

STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE

_____))
IN THE MATTER OF:))
Local Government Center, Inc., et al.) C-2011000036
RESPONDENTS))
_____)

HEALTHTRUST’S MOTION FOR STAY OF FINAL ORDER ADDRESSING REMAND

HealthTrust, Inc. moves for a stay of the Final Order Addressing Remand (Remand Order) pursuant to RSA 421-B:26-a, XXVIII. In short –

HealthTrust’s obligation to make payments to seventy-four political subdivisions in the aggregate amount of \$2,307,982.29 while the case remains “under the threat of continued litigation,”¹ will cause substantial harm to HealthTrust and its member political subdivisions, and will cause disruption and harm to the political subdivisions receiving substantial funds if the Remand Order is vacated upon reconsideration or by the New Hampshire Supreme Court.

ARGUMENT

An agency order may be stayed in conjunction with a motion for reconsideration or rehearing.² HealthTrust has contemporaneously filed a motion for reconsideration. HealthTrust’s filing of the motion for reconsideration allows the Hearing Officer to stay the Remand Order “upon such terms and conditions as [he] may prescribe.”³ By its motion for stay, HealthTrust seeks to avoid substantial harm to it and its member political subdivisions, and the disruption and harm to political subdivisions that could result if they receive substantial funds from HealthTrust, and the Remand Order is vacated upon reconsideration or by the Supreme Court.

The Remand Order demonstrates the appropriateness of HealthTrust’s request for a stay. The Remand Order refers to HealthTrust’s distribution of the \$17.1 million as “premature”

¹ Remand Order at 21.

² RSA 421-B:26-a, XXVIII.

³ RSA 541:5.

because HealthTrust failed to seek a stay of the order denying the Intervenor’s motion.⁴ The Remand Order infers that ordering HealthTrust to pay an additional \$2.3 million to member and former member political subdivisions is reasonable, in part, because HealthTrust did not seek a stay of the Order requiring it to distribute the \$17.1 million while the Intervenor’s appeal was pending:

When HT distributed the \$17.1 million surplus funds, it acted under the threat of continued litigation, through means of an appellate review, that the presiding officer’s order limiting payments in restitution to “participating political subdivisions,” meaning only current members, would be vacated or modified as later prescribed by the Court. . . . [T]he payment of a judgment pending appeal carries the risk that the subsequent appellate decision will modify the judgment. This risk is particularly heightened in a case such as this one, where the determination of law as to the correct pool of recipients who were to receive a proportionate share of the judgment was a question raised on appeal.⁵

In *New England Tel. & Tel. Co. v. State*, the New Hampshire Supreme Court stayed an order of the Public Utilities Commission (PUC) disallowing higher rates filed by a public utility because “justice requires such a suspension until the merits of the pending appeal can be presented to this Court and reviewed by it.”⁶ In *New England Tel. & Tel. Co.*, the PUC had statutory authority to suspend higher rates filed by a public utility for up to one year while the PUC investigated the rate hike, although the utility could impose the higher rates on customers if the PUC had not determined their reasonableness within six months of the filing.⁷ The PUC disallowed the higher rates, and the utility sought a stay of the order while its appeal of the suspension order remained pending.⁸

⁴ *Id.* at 22.

⁵ Remand Order at 21-22.

⁶ 97 N.H. 555, 556 (1952).

⁷ The statute required that the utility post a bond to ensure reimbursement to its customers if the higher rates were reduced following a determination on the merits of the rate hike. *Id.*

⁸ *Id.*

The Supreme Court granted the stay, finding that “justice [would] best be served” by allowing the higher rates during the appeal period.⁹ The Court found that while the utility’s bond ensured that its customers did not have to worry about being repaid if the tariff for higher rates was disallowed, the utility enjoyed no similar protection. Importantly, the Court also voiced its concern over the harm and chaos that would result if the higher rates were suspended and the utility prevailed on appeal:

[C]ontinuation of the currently effective rates pending the appeal is likely to be productive of less disruption both to the public and the Company than would arise from immediate institution of the rates prescribed by the Commission, followed by reversion to higher rates in the event the Company should successfully maintain its appeal.¹⁰

Similarly, in *Public Service Co. of N.H. v. State*, the Supreme Court found the interests of justice required a suspension of a PUC order that reduced a public utility’s tariff from 9.28% to 7%.¹¹ The Court found that if Public Service prevailed on the merits of its appeal of the PUC order, “the amount at issue . . . \$1,600,000 . . . [and the] procedure of rebates and recollections would pose a substantial administrative burden on the company.”¹² The Court also found that the utility’s customers could be adequately protected from risk, and suspension of the order would prevent disruption to the public and the company:

If the commission order is suspended, pending a determination of the appeal, the customers would be protected under the company’s bond (RSA 541:18) for any revenues collected which may ultimately be found to be excessive. The company would enjoy no comparable safeguard if the commission order is permitted to take effect. Therefore, we are of the opinion that a continuation of the bonded rates pending a rehearing would produce less disruption to the public and the company.¹³

⁹ *Id.*

¹⁰ *Id.*

¹¹ 112 N.H. 348, 349-50 (1972).

¹² *Id.* at 349.

¹³ *Id.* at 350.

HealthTrust's payment of \$2.3 million to political subdivisions while the Remand Order remains subject to reconsideration and appeal presents the same concerns that the Supreme Court addressed in *New England Tel. & Tel. Co.* and *Public Service Co. of N.H.* The Hearing Officer can ensure the \$2.3 million dollars remains available for payment to the political subdivisions if HealthTrust's motion for reconsideration and appeal prove unsuccessful. For example, he could order HealthTrust: (1) to deposit the funds in a dedicated account until the motion for reconsideration and appeal are decided, and provide proof of the deposit and the account to the BSR; or (2) to transfer the funds to the BSR while the motion for reconsideration and appeal are decided. Conversely, the political subdivisions that receive the funds will be harmed and face substantial disruption if they spend the funds, HealthTrust prevails on reconsideration or appeal, and the political subdivisions need to repay the funds.

The Remand Order directs that HealthTrust pay the \$2.3 million within 60 days. However, it cannot be credibly argued that timing of the payment has special significance. For all but the Intervenors, the funds are quintessentially "found money"; that is, the sixty-six political subdivisions that did not intervene in the administrative proceeding or the Intervenors' appeal never made a claim for the funds, and many may not be aware that they are to receive funds as a result of the Remand Order. Moreover, the political subdivisions likely will be reluctant to use the funds because of the risk of a repayment obligation if HealthTrust succeeds on reconsideration or appeal.

While the eight political subdivisions that intervened in the proceeding would be bound to comply with a subsequent order to repay their respective shares of the \$2.3 million distribution if such an order were issued on appeal or upon further remand, the sixty-six additional political subdivisions that are not parties to, or intervenors in, the matter would not be bound by such a

ruling. Instead, if any of these political subdivisions, particularly the former members, refuse to voluntarily repay such funds, HealthTrust's only remedy to recollect the funds would be to initiate separate collection proceedings against each or to implead such entities into the current matter. The substantial harm of these additional legal expenses for both HealthTrust and the former members would be avoided if the order were stayed pending final resolution of the matter.

As in *New England Tel. & Tel. Co.* and *Public Service Co. of N.H.*, the Hearing Officer should suspend the Remand Order pursuant to conditions that will ensure the funds remain available for payment to the recipient political subdivisions if HealthTrust's motion for reconsideration is denied and it does not successfully appeal the Remand Order.

WHEREFORE, HealthTrust respectfully requests that the Hearing Officer:

- A. Grant HealthTrust's Motion for Stay of the Final Order Addressing Remand; and
- B. Grant such additional relief as justice requires.

Respectfully submitted,
HEALTHTRUST, INC.
By Its Attorneys,

Dated: November 6, 2016

By: /s/ Michael D. Ramsdell
Michael D. Ramsdell (NH Bar #2096)
Ramsdell Law Firm, P.L.L.C.
46 South Main Street
Concord, NH 03301
(603) 856-7536
mramsdell@ramsdelllawfirm.com

/s/ David I. Frydman
David I. Frydman (NH Bar #9314)
General Counsel
HealthTrust, Inc.
25 Triangle Park Drive
P.O. Box 617
Concord, NH 03302-0617

603-230-3373
dfrydman@healthtrustnh.org

CERTIFICATE OF SERVICE

I certify that I have forwarded copies of this pleading to counsel of record via email.

/s/ Michael D. Ramsdell
Michael D. Ramsdell