



conservation law foundation

For a thriving New England

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Via Electronic Mail; Original and Six Copies by Overnight Mail

Debra A. Howland
Executive Director
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, NH 03301-2429



**Re: Docket No. DE 12-292, Public Service Company of New Hampshire
2013 Energy Service Rate**

Dear Ms. Howland,

This letter is submitted in accordance with Puc 203.18, on behalf of the Conservation Law Foundation and its members, and addresses a response to a record request from the Commission provided by Public Service Company of New Hampshire (“PSNH”) on December 19, 2012 in the above-referenced proceeding. PSNH’s response includes the affidavit of Terrance J. Large, (the “PSNH Affidavit”) which was, upon information and belief, provided to demonstrate that PSNH’s pending rate change request in the instant docket would, if approved by the Commission, meet the requirements of statute, including, without limitation, RSA 378:40 and RSA 378:41. CLF hereby asserts that the rate change requested by PSNH¹ does not meet the requirements of RSA 378:40 and the Commission is thus devoid of statutory enabling authority to approve the rate change sought in this proceeding.

RSA 378:40, entitled “Plans Required,” explicitly and directly imposes an affirmative requirement on utilities seeking approval for a rate change to file a least cost integrated resource plan at least biennially. It states that “[n]o rate change shall be approved or ordered with respect to any utility that does not have on file with the commission a plan that has been filed and reviewed in accordance with the provisions of RSA 378:38 and RSA 378:39.” RSA 378:40. Under RSA 378:38, “each electric utility shall file a least cost integrated resource plan (LCIRP) with the commission at least biennially” (emphasis added). Accordingly, PSNH “shall” (i.e., is required)² to file a least cost integrated resource plan (“LCIRP”) “at least” every two years, and in addition, must have timely filed an LCIRP in order for the Commission to approve a rate change. In this instance, PSNH has failed to do so.

¹ The instant proceeding was brought by PSNH to request approval of a change in its default energy service rate from 7.11 cents/kwh to 9.54 cents/kwh, amounting to an approximately 34% rate increase.

² The use of the term “shall” in the statute emphasizes that PSNH is *directed* to file an LCIRP at least every two years. *State v. Johanson*, 156 N.H. 148, 151 (2007); *City of Rochester v. Corpening*, 153 N.H. 571, 574 (2006).

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According to the PSNH Affidavit, the company last filed an LCIRP on September 30, 2010. As of today's date it has been more than two years plus eighty one days since PSNH last filed an LCIRP. Clearly, PSNH did not comply with the requirement to file an LCIRP biennially and is therefore in violation of RSA 378:38.

The regulation of public utilities and the establishment of rates to be charged by a public utility are, in the first instance, legislative functions which, in New Hampshire, have been delegated to the Commission. *Legislative Utility Consumers' Council v. Public Service Company Of New Hampshire*, 119 N.H. 332, 340 (1979). Under RSA 378:40, the Commission lacks the statutory enabling authority to approve PSNH's request for an increase in the default energy services rate in this proceeding. PSNH's failure to undertake the statutorily mandated duty to file an LCIRP vitiated the Commission's authority to approve PSNH's proposed massive rate increase and any attempt by the Commission to grant such increase would be *ultra vires* and void *ab initio* as a matter of law. *In Re Town of Nottingham*, 153 N.H. 539, 555 (2006) ("An agency 'must also comply with the governing statute, in both letter and spirit,') (*quoting, Appeal of Morin*, 140 N.H. 515, 519, 669 A.2d 207 (1995)). *Cf. In re Campaign for Ratepayers' Rights*, 162 N.H. 245, 256 (2011) ("Absent subject matter jurisdiction, a tribunal's order is void.") (*quoting Gordon v. Town of Rye*, 162 N.H. 144, 149 (2011)). *See also, In re Alexis O.*, 157 N.H. 781, 790 (2008) ("Administrative regulations that contradict the terms of a governing statute exceed the agency's authority, and are void.").

The PSNH Affidavit (at par. 1) notes that the September 20, 2010 LCIRP is currently pending before the Commission. The statutory exception in RSA 378:40 for LCIRPs undergoing Commission review does not apply, however, where the utility has failed to timely make the required LCIRP filing (i.e., within two years). That a timely filing is first required is unequivocal in the text of the statute. The relevant text states,

[h]owever, nothing contained in this subdivision shall prevent the commission from approving a [rate] change, [] where the utility has made the required plan filing in compliance with RSA 378:38 and the process of review is proceeding in the ordinary course but has not been completed.

RSA 378:40. The condition precedent for the statutory exemption contains two elements: 1) "the utility has made the required plan filing in compliance with RSA 378:38"; **and**, 2) "the process of review is proceeding in the ordinary course but has not been completed." It is indisputable that PSNH did not make the required plan filing in compliance with RSA 378:38 because the statute directs PSNH to make the filing biennially and more than two years have passed. Accordingly, PSNH failed to meet the statutory condition precedent for the exception.

RSA 378:38 is explicit that the deadline for filing an LCIRP occurs two years from the filing of its last LCIRP. The language in RSA 378:38 is clear. There is no ambiguity in the statute. Ascribing the "plain and ordinary meaning to the words used" leaves no uncertainty: the

General Court mandated that PSNH was required to make the filing biennially and PSNH did not. See, *State v. Hynes*, 159 N.H. 187, 193 (The intent of the statute is discerned by examining the language of the statute, and, where possible, applying “the plain and ordinary meaning to the words used.”).

Although the Commission is empowered to waive certain requirements to file an LCIRP, such authority is not relevant here because PSNH did not request one nor has a waiver been granted. RSA 378:38-a. In fact, on a prior occasion in 2004, PSNH requested such a waiver under RSA 378:38-a as it related to the generation elements of least cost integrated resource planning. See *re Public Service of New Hampshire, Order on Request for RSA 378:38-a Waiver*, Order 24,435 (Feb. 25, 2005). Evidently PSNH is aware of its right to petition for a waiver, and chose not to seek a waiver in this instance.

Even a cursory review of prior Commission orders and precedent make it abundantly plain that in the absence of a waiver (i.e., extension) granted by the Commission, PSNH was required to file an LCIRP by September 30, 2012, within two years of its last filed plan. See, *Re Public Service Company of New Hampshire*, 91 NH PUC 527 (2006) (PSNH LCIRP filed June 30, 2005; Commission approval order November 8, 2006 which extended filing date for next plan to September 30, 2007); *Re Public Service Company of New Hampshire*, 94 NH PUC 103 (2009) (PSNH LCIRP filed September 28, 2007; Commission approval order February 27, 2009 which extended filing date for next plan until February 28, 2010; subsequently extended to September 30, 2010 in *Re Public Service of New Hampshire*, 97 NH PUC 760 (2009)). Most notable about PSNH’s prior LCIRP filings is that there was never a single day in which the date in which it filed an LCIRP extended beyond two years from the prior LCIRP submittal without first obtaining an extension by order from the Commission. Indeed, CLF did not find a single instance prior to the instant proceeding in which a utility missed the biennial LCIRP filing deadline without first obtaining an extension by order from the Commission and complying with such extension.³

In fact, in at least one prior instance a utility filed an LCIRP while its prior plan was still under review by the Commission in order to comply with the two-year requirement in RSA 378:38. See, *Re Granite state Electric Company dba National Grid*, 93 NH PUC 96 (2008)(LCIRP filed May 19, 2005 and then May 1, 2007; Commission order approving both LCIRPs Feb. 29, 2008). **The most glaring characteristic of the instant proceeding is that PSNH is seeking Commission approval for one of the largest rate hikes in the state’s history, without first complying with its statutory obligation to file a plan under RSA 378:38 and thus is also in violation of RSA 378:40.**

³ The extent to which the Commission is empowered to waive the “biennially” requirement *sua sponte* without a utility first petitioning for a waiver is beyond the scope of this comment and CLF hereby reserves any and all rights with respect to same.

It is important to recognize that the failure of PSNH to adequately plan, or for that matter, to take seriously the General Court's policy mandating least cost integrated resources planning is the cause for PSNH seeking massively above market rates in the first instance. The Commission is undoubtedly aware of PSNH's witness Terrence Large's brazen comments during the hearing in DE 10-261, that the LCIRP planning process "sadly has very limited value" Transcript ("Tr.") Day 1 PM, p. 115, lines 14-15); that the LCIRP drives decision-making "[t]o a very limited degree." Tr. Day 1 PM, p. 116, lines 3-4; and suggesting that the only purpose of the planning process is to "satisfy the requirements of the law". Tr. Day 1 PM, p. 120, line 14. This was after PSNH made clear in testimony that its least cost planning does not consider forward price curves for natural gas, does not project energy margins or clearing prices, does not consider forecasts of customer migration, and does not meaningfully consider future environmental costs for PSNH's generation fleet. See, CLF Post-Hearing Brief, DE 10-261 (June 13, 2012).

PSNH has now acted on its dismissive beliefs, and taken its haughtiness to a new unprecedented level. It decided to disregard the statutory deadline for filing an LCIRP while at the same time seeking a 34% rate increase to impose above-market costs upon New Hampshire's captive, most vulnerable ratepayers. PSNH's failure to file a timely LCIRP as required by statute has the effect of negating the Commission's authority to approve its requested rate increase and the Commission may not do so in compliance with the law.⁴

We appreciate the opportunity to provide our comments and respectfully request that the Commission consider these comments in rendering its decision in the above referenced docket.

Respectfully submitted



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cc: Service List in DE12-292

⁴ Although CLF is not a party to the instant proceeding, it is empowered by law to protect its rights and those of its members. See, RSA 541:3 (stating that in addition to any party to a proceeding before the commission, "any person directly affected thereby . . . may apply for a rehearing. . ."); RSA 541:6 (applicant for rehearing may appeal by petition to the supreme court). See also *Appeal of Richards*, 134 N.H. 148, 154 (1991) ("A party or any person directly affected by the PUC's decision or order may apply for a rehearing with respect to 'any matter determined in the action or proceeding, or covered or included in the order.' RSA 541:3. If the motion for rehearing is denied, the party may then appeal by petition to this court. RSA 541:6.") (first emphasis added; second emphasis in original) (holding that Campaign for Ratepayer Rights, which was not a party to the proceeding, had standing to appeal denial of motion for rehearing).