

Westlaw

2008 WL 5004243 (Vt.P.S.B.)

Page 1

Slip Copy

In Re: Request for an Accounting Order by Town of
Stowe Electric Department

Vermont Public Service Board
Order entered: September 18, 2008

ORDER RE: ACCOUNTING ORDER

L BACKGROUND

*1 The Vermont Public Service Board (the "Board") has reviewed the Town of Stowe Electric Department's ("Stowe" or the "Company") petition, with supporting testimony, filed on July 1, 2008, requesting that the Board issue an Accounting Order pursuant to 30 V.S.A. § 221 permitting Stowe to defer and amortize a total of \$1,469,027^{FN1} in legal costs for later recovery over a period of ten years.^{FN2} These legal costs were incurred as a result of Stowe's litigation before the Federal Energy Regulatory Commission ("FERC") involving Stowe's dispute with the Vermont Electric Power Company, Inc. ("VELCO") over cost increases for the "specific facilities" portion of the Lamoille County transmission line project (the "Project").^{FN3} In this Order, we decline to approve Stowe's request for an Accounting Order.

FN1. Stowe deferred legal costs of \$155,233 in 2006, and \$1,313,794 in 2007. Stowe anticipates that it will defer an additional amount not to exceed \$150,000 for fiscal 2008. Radigan pf. at 4.

FN2. Petition at 3, 4; Radigan pf. at 4.

FN3. Petition at 3.

In its current request for an accounting order, Stowe asserts that the FERC litigation costs are directly related to the allocation of the specific facilities costs for the Project and that the requested deferral is both proper and compliant under current accounting standards as set out in the Statement of Financial

Accounting Standards No. 71-- *Accounting for the Effects of Certain Types of Regulation* ("SFAS 71"), FERC's Uniform System of Accounts ("FERC USoA"), and Generally Accepted Accounting Procedures ("GAAP").^{FN4}

FN4. Petition at 4.

Stowe contends that the legal costs meet the four criteria for an "extraordinary" event as defined under GAAP and as articulated by the Board in Docket Nos. 6946/6988, *Petition of Central Vermont Public Service Corporation*, Order of 3/29/05 at 54, in that they are "material," "unplanned," "beyond management control," and "unusual" or "abnormal." As to materiality, Stowe notes that the legal costs of \$1,313,800 accrued through year-end 2007 represent 449% of Stowe's average net income for 2006 and 2007, 15% of total assets, and 24% of net assets. Second, although the Project had undergone lengthy planning, Stowe asserts that it could not have anticipated or planned for the increase in project costs from \$20 million to \$40 million and the resultant costs of litigation. Third, as to the event being beyond management's control, Stowe contends the costs of the Project were entirely controlled by VELCO and not Stowe. Finally, Stowe claims the event was unusual and abnormal since the degree of the cost increase of the Project was unprecedented, and because it marked the first time a dispute had arisen under the 1991 Vermont Transmission Agreement ("VTA").^{FN5}

FN5. Radigan pf. at 13-15.

Stowe further asserts that under FERC USoA, the costs are considered as "law expenditures" related to the construction of the Project and therefore are properly categorized as "costs of construction" to be deferred and amortized over the requested ten-year period.^{FN6}

FN6. Radigan pf. at 9.

*2 In addition, Stowe alleges that the legal costs are "allowable costs" intended for future recovery under SFAS 71 since it is "probable" that such costs will be

included in different periods for the purposes of developing rates. Stowe contends, therefore, that the costs qualify for treatment as a "Regulatory Asset" to be amortized over the ten-year period corresponding to the initial ten years of commercial operation of the Project.^{FN7}

FN7. Radigan pf. at 8.

On August 13, 2008, the Vermont Department of Public Service ("DPS") filed a letter with the Board recommending that the Board deny Stowe's request for an Accounting Order without hearing, contending that Stowe's petition fails to make a *prima facie* case supporting its request for relief. In its letter, the DPS disagrees with the assertions made by Stowe and contends that Stowe's deferral was made without proper basis or authority.

In particular, the DPS asserts that Stowe's treatment of the legal costs as "extraordinary" under GAAP is unfounded since three of the four criteria for such a classification have not been met. The DPS does not question Stowe's assertion that the costs of litigation were material, but does disagree with the claim that the costs were unplanned and beyond management's control because, according to the DPS, Stowe clearly intended to litigate the issue of cost increases before FERC as opposed to considering alternate means of resolving the dispute (e.g., arbitration, mediation). In support of its argument, the DPS points to the fact that Stowe agreed to incur all of the costs of the FERC litigation (Petition at 3), and cites to Stowe's original complaint before FERC (at page 21) in which Stowe sought to avoid the arbitration requirement stipulated in the 1991 Vermont Transmission Agreement. In addition, the DPS argues that the legal costs were neither unusual nor abnormal since disputes over contract or tariff terms are commonplace and are likely to arise from time to time.^{FN8}

FN8. DPS response of August 13, 2008, at 2, 3.

The DPS also contends that the legal costs incurred by Stowe should be treated and categorized as a regulatory expense and not as deferrable costs of construction. The DPS claims that Stowe's litigation before FERC did not involve construction of the Project but rather Stowe's inability to bargain with VELCO on rates and termination of service under the VTA.

Thus, according to the DPS, the FERC litigation involved a contract dispute and not authorization to construct the Project. The DPS further asserts that the Lamoille County Project is a VELCO construction project and not Stowe's.^{FN9}

FN9. DPS response of August 13, 2008, at 1.

The DPS next claims that Stowe's deferral under SFAS 71 created an unauthorized Regulatory Asset. The DPS points to Stowe's own witness (Radigan pf. at 8) who states that under the FERC USoA, "Regulatory Assets result from the rate actions of regulatory agencies treating or authorizing the deferral of specific revenues, expenses, gains, or losses that would have been included in net income determination in one period . . . but for being 'probable that such items will be included in a different period(s) for purposes of developing rates . . .'" The DPS contends that Stowe nevertheless proceeded to book the legal costs as a regulatory asset without obtaining the necessary regulatory authorization and failed to provide any evidence that rate recovery of its legal costs in a later year is "probable." By seeking the deferral of those costs now, the DPS charges that Stowe may be engaged in retroactive ratemaking in violation of Vermont law.^{FN10}

FN10. DPS response of August 13, 2008, at 1, 2; DPS Attachment 2.

*3 Finally, the DPS discloses that it made earlier attempts to engage in a discussion with Stowe involving the FERC litigation costs and their accounting treatment. The DPS states that initially it had made a series of informal inquiries of Stowe which failed to elicit a response. On December 18, 2007, the DPS sent an information request to Stowe pursuant to 30 V.S.A. § 206, asking for cost estimates for completing the FERC litigation as well as information pertaining to Stowe's source of funding in meeting those costs. The DPS reports that Stowe declined to respond within the allotted time frame and never provided the requested information. If the Board opens a docket in this case, the DPS requests that Stowe's nonresponsiveness be considered in conjunction with the other issues raised and that the Board also consider levying appropriate sanctions for what the DPS alleges to be Stowe's violation of 30 V.S.A. § 206.^{FN11}

FN11. DPS response of August 13, 2008, at 3, 4. DPS Attachment 3.

Stowe did not file a response to the Department's August 13 letter.

II. DISCUSSION & CONCLUSION

30 V.S.A. § 221 provides that "the board may prescribe the forms of all books, accounts, papers and records of any public utility over which it has jurisdiction." Typically, and of relevance to the instant case, the Board has issued accounting orders to allow certain costs or revenues to be deferred on a utility's books until the utility's next rate case, at which time the Board would determine whether to allow them. Because most accounting orders are issued without notice to the general public or upon evidentiary hearings, the Board has emphasized that accounting orders allow specific accounting treatment only, and have no precedential effect on the ratemaking treatment of those costs or revenues.^{FN12}

FN12. Docket 5983, Order of 6/8/98, at 20.

In general, the costs or revenues that may warrant an accounting order authorizing their deferral are those deemed exceptional or extraordinary by the Board, as interpreted under GAAP. As both Stowe and the DPS note, GAAP establishes four criteria for an "extraordinary" cost, which the Board has typically applied in reviewing similar requests:^{FN13}

FN13. E.g., Dockets 6946 & 6988, Order of 3/29/05, at 54.

- Is the amount material?
- Was the event unplanned?
- Was the event beyond Stowe's management control?
- Is the problem unusual, abnormal, and not likely to be repeated?

We have reviewed and considered the parties' filings and find the DPS's arguments to be fully persuasive.

No party has requested a hearing, 30 V.S.A. § 21 does not require a hearing, and we conclude that no hearing is necessary to resolve the issues presented. Therefore, for the reasons set forth in the DPS's August 13 letter, we deny Stowe's request for an Accounting Order without hearing.

*4 Further, we agree with the DPS's conclusion that Stowe's accounting treatment of its legal costs as a deferrable regulatory asset to be recovered in rates was inappropriate and incorrect, and should properly have been categorized as a regulatory expense. Therefore, we find that a prior-period accounting adjustment by Stowe is necessary to correct that error. Namely, Stowe must make appropriate adjustments to its net assets (with proper disclosures as required under Accounting Practices Board Opinion 20) equal to the total amounts deferred for fiscal years 2006 and 2007, \$155,233 and \$1,313,794 respectively, effectively correcting the error of treating those costs as a deferrable regulatory asset as opposed to a regulatory expense.

III. ORDER

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

1. The Accounting Order requested by the Stowe Electric Department on July 1, 2008, is denied.

2. Pursuant to 30 V.S.A. § 221, Stowe shall make a prior-period accounting adjustment to its net assets equal to the total amounts already deferred by Stowe for fiscal years 2006 (\$155,233) and 2007 (\$1,313,794). Any additional legal costs incurred by Stowe related to the Lamoille County project, and intended by Stowe to be deferred in fiscal year 2008, shall be treated as a regulatory expense.

DATED at Montpelier, Vermont, this 18th day of September, 2008.

James Volz

David C. Coen

John D. Burke

2008 WL 5004243 (Vt.P.S.B.)

Page 4

OFFICE OF THE CLERK FILED: September 18,
2008 ATTEST: Susan M. Hudson Clerk of the Board

END OF DOCUMENT