STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7138

Investigation into Village of Lyndonville Electric	)
Department's proposed Revenue Stabilization	)
Adjustment Charge tariff	)

Order entered: 9/27/2006

REPORT AND RECOMMENDATION

I. INTRODUCTION

On November 16, 2005, the Village of Lyndonville Electric Department ("Lyndonville" or "LED") filed a tariff amendment with the Public Service Board ("Board") for a Revenue Stabilization Adjustment Charge ("RSAC"), to take effect on a service-rendered basis commencing January 1, 2006 (Tariff Filing No. 7455-A). Through this rate design tariff, Lyndonville is proposing to implement a quarterly adjustment mechanism that would allow the pass through to customers of changes in purchased power costs.

On December 19, 2005, the Vermont Department of Public Service ("Department"), pursuant to 30 V.S.A. Section 225, filed a letter with the Board recommending the Board open an investigation into Lyndonville's proposed RSAC tariff.

On December 23, 2005, the Public Service Board ("Board") issued an order suspending Lyndonville's RSAC tariff filing.

On January 11, 2006, a prehearing conference in this docket was held. In attendance were William Piper, Esq., of Primmer Piper Eggleston & Cramer P.C., representing Lyndonville, and Leslie Cadwell, Esq., representing the Department.

On March 10, 2006, the Department filed a Motion to Dismiss Lyndonville's request for approval of the RSAC tariff, asserting that the RSAC amounts to retroactive ratemaking and single-issue ratemaking.

On March 27, 2006, Lyndonville filed a Memorandum of Law in Opposition to the Department's Motion to Dismiss, asserting that the RSAC tariff does not constitute retroactive ratemaking, and that the Board should consider evidence on the question of single-issue ratemaking rather than dismissing this case on a pre-hearing motion.

On March 29, 2006, the Department filed a Reply Memorandum on the DPS Motion to Dismiss.

For the reasons discussed below, I recommend that the Board grant the Department's motion to dismiss, and thereby decline Lyndonville's request for approval of the RSAC tariff.

II. DISCUSSION

The Department has moved that the Board dismiss this proceeding, pursuant to Rule 12(b)(6) of the Vermont Rules of Civil Procedure, on the grounds that the Board lacks the statutory authority to grant the relief requested by Lyndonville.[1] The Department contends that Lyndonville's proposed RSAC amounts to retroactive ratemaking as well as single-issue ratemaking, both of which are prohibited under Vermont law.[2] Lyndonville concedes that the Board lacks jurisdiction to approve a rate scheme that includes retroactive ratemaking; however, it disagrees that the Board lacks jurisdiction to "conduct" single-issue ratemaking.[3] In addition, Lyndonville contends that the "RSAC rate methodology is, for reasons that will be made clear in expert testimony, deficient as a method of calculating retroactive costs and benefits and, therefore, could not be used for the purpose of retroactive ratemaking."[4] Hence, Lyndonville opposes disposition of this proceeding on the Department's pre-hearing motion, and requests that it be afforded the opportunity to present evidence on the issues in this case.

A motion to dismiss for failure to state claim upon which relief may be granted, under Rule 12(b)(6) of the Vermont Rules of Civil Procedure, should not be granted unless it is beyond

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1. Motion to Dismiss at 1 and 3.

2. Motion to Dismiss at 2.

3. The Village of Lyndonville Electric Department's Memorandum of Law in Opposition to the Department of Public Service's Motion to Dismiss ("Lyndonville Memorandum") at 4.

4. Lyndonville Memorandum at 3.

doubt that there exist no facts or circumstances that would entitle the moving party to relief.[5] Hence, with regard to the retroactive ratemaking issue, the threshold question is whether facts and circumstances additional to the language of the proposed RSAC tariff need be considered in order to determine whether the tariff constitutes retroactive ratemaking. Because a tariff amounts to a binding contract between a utility company and its customer, tariffs are interpreted no differently than any other contract, with all ambiguities strictly construed against the drafter.[6] Accordingly, if the language of the tariff is clear, it is not necessary to consider extrinsic evidence in order to ascertain the intention of the drafter.[7]

The proposed RSAC tariff provides, in pertinent part, as follows:

> The RSAC will be updated quarterly. Forty five days prior to the start of a quarter, LED will submit an updated calculation of the proposed RSAC to the Public Service Board. The charge will be calculated as follows:
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> Step 1. The relationship between the cost of purchase power and fuel to the kWh sold in the prior quarter shall be determined quarterly by dividing the sum of the costs as defined in Account 555 "Purchased Power" and Account 565 "Transmission of Electricity by Others" and Accounts 501 and 547, Fuel Accounts in the prior quarter by the sum of the kWh sales associated with Revenue Accounts 440 through 447 for the same period.
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> Step 2. The difference between the unit value calculated above, and the unit base value shall be multiplied by the kWh sales associated with Revenue Accounts 440 through 447 during the same period to determine the dollar amount of the cost adjustment for the period. The unit base value shall be the base power costs for the same quarter from the most recent approved rate case divided by the rate case kWh sales associated with Revenue Accounts 440 through 447 during the same quarter.
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> Step 3. This dollar amount, divided by the revenue recorded in Accounts 440 through 447 in the same period, shall determine the factor that shall be multiplied by the dollar amount of each billing rendered under the provisions of LED's retail tariffs in the effective quarter.

The language in the RSAC tariff clearly articulates a process by which "the difference between

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5. *Wharton v. Tri-State Drilling & Boring*, 175 Vt. 494, 496 (2003).

6. 64 Am. Jur. 2d Public Utilities § 61.

7. *In re Grievance of Verderber*, 173 Vt. 612, 615 (2002); *In re Petition of Adelphia Business Solutions of Vermont, Inc.*, 177 Vt. 136, 139 (2004).

the actual and budgeted power costs is used to establish a going-forward surcharge to all tariff charges for all retail rates."[8] Because there is nothing ambiguous about the language of the proposed RSAC tariff provision, it is not necessary to look beyond that language to ascertain the meaning of the provision. Hence, there are no questions of fact to resolve concerning the meaning of the proposed tariff provision itself. Rather, the only question is whether, as a matter of law, the proposed RSAC tariff constitutes retroactive ratemaking.

The Vermont Supreme Court has held that "a rate that requires consumers to pay for past deficits of a utility or that requires a utility to refund to consumers a portion of its previously earned profits constitutes retroactive ratemaking."[9] Lyndonville argues that the proposed RSAC tariff does not attempt to true-up to actual costs incurred during a given quarterly time period. However, that is exactly what the RSAC does. In accordance with its plain language, the proposed RSAC tariff operates to impose a surcharge on future retail rates that compensates for the difference between budgeted costs (that had been included in rates approved by the Board) and costs actually incurred by Lyndonville.[10] Therefore, I conclude that the proposed RSAC tariff amendment constitutes retroactive ratemaking.

The Vermont Supreme Court also has addressed the question of Board jurisdiction to approve a rate scheme that constitutes retroactive ratemaking. In *In re Central Vermont Public Service Corporation,* the court explained that Board jurisdiction does not exceed the bounds of the authority it derives from statutes.[11] The Board's traditional rate-making authority derives from 30 V.S.A. § 218. That statutory provision was cited by the Vermont Supreme Court when it explained that the Board lacks jurisdiction to approve a rate scheme that constitutes retroactive ratemaking. The court stated:

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8. Lyndonville Memorandum at 3.

9. *In re Central Vermont Public Service Corporation*, 144 Vt. 46, 56 (1984).

10. See *In re Central Vermont Public Service Corporation*, 144 Vt. 46 (1984) (Tariff filed by utility company that calls for a yearly surcharge, or credit, representing the difference between projected costs and costs actually incurred constitutes retroactive ratemaking.)

11. *In re Central Vermont Public Service Corporation*, 144 Vt. 46, 52 (1984).

> The Board has no statutory authority to make whole either the utility company or its customers for inequities that existed in the past. "Subsequent cases cannot correct past errors."[12]

Because the proposed RSAC tariff amendment attempts, at least in part, to make Lyndonville whole for past expenses, it constitutes retroactive ratemaking. Therefore, I conclude that the Board does not have jurisdiction under 30 V.S.A. § 218 to approve it.[13]

III. CONCLUSION

For the reasons discussed above, I conclude that the proposed RSAC tariff constitutes retroactive rate making, and that, therefore, that the Board lacks jurisdiction to approve it. I further conclude that, because the proposed RSAC tariff constitutes retroactive ratemaking, it is unnecessary to reach the question of whether the RSAC tariff also represents impermissible single-issue ratemaking.

I therefore recommend that the Board grant the Department's motion to dismiss for failure to state a claim upon which relief can be granted.

Dated at Montpelier, Vermont, this 25th day of July, 2006.

s/Ennis John Gidney
Ennis John Gidney
Hearing Officer

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12. *In re Central Vermont Public Service Corporation*, 144 Vt. 46, 53 (1984), quoting *In re Central Vermont Public Service Corporation*, 141 Vt. 284, 290 (1982).

13. It is important to note that, notwithstanding 30 V.S.A. § 218, the Board has jurisdiction, under 30 V.S.A. § 218d to approve alternative forms of regulation that may include changes or additions to, waivers of, or alternatives to, traditional rate-making procedures, standards, and mechanisms, including substantive changes to rate base-rate of return rate setting. 30 V.S.A. § 218d(d). Therefore, while the Board cannot approve the RSAC tariff amendment as proposed here, the Board has authority to consider purchase power adjustment clauses (such as the RSAC) in the context of an alternative regulation plan.

IV. BOARD DISCUSSION

During oral argument, Lyndonville urged us to remand this matter to the Hearing Officer in order to provide it an opportunity to present evidence and testimony on the issue of whether the RSAC tariff constitutes retroactive ratemaking. Lyndonville asserted that this issue is a question of fact, and that, therefore, the issue should not be resolved by a ruling on the Department's motion to dismiss. We disagree.

Lyndonville contends that the RSAC is an appropriate proxy for presenting known and measurable changes (as would be essential to support a traditional request for a change in rates), and that, therefore, an evidentiary hearing must be held to address this point in order to determine whether the RSAC constitutes retroactive ratemaking. However, Lyndonville's contention is inapposite. It is the RSAC tariff's rate calculation mechanism itself that determines whether the RSAC constitutes retroactive ratemaking, notwithstanding whether the RSAC is, or is not, an appropriate proxy for the traditional ratemaking process.

The RSAC tariff unambiguously sets forth a specific rate calculation mechanism, and there is no factual dispute about the way in which the RSAC mechanism operates. Therefore, we conclude that the question before us is whether, as a matter of law, the RSAC tariff, as written, constitutes retroactive ratemaking. We further conclude that it is appropriate to resolve this question of law by ruling on the Department's motion to dismiss.

For the reasons discussed by the Hearing Officer, we agree that the RSAC tariff does constitute retroactive ratemaking. Because the Board lacks jurisdiction to approve a rate scheme that includes retroactive ratemaking,[14] we adopt the Hearing Officer's recommendation to grant the Department's motion to dismiss.

During oral argument, Lyndonville also questioned the Department's assertion that the RSAC tariff constituted prohibited single-issue ratemaking. Although we do not reach the issue concerning single-issue ratemaking in this case, we note that Lyndonville seeks the RSAC tariff in order to be able to respond to volatility in the market that drives power purchase costs.[15] The

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14. *In re Central Vermont Public Service Corporation*, 144 Vt. 46 (1984).

15. Letter of Mary Z. Mills, dated November 22, 2005.

Vermont Supreme Court has spoken on the matter of Board authority to approve a power purchase adjustment clause. In *In re Central Vermont Public Service Corporation*, the court held that volatility in the market is not an extraordinary circumstance that allows for the Board to approve single-issue ratemaking.[16] Therefore, it appears that, even if the RSAC did not constitute retroactive ratemaking, the RSAC tariff could not be approved by the Board.

Finally, we note that there is another avenue available for Lyndonville to explore. Under 30 V.S.A. § 218d, the Board may consider a power purchase adjustment clause as part of an electric company's proposed alternative regulation plan. Because of Lyndonville's clear interest in addressing the problems presented by inconstant power purchase costs, we encourage Lyndonville to examine how it might best take advantage of the opportunity presented by 30 V.S.A. § 218d to develop a lawful power purchase adjustment mechanism.

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16. *In re Central Vermont Public Service Corporation*, 144 Vt. 46, 58 (1984).

V. ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board of the State of Vermont that:

1. The conclusions and recommendation of the Hearing Officer are adopted.
2. The Motion to Dismiss filed by the Vermont Department of Public Service is granted.
3. The Revenue Stabilization Adjustment Charge ("RSAC") tariff filed by the Village of Lyndonville Electric Department ("Lyndonville") is not approved.

Dated at Montpelier, Vermont, this 27th day of September, 2006.

s/James Volz	)	
	)	PUBLIC SERVICE
	)	
s/David C. Coen	)	BOARD
	)	
	)	OF VERMONT
s/John D. Burke	)	

OFFICE OF THE CLERK

FILED: September 27, 2006

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.