

**The State Of New Hampshire
Before The Public Utilities Commission**

Docket No. DE 10-160

Public Service Company of New Hampshire
Investigation into Effects of Customer Migration

MEMORANDUM OF LAW
OF THE CONSERVATION LAW FOUNDATION

I. Introduction

By Secretarial Letter dated January 21, 2011, the Commission requested briefs addressing certain of the legal issues raised in the above-captioned docket to investigate the effects of customer migration from Public Service Company of New Hampshire's ("PSNH") default energy service to competitive supply. Included among the issues identified by the Commission, the Secretarial letter states,

PSNH has proposed the creation of a non-bypassable charge, consisting of certain fixed costs associated with its generation plants and certain purchased power obligations, to mitigate the cost of default service for those customers who continue to take default service from the Company. The Commission asks the parties to address whether [] a non-bypassable charge is an appropriate recovery mechanism pursuant to RSA 374-F and whether it is permissible under RSA 369-B:3,IV(b)(1)(A) and RSA 374-F.

Secretarial Letter at p. 2. In testimony, PSNH specified that the fixed costs it proposes to remove from its energy service rate and incorporate into a non-bypassable charge include depreciation, property tax expenses and the debt service component of the capital structure which supports PSNH's generation assets¹ (hereinafter referred to as the "Proposed Non-Bypassable Charge").

¹ Pre-filed testimony of Robert Baumann, page 4 lines 13-15; Hearing Transcript, Cross Examination of Robert Baumann, 11/30/10, page 109 lines 16-24, page 110 lines 1-9.

The Conservation Law Foundation (CLF) provides this memorandum in response to the Secretarial Letter concerning the legal permissibility of the Proposed Non-Bypassable Charge.

II. The Proposed Non-Bypassable Charge Is Not Legally Permissible Under the Commission's Statutory Enabling Authority

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). The Commission's powers derive from enabling authority granted by the legislature. *Appeal of Richards*, 134 N.H. 148, 158 (1991). Numerous New Hampshire Supreme Court decisions note that the Commission's authority is limited to only that which is provided by statute. *State of New Hampshire v. New Hampshire Gas & Electric Co.*, 86 N.H. 16 (1932); *H.P. Welch Co. v. State*, 89 N.H. 428 (1938); *Blair and Savoie v. Manchester Water Works*, 103 N.H. 505 (1961); *State v. New England Telephone & Telegraph Co.*, 104 N.H. 394 (1961); *Appeal of Public Service Co.*, 122 N.H. 1062 (1982). In *Appeal of Public Service Company*, the Court found:

The PUC is a creation of the legislature and as such is endowed with only the powers and authority which are expressly granted or fairly implied by statute. *Petition of Boston & Maine Railroad*, 82 N.H. 116, 116, 129 A. 880,880 (1925). Consequently, the authority of the PUC [] is limited to that specifically delegated or fairly implied by the legislature and may not be derived from other generalized powers of supervision.

Appeal of Public Service Co., 122 N.H. 1062, 1066 (1982); See also, *Re Congestion on the Telephone Network Caused by Internet Traffic*, 89 NH PUC 173, 175 (2004) ("It is a well-established principle that this Commission possesses only those powers that are granted to it by the legislature.")

The foregoing precedent clearly establishes that the Commission's authority is only that which is provided by the legislature and that the extent of such authority is derived from the enabling statutes empowering the Commission.

- A. The Proposed Non-Bypassable Charge would contravene a specific legislative directive mandating that PSNH's energy service rate include the cost of providing default energy service.

PSNH proposes to remove from its energy service rate and incorporate into a non-bypassable charge the cost it incurs to provide power: specifically depreciation, property tax expenses and the debt service component of the capital structure which supports PSNH's generation assets. An explicit statutory directive, however, requires the Commission to include these very same costs, so long as prudently incurred, in PSNH's energy service rate. In RSA 369-B:3,IV(b)(1)(A), the General Court unequivocally commands that "the price of [PSNH's] default service shall be PSNH's actual, prudent, and reasonable costs of providing such power, as approved by the commission."

The General Court could not be clearer regarding the composition of PSNH's energy services rate. *The energy service rate shall be PSNH's costs of providing default energy service.* This mandate binds not only PSNH, but also the Commission. As set forth above, "the authority of the PUC [] is limited to that specifically delegated or fairly implied by the legislature and may not be derived from other generalized powers of supervision." *Appeal of Public Service Co., supra*, 122 N.H. at 1066. At the hearing in this docket, PSNH's witness, Robert Baumann, made it apparent that PSNH's Proposed Non-Bypassable Charge would contravene RSA 369-B:3,IV(b)(1)(A) by unequivocally acknowledging that PSNH's Proposed Non-Bypassable

Charge would include "PSNH's actual, prudent and reasonable costs" of providing default energy service:

Q: And, so, on Page 4 and 5 of your written Testimony [] you proposed that certain fixed costs [] which include depreciation, property tax expenses, and the debt service component of the capital structure which supports PSNH's generation should be taken from the Energy Services Default rate and included in a bypassable [sic] charge payable by all ratepayers in PSNH's service territory [territory?]. Do I have that correct?

A. (Baumann) Included in a non-bypassable charge?

Q. Yes.

A. (Baumann) Yes. That's correct.

Hearing Transcript, Cross Examination of Robert Baumann, 11/30/10, page 109 lines 16-24, page 110 lines 1-4.

Q. So, would you agree that the approximately \$40 million in fixed costs that you referred to in your testimony are costs -- are actual costs that are prudently incurred by PSNH to provide the power it generates to customers within PSNH's service territory?

A. (Baumann) When you say the word "customers", they were -- are you saying "all customers" or --

Q. Customers within PSNH's service territory.

A. (Baumann) We believe that a portion -- that those costs are -- should be allocated to all customers 100 percent.

Q. Right. And, do you believe that those are actual costs prudently incurred by PSNH to provide the power it generates to customers within PSNH's service territory?

A. (Baumann) Yes.

Hearing Transcript, Cross Examination of Robert Baumann, 11/30/10, page 110 lines 11-24, page 111 line 1.

The language in RSA 369-B:3,IV(b)(1)(A) is clear. Ascribing the “plain and ordinary meaning to the words used” leaves no uncertainty: the General Court mandated that the actual costs prudently incurred by PSNH to provide to customers within PSNH’s service territory the power it generates must be included in the price of PSNH’s energy service. 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.”). The use of the term “shall” in the statute emphasizes that the Commission is *directed* to include PSNH’s cost of providing power, *including fixed costs*, in the price of PSNH’s energy service. *State v. Johanson*, 156 N.H. 148, 151 (2007); *City of Rochester v. Corpening*, 153 N.H. 571, 574 (2006). PSNH’s proposal to remove its fixed costs and include them in the Proposed Non-Bypassable Charge is not permissible because it flouts the plain language of RSA 369-B:3,IV(b)(1)(A), which specifies that “the price of [PSNH’s] default service shall be PSNH’s actual, prudent, and reasonable costs of providing such power, as approved by the commission.” There is no doubt what is intended by the statute. Simply put, the governing law does not authorize the relief proposed by PSNH.

- B. The Commission’s more general authority under RSA Chapter 374-F does not provide a valid basis to contravene the specific directive in RSA 369-B:3,IV(b)(1)(A).

The Secretarial Letter also raises the question of whether the Proposed Non-Bypassable Charge is permissible under RSA Chapter 374-F. During the prehearing conference in this docket, PSNH asserted that RSA 374-F:4, VIII(a) empowers the Commission to order “other charges and services -- and service provisions or take other actions which are necessary to

implement the restructuring that's consistent with restructuring principles."^{2 3} PSNH essentially claims that the more general authority provided under RSA 374-F:4, VIII(a) controls and would authorize the Commission to impose the Proposed Non-Bypassable Charge notwithstanding that it would contravene the specific mandate of RSA 369-B:3,IV(b)(1)(A). In effect, PSNH's reading would create an inherent conflict between the two statutes which according to PSNH, should be resolved in favor of the more general authority in RSA Chapter 374-F. PSNH's interpretation, however fails when scrutinized under the Supreme Court's and the Commission's precedent, which provide that a later and more explicit statutory directive controls over an earlier more general enactment.

Of the two statutes at issue, RSA 369-B:3,IV(b)(1)(A) is the later statute, enacted during the 2000 legislative session as opposed to the 1999 enactment of RSA Chapter 374-F. In addition, RSA Chapter 374-F broadly establishes the electric utility restructuring construct. RSA 369-B:3,IV(b)(1)(A), on the other hand, provides a very specific statutory directive which was designed to alter the restructuring construct adopted by the General Court in RSA Chapter 374-F.

In the event of a conflict between two statutes the Supreme Court has ruled:

It is a well-recognized rule of statutory construction that where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the latter will be regarded as an exception to the general enactment where the two conflict." *State v. Bell*, 125 N.H. 425, 432, 480 A.2d 906 (1984). We also note that RSA 161:4, VI was enacted in 1991, while RSA chapter 151-E was enacted in 1998. "When a conflict exists between two statutes, the later statute will control, especially when the later statute deals with a subject in a specific way and the earlier enactment treats that subject in a general fashion," *Petition of Public Serv. Co. of N.H.*, 130 N.H.

² Prehearing Conference Transcript, 6/28/10, page 8 line 24, page 9 line 1-5.

³ RSA 374-F:4, VIII(a) states that: "The commission is authorized to order such charges and other service provisions and to take such other actions that are necessary to implement restructuring and that are substantially consistent with the principles established in this chapter."

265, 283, 539 A.2d 263 (1988) (quotations omitted), appeal dismissed, 488 U.S. 1035, 109 S. Ct. 858, 102 L. Ed. 2d 983 (1989).

Bel Air Associates v. Dept. of Health and Human Services, 154 N.H. 228, 233 (2006).

Recently, the Commission itself relied on *Bel Air Associates* when it ruled, in its investigation of PSNH's scrubber project: "that the proper interpretation of the conflicting statutes in this situation is that the Legislature intended the more recent, more specific statute, RSA 125-0:11, to prevail." *Re Investigation of PSNH's Installation of Scrubber Technology at Merrimack Station*, Order No. 24,898 at p. 9 (9/19/2008). The Commission is again faced with a situation which requires it to interpret a more recent, specific statute and an older more general statute. RSA 369-B:3,IV(b)(1)(A), enacted after RSA Chapter 374-F, constrains the Commission's discretion. It addresses the establishment and components of rates in a more specific way in comparison to the general authority over rates found in the earlier statute. Under the Commission's order in *Re Investigation of PSNH* and the Court's holding in *Bel Air Associates*, the more explicit directive in RSA 369-B:3,IV(b)(1)(A), which requires PSNH's actual costs to supply power to be included in its energy service price, controls and binds the Commission. The earlier and more general ratemaking authority in Chapter 374-F does not provide valid legal authority for the Proposed Non-Bypassable Charge.

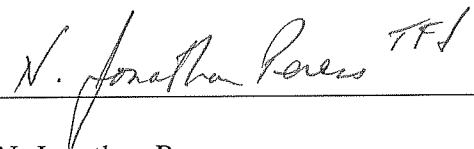
In sum, the legislature has spoken clearly and unequivocally. Costs incurred by PSNH to provide power, including fixed costs, may not be lawfully included in a non-bypassable charge.

Respectfully submitted,

CONSERVATION LAW FOUNDATION

Dated: February 25, 2011

By:


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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of February, a copy of the foregoing Memorandum of Law of the Conservation Law Foundation was sent electronically, and by First Class Mail, to all parties on the service list in this docket.

Dated in Concord, New Hampshire this 25th day of February, 2011.

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