

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2013 TERM

Docket No: \_\_\_\_\_

APPEAL OF PSNH RATEPAYERS

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APPEAL BY PETITION PURSUANT TO RSA 541:6 AND  
NEW HAMPSHIRE SUPREME COURT RULE 10.

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May 6, 2013

**APPEAL BY PETITION PURSUANT TO RSA 541:6 AND  
NEW HAMPSHIRE SUPREME COURT RULE 10**

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NOW COME George Chase, Alexandra Dannis, James Dannis, William Hopwood, Amy Matheson, and Janet Ward (together "PSNH Ratepayers"), by and through their attorneys, Orr & Reno, P.A., and, pursuant to RSA 541:6 and New Hampshire Supreme Court Rule 10, appeal to this Honorable Court from the New Hampshire Public Utilities Commission's order on reconsideration, Order No. 25,485, issued on April 5, 2013. In support of this Petition, the PSNH Ratepayers state as follows:

**a. Parties and Counsel**

Appellants:

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**b. Administrative Hearing Transcript, Pleadings and Orders**

- |    |   |                    |
|----|---|--------------------|
| 1) | Condensed Transcript of Hearing<br>Docket No. DE 12-192<br>December 18, 2012              | See Appendix p. 1  |
| 2) | Affidavit of Terrance J. Large, Exhibit 6 to Docket No.<br>DE 12-192<br>December 18, 2012 | See Appendix p.37  |
| 3) | Conservation Law Foundation's Letter to Debra A.<br>Howland<br>December 21, 2012          | See Appendix p. 38 |
| 4) | Order Approving 2013 Energy Service Rate<br>Order No. 25,448<br>December 28, 2012         | See Appendix p. 42 |

- |    |   |                    |
|----|---|--------------------|
| 5) | Motion for Rehearing Submitted by Conservation Law Foundation and PSNH Ratepayers<br>January 28, 2013   | See Appendix p. 54 |
| 6) | Public Service Company of New Hampshire's Objection to Conservation Law Foundation's and Ratepayers' Motion for Rehearing of Order No. 25,448<br>January 30, 2013 | See Appendix p. 67 |
| 7) | Conservation Law Foundation's Letter to Debra A. Howland<br>March 29, 2013  | See Appendix p. 82 |
| 8) | Order Granting Confidential Treatment and Denying Motion for Rehearing<br>Order No. 25,485<br>April 5, 2013   | See Appendix p. 98 |

**c. Questions Presented**

1. Whether the Public Utilities Commission ("PUC") erred in interpreting RSA 378:38 as allowing an electric utility to file a least cost integrated resource plan ("LCIRP") within two years of a PUC decision on the utility's prior LCIRP, instead of requiring LCIRP filings to be made "at least biennially." RSA 378:38.
2. Whether the PUC erred in permitting Public Service Company of New Hampshire ("PSNH") to raise its default service rates despite PSNH's failure to file its statutorily-required LCIRP biennially.
3. Whether the PUC erred by failing to act on the January 28, 2013 motion for rehearing within the 10 day time period established in RSA 541:5.

**d. Relevant Constitutional Provisions, Statutes, and Rules**

- |              |                     |
|--------------|---------------------|
| RSA 374-F:2  | See Appendix p. 111 |
| RSA 378:37   | See Appendix p. 112 |
| RSA 378:38   | See Appendix p. 112 |
| RSA 378:38-a | See Appendix p. 112 |

RSA 378:39	See Appendix p.113
RSA 378:40	See Appendix p. 113
RSA 378:41	See Appendix p. 113
RSA 541:5	See Appendix p. 114
RSA 541:6	See Appendix p. 114

**e. Relevant Contractual Provisions**

There are no insurance policies, contracts, or related documents in this case.

**f. Statement of the Case**

This is an appeal from the New Hampshire Public Utilities Commission’s (“PUC” or “Commission”) decision to permit Public Service Company of New Hampshire (“PSNH”) to raise its default service<sup>1</sup> rates by 34% even though PSNH had not filed a biennial Least Cost Integrated Resource Plan (“LCIRP”) as required by RSA 378:38 and 378:40. *Order Approving 2013 Energy Service Rate*, Order No. 25,448 (Dec. 28, 2012) [hereinafter “Order”], Appendix (“A.”) at 42; *Order Granting Confidential Treatment and Denying Motion for Hearing*, Order No. 25,485 (April 5, 2013) [hereinafter “Rehearing Order”], A. at 98. In its orders, the Commission determined that the biennial filing requirement in RSA 378:38 does not mean that electric utilities must file their LCIRPs every two years. *Rehearing Order* at 8-9, A. at 105-106. Instead, according to the Commission, electric utilities must file an LCIRP two years after a Commission decision on the prior filing. *Id.* This holding, as explained below, is unlawful and unreasonable because it is contrary to the plain language of the statute and permits a 34% rate increase to go into effect even though PSNH had not filed the statutorily required LCIRP.

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<sup>1</sup> Default service is provided by PSNH to its customers who purchase their electricity supply service (in addition to their transmission and distribution service) from PSNH. *See* RSA 374-F:2, I-a.

On September 28, 2012, PSNH filed with the Commission a request to increase its default service rate. *Order* at 1, A. at 42. PSNH's request sought to increase rates by 2.43 cents per kilowatt hour ("kWh"), from 7.11 cents per kWh to 9.54 cents per kWh. *Id.* at 4-5, A. at 45-46. The filing did not address whether PSNH had met its biennial LCIRP filing requirement under RSA 378:38 and RSA 378:40 (requiring an LCIRP to be properly filed before rate changes are made).

At the hearing on PSNH's rate increase request held December 18, 2012, the Office of Consumer Advocate questioned whether PSNH had complied with these statutes. *Transcript* at 76:18 through 77:7, A. at 19-20 ("And, so, since it has been more than two years since they filed the IRP filing, to keep us statutorily and procedurally in line, I would simply ask that the Commission exercise its authority to either direct PSNH to file a new plan or to suspend -- to allow rate changes to take place, even though the integrated rate plan is over two years old."). In response to a record request made by the Commissioners at the hearing, PSNH filed an affidavit indicating that the default service rate increase request was in compliance with its 2007 LCIRP filing. *Affidavit of Terrance Large* (Dec. 18, 2012), A. at 37. Mr. Large also confirmed that PSNH's last LCIRP was filed on September 30, 2010, and that the 2010 LCIRP docket was currently pending before the Commission. *Id.*

After the hearing, the Conservation Law Foundation ("CLF") filed a letter with the Commission asserting that PSNH had not met its statutory requirements for obtaining a rate increase. *Conservation Law Foundation's Letter to Debra A. Howland* (Dec. 21, 2012), A. at 38. On December 28, 2012, without directly resolving the questions raised by the Office of Consumer Advocate or the arguments made by CLF, the Commission approved PSNH's rate

increase, even though PSNH's most recent LCIRP filing was more than two years old. *Order* at 8-9, A. at 49-50.

CLF and six PSNH ratepayers filed a timely motion for rehearing of the Commission's *Order. Conservation Law Foundation's and Ratepayers' Motion for Rehearing of Order No. 25,448* [hereinafter "Motion for Rehearing"], A. at 54. The Motion for Rehearing asserts that the Commission lacked statutory authority to approve PSNH's rate increase because the utility had failed to file the plans required under RSA 378:38 and 378:40, and the Commission had not granted a waiver of these requirements as permitted under RSA 378:38-a. *Id.* at 4, A. at 57; Exhibit A to *Id.* at 1-4, A. at 61 - 64. PSNH objected to the Motion for Rehearing. *Public Service Company of New Hampshire's Objection to Conservation Law Foundation's and Ratepayers' Motion for Rehearing of Order No. 25,448* (Jan. 30, 2013), A. at 67. By letter dated March 29, 2013, CLF requested that the PUC issue an order on the Motion for Rehearing, noting that RSA 541:5 requires the PUC to rule on the motion (or suspend the order complained of) within 10 days, and further noting that 59 days had passed since the rehearing motion was filed. *Conservation Law Foundation's Letter to Debra A. Howland* (March 29, 2013), A. at 82. The letter also stated that the PUC's failure to comply with the 10 day deadline established in RSA 541:5 deprived CLF and the PSNH Ratepayers of due process and materially prejudiced them by imposing on them a significantly higher energy service rate that the Commission was not authorized to approve in the first instance. *Id.*, A. at 82-83.

On April 5, 2013, the PUC denied the Motion for Rehearing. *Order on Rehearing* at 9, A. at 106. In rejecting the argument that biennial LCIRP filings under RSA 378:38 are prerequisites for rate changes under RSA 378:40, the Commission stated that "[w]e continue to



find that an interpretation of the filing requirement [in RSA 378:38] to run from the date of a Commission decision to be the best approach from a practical and regulatory standpoint.” *Id.*

RSA 378:38 plainly states that electric utilities must “file a least cost integrated resource plan with the commission *at least biennially.*” RSA 378:38 (emphasis added). In addition, RSA 378:40 requires utilities to be in compliance with RSA 378:38 before the Commission can approve a rate change:

No 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. However, nothing contained in this subdivision shall prevent the commission from approving a change, otherwise permitted by statute or agreement, 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.

Although waivers from the biennial filing requirement are statutorily permitted, PSNH did not seek, and the Commission did not grant, any such waiver prior to the PUC’s Order. RSA 378:38-a; *Exhibit A to Motion for Rehearing*, A. at 63.

The simple question of statutory construction presented in this case is whether RSA 378:38 requires a utility to file a LCIRP every two years, and whether, in the absence of such a filing or a waiver granted under RSA 378:38-a, the Commission may approve a rate change. The PUC’s legal conclusion that an electric utility may file a LCIRP two years after the Commission’s order on the utility’s prior LCIRP (irrespective of when the prior LCIRP was filed, allowing for more than two years between LCIRP filings) is contrary to the plain meaning of the biennial filing requirement in the statute, as well as the protections that the legislature provided to ratepayers in RSAs 378:37 through 378:41. The other question presented is whether the PUC acted unlawfully or unreasonably in failing to meet its statutory obligation to act on the PSNH Ratepayers’ Motion for Rehearing within 10 days. RSA 541:5.

**g. Jurisdiction**

The jurisdictional basis for this appeal is RSA 541:6.

**h. Bases for appeal**

- 1. There is a substantial basis for the difference of opinion regarding the meaning the statutory requirements contained in RSA 378:37 through RSA 378:41 and regarding the PUC's obligations under RSA 541:5.**

The PUC found that the term "biennial" in RSA 378:38 means two years from the date of a Commission decision on the prior LCIRP filing. *Order on Rehearing* at 9, A. at 106. This interpretation is at odds with the plain and ordinary meaning of RSA 378:38, which requires electric utilities to file their LCIRPs "at least biennially." The term "biennial" is defined as "occurring, appearing, or being made, done or acted upon every two years." *Webster's Third New International Dictionary* at 213 (1986); *see also Merriam-Webster Online Dictionary*, <http://www.merriam-webster.com/dictionary/biennial> (last visited May 5, 2013) (defining "biennial" as "occurring every two years" or "continuing or lasting for two years; *specifically*: growing vegetatively during the first year and fruiting and dying during the second").

This case presents questions of statutory construction which this Court reviews *de novo*. *Appeal of Union Telephone Co.*, 160 N.H. 309, 314 (2010). Words used in a statute are construed according to their plain and ordinary meaning. *Id.* at 317. In addition, statutes are interpreted "in the context of the overall statutory scheme and not in isolation." *Id.* The plain meaning of RSA 378:38, considering the statute as a whole and within the context of the entire statutory scheme relating to LCIRPs, demonstrates that the utility is required to file its LCIRP every two years, whether or not the previous LCIRP proceeding has been concluded. *See, e.g., Exhibit A to Motion for Rehearing*, A. at 63 (highlighting, for example, one instance in which a public utility filed an LCIRP while its prior plan was still under review by the Commission to

meet the two-year requirement). The statutory language does not state, as the PUC found, that the utility will file an LCIRP two years after the PUC's approval of the prior LCIRP; instead it indicates clearly that utilities must "file" their plans "at least biennially." RSA 378:38. The words "at least" and "biennially" must be given effect. *Smith v. City of Franklin*, 159 N.H. 585, 589 (2010) (stating that the Court "must give effect to all words in a statute, and presume that the legislature did not enact legislation with superfluous or redundant words"). Given that the PUC's interpretation differs dramatically from the plain meaning of the statute, it is clear that there is a substantial basis for the PSNH Ratepayers' disagreement with the PUC's decision.

With regard to the 10 day deadline established in RSA 541:5, the PSNH Ratepayers submit that the statute is clear and straightforward. However, because the PUC's Rehearing Order did not address the arguments raised by the March 29, 2013 letter (A. at 82) concerning this issue, the PUC's interpretation of RSA 541:5 is discernable only from its inaction on the Motion for Rehearing for 67 days, while all of PSNH's default service customers continued to pay the 34% rate increase and the appellants to this case waited for their appeal rights to vest.

**2. This case presents the opportunity to decide, modify or clarify an issue of general importance in the administration of justice.**

The PUC's error in construing RSA 378:38 has significant consequences not only for this case, but also for utility planning practices in the future. An LCIRP is an integral part of the regulatory process for electric utilities. The Legislature deemed least cost planning so important that it must be referenced in "any proceeding before the commission initiated by a utility." RSA 378:41. The stated policies behind the LCIRP requirement are:

to meet the energy needs of the citizens and businesses of the state at the lowest reasonable cost while providing for the reliability and diversity of energy sources; the protection of the safety and health of the citizens, the physical environment of the state, and the future supplies of nonrenewable resources; and consideration of the financial stability of the state's utilities.

RSA 378:37. The PUC's decision below contravenes not only the letter of the law but the important policy goals that underlie it. Historically, the LCIRP process was meant to assure that utilities will "satisfy future demand with the optimal combination of supply-side resources and demand-side programs." *Public Service Co. of New Hampshire*, Order No. 24,435 (Feb. 25, 2005), A. at 135, 148 (quoting *Public Service Co. of New Hampshire*, Order No. 19,052 (April 7, 1988), A. at 117, 128). After the restructuring of the electric industry, the PUC indicated that PSNH's LCIRP "should describe options available to it for assuring that safe and reliable electricity is available to its customers at the lowest possible cost." *Id.*, A. at 149-150. Through the biennial LCIRP requirement, the Legislature has directed the PUC to protect ratepayer interests by "evaluat[ing] the adequacy of each utility's planning process," considering "environmental, economic and health-related impacts." RSA 378:39. Further ratepayer protections are provided by RSA 378:40 which prohibits the PUC from approving rate increases unless it is satisfied that a utility has met its LCIRP filing requirements. RSA 378:40 ("No 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.")

The PUC plainly did not have authority to approve of PSNH's rate increase in contravention of RSA 378:40. *See 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 (1995))). Further, allowing a utility to file a LCIRP less than biennially without requiring a waiver pursuant to RSA 378:38-a undermines the objective of RSA 378:40, which insures that the PUC will review rate increases within the context of the utility's most current resource planning information and that the utility is meeting its ongoing

planning obligations. By automatically extending the time between filings (*i.e.*, by deciding that the time for the next LCIRP filing begins to toll only after the last plan was approved), the Commission has not only circumvented the Legislature's mandate for biennial filings, but has also deprived itself and ratepayers of timely information concerning how PSNH will use its generation and other resources to meet its default service obligations. The Commission also abandoned its apparent past practice of requiring a biennial LCIRP, pending waiver via RSA 378:38-a. *See Exhibit A to Motion for Rehearing*, A. at 63. The result of the PUC's decision is that an electric utility can avoid its LCIRP filing obligations for several years. For example, PSNH's most recent LCIRP filing was made on September 30, 2010 and as of December 18, 2012, a final approval order had not been issued. *Affidavit of Terrance J. Large* (Dec. 18, 2012), A. at 37. Under the PUC's analysis, PSNH's next LCIRP is not due until after December 2014, nearly four and a half years after the last LCIRP was filed. *Id.*; *Order on Rehearing* at 9, A. at 106. This ruling contravenes the Legislature's requirement that utilities engage in ongoing and recursive planning processes in support of the goals set forth in RSA 378:37 through 378:41. Left undisturbed, this relaxation of the Legislature's planning requirement will apply to all electric utilities going forward.

Lastly, the PUC's failure to adhere to the deadline for ruling on a motion for rehearing established in RSA 541:5 resulted in material prejudice to the PSNH Ratepayers. By issuing the Rehearing Order 67 days after the Motion for Rehearing was filed, the PUC deprived the PSNH Ratepayers of a swift remedy and exposed them to increased electric rates for nearly two months longer (e.g., 57 days longer) than if the Commission had observed the dictates contained in RSA 541:5. In view of the foregoing, this case presents the opportunity to clarify issues of general importance in the administration of justice.

**3. Acceptance of the appeal would protect a party from substantial and irreparable injury.**

The appellants in this case are PSNH default energy service customers. *See Motion for Rehearing*, ¶ 3, A. at 55. As a result of the Commission's reading of RSA 378:38, PSNH was permitted to raise its default service rates by 34% for service rendered on January 1, 2013 (and thereafter) without demonstrating its conformity with the legislatively-dictated LCIRP requirements. As described above, these requirements are established, *inter alia*, to protect the interests of individual ratepayers. RSA 378:37. Those interests include paying electricity rates that are based upon a utility's demonstrated compliance with its least cost integrated planning obligations. The PUC is prohibited from approving or ordering a rate change unless a utility has "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. Thus, the Commission did not have authority in this case to approve PSNH's 34% increase in default service charges because PSNH had not filed a LCIRP within two years of its last LCIRP. In addition, the Commission did not have authority to exceed the deadline established in RSA 541:5 for ruling on the Rehearing Motion. The Court should accept this appeal to protect the appellants from the substantial and irreparable injury associated with paying the higher default service rates that the PUC unlawfully approved.


**i. Preservation of Issues for Appellate Review**

Every issue specifically raised has been presented to the administrative agency and has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading.

Respectfully submitted,  
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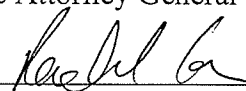
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Certificate of Compliance

I hereby certify that a copy of the foregoing Appeal by Petition has on this 6<sup>th</sup> day of May, 2013 been either hand delivered or sent by first class mail, postage prepaid, to the parties of record, including Suzanne Amidon, Esq. for the New Hampshire Public Utilities Commission, 21 South Fruit Street, Suite 10, Concord, N.H. 03301-2429, Susan Chamberlain, Esq. for the New Hampshire Office of Consumer Advocate, 21 South Fruit Street, Suite 18, Concord, N.H. 03301, and Matthew Fossum, Esq. for Public Service Company of New Hampshire, P.O. Box 330 Manchester, NH 03105-0330 as well as the Attorney General of the State of New Hampshire, 33 Capitol St Concord, NH 03301.

  
Rachel A. Goldwasser