is unaware of the status or authority of Rhode Island's utility consumer advocate.

10. While the Defendant may argue that the Connecticut Attorney General adequately represents the interests of all of Connecticut's citizens and interests as parens patriae, such representation is problematic. As indicated above, the Connecticut DPUC has expressly stated in a recent electric utility decision, that it will likely include the cost of the Seabrook Tax in customer rates. Application of the

Connecticut Light and Power Company for an Increase in Rates, Conn. DPUC Docket No. 90-12-03 (1991), p. 18.

11. The Connecticut Attorney General is statutorily mandated to represent the interests of the Connecticut DPUC Commissioners in this or any other legal forum. Conn. Gen. Stat. § 3-125. While the Connecticut DPUC has indicated that it intends to pass the expense of the Seabrook Tax through to Connecticut electric utility ratepayers, and the Attorney General must defend that policy decision, the COCC opposes the pass-through of the Seabrook Tax to Connecticut ratepayers, and would challenge that policy. Thus, any representation of the interests of both the Connecticut DPUC and Connecticut

utility ratepayers by the Connecticut Attorney General's sole counsel will result in the representation of conflicting interests between constituent groups of Connecticut citizens.

12. In its role as a regulatory body, the Connecticut DPUC is required to balance the interests of both utility shareholders and ratepayers. Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944). Thus, any representation of the interests of the DPUC by the Attorney General will, by necessity, include representation of the interests of the utilities, balanced against those of Connecticut utility ratepayers. The COCC contends that the statutory responsibilities of the State Attorney General under Connecticut law

compromise the Attorney General's ability to adequately represent the interests of Connecticut utility ratepayers, and that intervention of the COCC as counsel for plaintiff Connecticut electric utility ratepayers is required.

13. The Attorney General has also indicated that he is prosecuting the case on behalf of the State of Connecticut in its proprietary capacity, as "proprietor of numerous state buildings,...resulting in charges [for electricity purchases] of over $36 million dollars" on an annual basis. Plaintiffs' Brief, p. 16. The interests of individual residential utility ratepayers in Connecticut may conflict with the interests of such a large business customer of the utilities, and thus such disparate interests should

not be represented by the Connecticut Attorney General alone. As such, the interests of Connecticut residential utility ratepayers will not be adequately protected unless the COCC Motion to Intervene is granted by this Court.

WHEREFORE, the Office of Consumer Counsel for the State of Connecticut respectfully requests that this Court grant its Motion to Intervene.

Respectfully submitted,

John F. Merchant

JOHN F. MERCHANT
CONNECTICUT CONSUMER COUNSEL
Counsel of Record

PHYLLIS J. TROWBRIDGE
SENIOR STAFF ATTORNEY
Office of Consumer Counsel
136 Main St., Suite 501
New Britain, CT 06051
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COMPLAINT

The Connecticut Office of Consumer Counsel, as Intervenor party plaintiff, asks leave of the Court to adopt, as the Connecticut Office of Consumer Counsel's own, the complaint as filed by party plaintiff, State of Connecticut, in this civil action for declaratory and

injunctive relief against the State of New Hampshire.

Respectfully submitted,

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BRIEF IN SUPPORT OF MOTION OF THE CONNECTICUT OFFICE OF CONSUMER COUNSEL FOR LEAVE TO INTERVENE AND FOR LEAVE TO FILE COMPLAINT

JURISDICTION

This is a suit between sovereign States, and is within the exclusive original jurisdiction of this Court under Article III, section 2, clauses 1 and 2 of the United States Constitution and 28 U.S.C. § 1251(a)(1). The Connecticut

Office of Consumer Counsel ("COCC") brings its motion pursuant to Rule 9 of the Rules of the Supreme Court and Rules 24(a) and 24(b) of the Federal Rules of Civil Procedure for leave to intervene and file a complaint in this Court.

QUESTION PRESENTED

Does the Connecticut Office of Consumer Counsel have sufficient interest in the subject matter of this suit so as to permit it to intervene as a party?

ARGUMENT

This action presents significant questions of law which are of great concern to the country in general, and more specifically, to the New England region and to Connecticut electric utility ratepayers. The matter before this Court addresses the attempt of a particular state, the State of New

Hampshire, to inequitably and discriminatorily tax out-of-state owners of a nuclear generating plant, while providing exemption from such tax to in-state owners. The tax at issue is the New Hampshire Nuclear Station Property Tax ("Seabrook Tax").[1] The parties plaintiff have, in the instant action, invoked the original jurisdiction of this Court.

By its motion, the COCC, as a statutorily-mandated representative of Connecticut utility ratepayer interests,[2] moves to intervene as a party plaintiff.

As indicated in Conn. Gen. Stat. § 16-2a, the COCC is empowered to:

> [A]ct as the advocate for consumer interests in all matters which may affect Connecticut consumers with respect to public service

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[1]N.H. Laws c. 354.

[2]Connecticut General Statutes ("Conn. Gen. Stat.") § 16-2a.

> companies. The office of consumer counsel is authorized to appear in and participate in any regulatory or judicial proceedings, federal or state, in which such interests of Connecticut consumers may be involved....

The United Illuminating Company ("UI") and The Connecticut Light and Power Company ("CL&P") are Connecticut-based "public service companies," as defined in Conn. Gen. Stat. § 16-1(4), which own a 17.5% and 4.06% interest in the Seabrook Facility, respectively. The Connecticut Department of Public Utility Control ("DPUC") has indicated that Connecticut electric utility customer rates will likely increase approximately $5 million per annum because of the additional expense accrued in the Seabrook Tax as levied upon UI and CL&P. Application of The Connecticut Light and Power Company for an Increase in Rates, Conn. DPUC Docket No. 90-12-03 (1991), p. 18.

(Excerpted and attached as Appendix "A".) Thus, under state statute, the COCC has statutory standing to represent utility consumer interests in this proceeding.

I. Intervention as of Right

As prior U.S. Supreme Court precedents indicate, the Federal Rules of Civil Procedure ("F.R.C.P.") provide guidance for determining whether a motion for intervention in an original action before the U.S. Supreme Court will be granted. Arizona v. California, 460 U.S. 605 (1983). Pursuant to F.R.C.P. 24(a)(2), anyone shall be permitted to intervene, upon timely application:

> When the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or

> impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

For the following reasons, the COCC submits that this standard has been satisfied in the instant proceeding.

The COCC clearly satisfies the first requirement, namely, "an interest relating to the property or transaction which is the subject of the action." As indicated above, the economic impact of the Seabrook Tax upon Connecticut ratepayers, as an expense passed on to them through their rates for electricity purchases, is calculated at approximately $5 million. Application of The Connecticut Light and Power Company for an Increase in Rates, Conn. DPUC Docket No. 90-12-03 (1991), p. 18. This increase in rates clearly constitutes "an interest relating to the property or

transaction which is the subject of the action." F.R.C.P. 24(a)(2).

The second criteria of F.R.C.P. 24(a)(2) is also satisfied in the instant proceeding. As indicated above, the COCC is the statutorily-mandated advocate for "consumer interests in all matters which may affect Connecticut consumers with respect to public service companies." Conn. Gen. Stat. § 16-2a. Therefore, absent representation of Connecticut utility ratepayer interests by its statutorily-mandated representative, the "disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest."

The COCC contends that the third requirement of F.R.C.P. 24(a)(2) is also satisfied, as the interests of Connecticut electric utility ratepayers are not "adequately represented by

existing parties."

The divergence of the general interests of the State, as represented by the Connecticut Attorney General ("CAG"), and the specific interests of Connecticut utility ratepayers as represented by the COCC is amply and repeatedly demonstrated in both state and federal precedents.

In upholding the State's interest, the CAG is statutorily mandated to represent state commissioners such as those comprising the decision-making authority of the Connecticut Department of Public Utility Control ("CDPUC"). Conn. Gen. Stat. § 3-125. However, the right, and necessity of the COCC to appeal from CDPUC commissioner decisions is well established and irrefutable. Conn. Gen. Stat. § 16-2a. Clearly, at the State level, the COCC has championed interests of utility ratepayers which have been contrary to those asserted in

CDPUC decisions. See, e.g., COCC v. CDPUC, CV-89-0369221S, COCC v. CDPUC, CV-90-0378940S, OCC v. CDPUC, CV 88-0092061S.

The divergence of interests promoted by the COCC and Connecticut Attorney General at the federal level was most recently demonstrated in the proceeding convened at the Federal Energy Regulatory Commission, to rule upon the proposed merger of Northeast Utilities and the Public Service Company of New Hampshire. Northeast Utilities Service Company (Re: Public Service Company of New Hampshire) FERC Docket Nos. EC-90-10-000, ER 90-143-000, ER 90-144-000, ER 90-145-000 and EL 90-9-000. In that proceeding, the CAG, apparently representing the interests of the Connecticut DPUC, recommended the approval of the merger of the two companies. Conversely, the COCC would not endorse the merger, absent

adoption of conditions which would protect CL&P ratepayers from any adverse financial impacts which could result if the merger were approved. Such conditions were neither raised nor endorsed by the CAG. The COCC was compelled to propose such conditions, as no other party to the proceeding, including the CAG, championed the interest of CL&P ratepayers by seeking to protect them from potential inequitable expenses arising from a merger they neither sought nor required.

As indicated supra, as either a party to an original action, or as parens patriae, the involvement of the CAG in the instant proceeding does not guarantee adequate protection of specific utility ratepayer interests. Such divergence of interest between the Attorney General and Consumer Counsel has also been recognized by the Connecticut Supreme Court in

upholding appeals taken by the COCC from CDPUC decisions, and defended unsuccessfully by the Connecticut Attorney General. See e.g., CL&P v. DPUC, 210 Conn. 349, 554 A.2d 1089 (1989).

With regard to the standard of proof required of parties intervening in original actions brought petitioning the original jurisdiction of this Court, it has been held that:

> An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state.
>
> New Jersey v. New York, 345, U.S. 369, 373 (1953).

In the cited case, the City of Philadelphia was not allowed intervention in an interstate water use dispute, when Pennsylvania was already a party to the

proceeding. However, that case is easily distinguished from the case at bar. In New Jersey v. New York, no showing was made of prior divergent interest between the State of Pennsylvania and City of Philadelphia with regard to the matter at hand. Conversely, the COCC has clearly indicated the inability of the CAG to adequately represent utility ratepayer interests in this field because of its requirement to also represent the adverse interests of the CDPUC. This difference, in conjunction with the COCC's statutory mandate to represent utility consumer interests, constitutes a compelling rationale for the COCC's intervention not evident in the New Jersey v. New York proceeding. (c.f. Arizona v. California, 103 U.S. 1382 (1983) (wherein, the Supreme Court allowed the intervention of an Arizona indian tribe in an action under the original jurisdiction of this

Court despite the participation of the State of Arizona as a party.)

For these reasons, the COCC submits that it should be allowed intervention as of right in this proceeding.

II. Permissive Intervention

In the event that the Court denies the COCC intervention as of right, the COCC would submit that it qualifies as an intervenor under F.R.C.P. 24(b) addressing permissive intervention. Pursuant to F.R.C.P. 24(b)(2), upon timely application, a potential intervenor may be permitted to intervene in an action "when an applicant's claim or defense and the main action have a question of law or fact in common." Clearly, the constitutional issues raised by the COCC and the other plaintiffs in this action, share a question of law or fact in common.

In this regard, the COCC raises the same claims raised by the CAG. However, as indicated in the COCC's Motion to Intervene, a divergence arises as to the adequacy of the CAG to represent both the interests of the state as a whole, as parens patriae, or as an extremely large proprietor of state buildings, and the specific interests of Connecticut utility ratepayers, especially individual residential customers.

If the Court determines that the right conferred to the COCC by Conn. Gen. Stat. § 16-2a is to be construed as conditional, it should exercise its discretion in favor of the COCC's Motion, unless it determines that the intervention would "unduly delay or prejudice the adjudication of the rights

of the original parties." F.R.C.P. 24(b)(2). Such is not the case with regard to the COCC's Motion.

The history of Rule 24(b) evidences a policy to allow intervention liberally by government agencies seeking to speak for the public interest. The 1946 amendment to the Rule, which added the second sentence, codified an earlier decision of this Court which sanctioned the intervention by a government agency which had the sole interest of settling questions of public law. See Securities and Exchange Commission v. United States Realty and Improvement Company, 310 U.S. 434 (1944). The legislative history of the amendment indicates an attempt to discourage lower courts from interpreting Rule 24(b) in an exclusionary manner:

> The amendment was added to avoid 'exclusionary constructions' where public officials seek permission to intervene, and 'the amendment

> and in fact expands the concept of "claim or defense" insofar as intervention by a government officer or agency concerned.' It is perhaps more accurate to say that it considers the governmental application with a fresh and more hospitable approach.
>
> Nuesse v. Camp, 385 F.2d. 694, 704-705 (C.A.D.C. 1967) (footnote omitted).

As further indicated in Nuesse, permissive intervention by government officials in order to advance the public interest is, therefore, an underlying policy of Rule 24(b).

> It is a living tenet of our society and not mere rhetoric that a public office is a public trust. While a public official may not intrude in a purely private controversy, permissive intervention is available when sought because an aspect of the public interest with which he is officially concerned is involved in litigation.
>
> Id., at 706.

The issue of intervention of parties is clearly an equitable one. To that end, Supreme Court Rules "make clear that the federal rules are only a guide to procedures in an original action. (citations omitted.) Arizona v. California, 460 U.S. 605 (1983). The instant proceeding provides a unique factual and legal situation, which can be distinguished from past contrary precedents, and which provides appropriately for the intervention of only the COCC as an intervenor representing plaintiff utility ratepayer interests. As indicated above, the COCC is the only statutorily mandated representative of utility consumer interests in Connecticut. Moreover, the plaintiff State of Massachusetts has not

established a separate state office of utility consumer counsel.[3] As a result, in granting the COCC's Motion for Intervention, this Court will not be "drawn into an intramural dispute" over the issues in this proceeding in Connecticut. c.f. New Jersey v. New York, 345 U.S. 369, 373 (1953).

The COCC represents that the motion presented herein is timely, having been filed only 58 days after the original petition by the Attorneys General of the States of Connecticut, Massachusetts, and Rhode Island was granted. Moreover, the

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[3]While Massachusetts provides a similar function through its Public Advocacy Bureau of the Office of the Attorney General, that function is expressly established within the Massachusetts Office of the Attorney General. To the contrary, the COCC was expressly legislated to exist outside of the Connecticut Office of the Attorney General. The State of Rhode Island has established a utility advocate office, however, the extent of its powers is unknown to the COCC.

COCC represents that the granting of its motion would not unduly delay or prejudice the rights of the original parties. The interests of the COCC and its constituents are substantially the same as the other plaintiffs and no additional issues of law will be presented for the Court's consideration. The complaint proposed herein is identical to that which the Court has approved for filing by the present plaintiffs. The issues are well known to all parties and neither the plaintiffs nor the defendant would be unfairly surprised by the complaint. Moreover, any other action which the COCC would seek as a means of resolving these questions would most likely be stayed pending a decision in this case.

CONCLUSION

The Connecticut Office of Consumer Counsel, both in its individual capacity and on behalf of its constituent Connecticut utility ratepayers, has a demonstrable and pressing interest in the litigation pending before this Court. The allegations stated in the proposed complaint are identical to and raise common questions of law and/or fact with those presented by plaintiffs. Therefore, the Court should grant the COCC's Motion for Leave to Intervene and for Leave to File Complaint.

Respectfully submitted,

John F. Merchant

JOHN F. MERCHANT
CONNECTICUT CONSUMER COUNSEL
Counsel of Record

PHYLLIS J. TROWBRIDGE
SENIOR STAFF ATTORNEY
136 Main Street, Suite 501
New Britain, CT 06051
(203) 827-7887

APPENDIX A

regarding the proposed acquisition. The Company selected and assumed for purposes of its presentation that the acquisition would obtain the necessary approvals and become effective during September 1991. The expectations flowing from this assumption are contained in sundry adjustments throughout the case.

When this case started, the projected "benefits" to Connecticut ratepayers of the takeover were over 20 million dollars. During the pendency of this case, those benefits had declined by almost two-thirds. CL&P asserts that because ratepayers can still anticipate some benefits they should pay the acquisition costs.

The proposition that the Authority should equate possible benefits flowing from the proposed merger with acquisition costs is wrong. Possible acquisition benefits must be evaluated against possible acquisition risks. In the instant case, only the benefit side of the equation was explored in depth and as we have seen and already noted, these benefits are transient and volatile. The equitable risks associated with the acquisition will be fully explored in Docket No. 90-01-01. Indeed, the Company's own witness indicated that the post acquisition capital structure of the NU holding company will be very highly leveraged; therefore, at least for a period of time, more risky because of the merger. Whether or not possible benefits outweigh possible risks will be decided in that docket. The only question we need resolve here is the allocation of

the aforementioned acquisition cost. This is separate and distinct from benefits and risks and must be evaluated independently.

We resolve it by not permitting one penny of these costs to be charged to Connecticut ratepayers. To assert that CL&P ratepayers should pay the acquisition costs incurred in bailing PSNH out of bankruptcy is an affront. The white knight is being charged for the privilege of rescuing the damsel; the lifeguard is billed for saving the floundering swimmer.* We reduce pro forma expense by $7,684,000.

In its written exceptions, the Company again claims that it is entitled to recover $2,813,000 associated with the Department's investigation of this merger in Docket No. 90-01-01. To that claim we again respond "... not ... one penny of these costs (will be) charged to Connecticut ratepayers."

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*The suggestion that Connecticut ratepayers pay for the privilege of assisting New Hampshire is made even more irksome by the enactment of New Hampshire public law, HB-FN-A, codified at Chapter 83-D of New Hampshire Revised Statutes Annotated, wherein New Hampshire has enacted a lasso tax whose loop only captures out of state Seabrook Station owners. This tax, if not overturned, would cost Connecticut ratepayers almost 5 million dollars per annum.