

**THE STATE OF NEW HAMPSHIRE
BEFORE THE PUBLIC UTILITIES COMMISSION**

**PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
PETITION FOR INCREASE IN SHORT TERM DEBT LIMIT AND TO ISSUE
LONG TERM DEBT**

DOCKET NO. DE 09-033

**CONSERVATION LAW FOUNDATION'S
CORRECTED MOTION FOR REHEARING ON THE COMMISSION'S ORDER
DENYING CONSERVATION LAW FOUNDATION'S MOTION TO COMPEL
PSNH'S RESPONSES TO DATA REQUESTS**

Pursuant to RSA 541:3, Conservation Law Foundation ("CLF") respectfully requests that the N.H. Public Utilities Commission ("Commission") rehear and reconsider its Order No. 25,001 ("Discovery Order") denying CLF's Motion to Compel Public Service Company of New Hampshire ("PSNH") to respond to certain data requests. The Commission erred as a matter of law when it denied CLF's motion on the grounds that its review of rate impacts is narrowly cabined to those impacts "caused by this particular financing request." Discovery Order at 5. In support of this motion, CLF states as follows:

1. RSA 541:3 provides that "[w]ithin 30 days after any order or decision has been made by the commission, any party to the action or proceeding before the commission, . . . may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion all grounds for rehearing, and the commission may grant such rehearing if in its opinion good reason for the rehearing is stated in

the motion.” CLF intervened in this docket, and is therefore a party to the proceeding.

2. On June 19, 2009, the Commission issued a decision, following briefing by the parties, concerning the standard of review applicable to PSNH’s proposed financing in this docket. *See Commission Order Defining Scope of Proceeding*, No. 24,979 (June 19, 2009) (“Scope Order”). That order sets forth the procedural history in this docket. *See* Scope Order at 1-2.
3. On July 1, 2009, the parties attended a technical session. By agreement of the parties, a schedule was set for additional discovery by CLF and the Office of Consumer Advocate. CLF timely served its discovery on PSNH; on July 9, 2009, PSNH objected to CLF’s Data Requests, Nos. CLF-01, Q-CLF-002; CLF-01, Q-CLF-003; and CLF-01, Q-CLF-004.
4. Pursuant to N.H. Code Admin. Rules PUC 203.09(i)(4), CLF and PSNH made a good faith effort to resolve PSNH’s objections during a telephone discussion on July 10, 2009. On that same day, PSNH provided information responsive to CLF-01, Q-CLF-002(a), and CLF did not seek further response to that data request in its Motion to Compel. The parties were not, however, able to resolve PSNH’s objections to CLF’s remaining requests.
5. Pursuant to N.H. Code Admin. Rules PUC 203.09, on July 24, CLF moved to compel PSNH’s responses to CLF-01, Q-CLF-002(b)&(c); CLF-01, Q-CLF-003; and CLF-01, Q-CLF-004.

6. PSNH objected to CLF's Motion to Compel on August 3, CLF filed a response to PSNH's objection on August 6, and that same day, the Commission issued its Discovery Order denying CLF's Motion to Compel.
7. As set forth in CLF's Motion to Compel, the discovery rule applied by the Commission in these proceedings is liberal. See Re Public Service of New Hampshire, 86 NH PUC 730, Order No. 23,831 at 7 (2001)(granting City of Berlin's motion to compel and ordering PSNH to provide requested discovery). The scope of discovery is broad, extending to information that is "relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence." *Id.* at 6; Re Public Service Company of New Hampshire, 89 NH PUC 226, Order No. 24,310 at 5 (2004).
8. The Commission will deny discovery requests only when it "can perceive of no circumstance in which the requested data will be relevant." Re Public Service of New Hampshire, 86 NH PUC 730; Order No. 23,831 at 6; Re Public Service Company of New Hampshire, 89 NH PUC 226, Order No. 24,310 at 5.
9. The Scope Order provides that:

[W]e find that the scope of our *Easton* review in this instance is limited by the Legislature's finding that the scrubber is in the public interest. **As a result, in this financing docket we will consider the economic impact of the proposed financing, its effect on PSNH's capital structure, and its potential impact on rates** but it is not within the scope of our authority to consider whether the use of the financing proceeds for the scrubber is for the public good or whether there are reasonable alternatives to the scrubber.

Scope Order at 18 (emphasis supplied). The Scope Order unequivocally “reject[ed] PSNH’s argument that an *Easton* review is not applicable in this case.”¹ *Id.*

10. The Commission’s task in conducting an *Easton* review of rate implications has been well defined by the New Hampshire Supreme Court:

It follows that in an *Easton* hearing the commission’s responsibility to address the rate implications of a decision approving a utility’s financing request is not a responsibility to determine what these rates will actually be if the financing is allowed.² . . . **Rather, the commission’s responsibility is to determine whether at a later ratemaking proceeding a reasonable rate can be set that will allow the company to support the capitalization that will result from use of the proceeds of the proposed financing.** Since a reasonable rate is, by definition, a rate derived from a process that balances investor and customer interests, **the commission may find that a reasonable rate can be set in the future if it finds that there will be a genuine opportunity to recognize the interests of customers as well as the interests of investors without bankrupting the utility.** . . . Hence, in this proceeding, the commission was obliged to determine whether the probable range of rates would provide genuine scope to resolve the competition between the interests and to determine whether a rate set within the range would allow the company to support the anticipated capitalization. **Upon an affirmative determination, the Commission could grant the company’s request consistently with its obligation to set reasonable rates at the later ratemaking proceeding.**

Appeal of Conservation Law Foundation of New England, Inc., 127 N.H. 606, 640-41 (1986) (emphasis supplied).

¹ See *Appeal of Easton*, 125 N.H. 205 (1984).

² The Court recognized one exception to this rule: “[t]he one exceptional instance in which the commission would be effectively obligated to determine a rate, rather than a range, in an *Easton* proceeding like this, would occur if the commission were to find that a requested financing would require virtually full dollar inclusion in the rate base as the only alternative to corporate bankruptcy. In that case, the commission would be obligated to determine the particular rate effect that would result. If it found that rate commercially feasible, the commission would then be required to determine whether it would be reasonable as the only alternative to the probable effects of bankruptcy on the customers.” *Appeal of Conservation Law Foundation*, 127 N.H. at 641.

11. CLF's data requests relate to significant factors that very well may influence energy service rates in the future, as the Commission acknowledged in the Discovery Order. *See* Discovery Order at 5 ("industrial customer migration may be a factor influencing energy service rates in the future . . . national declines in demand for electricity generally, and coal-fired generation in particular, is another example of a factor that may arguably influence PSNH's rates in the future.").
12. CLF-01,Q-CLF-002 (b)&(c) sought information related to the extent of load departure from PSNH's service territory, what PSNH anticipates the effect of that departure to be on rates, and how the load departure will affect PSNH's ability to complete the planned capital projects, including the Scrubber Project, that will be funded with the proposed financing. As set forth above, PSNH provided certain information responsive to part (a) of this request. Those data included sales forecasts updated as recently as June 19, 2009, in connection with pending PUC Docket No. DE 08-113, and show that, in 2009, PSNH expects to lose to competitive suppliers about 50% of its industrial sales. PSNH's June 2009 projection of the sales—in megawatt hours—that will be lost to competitors in 2009 was 118% percent higher than its December 2008 projection. Accompanying information provided by PSNH shows that the level of migration for PSNH's large customers increased from twenty-three megawatts as of September 12, 2008, to 102 megawatts as of November 20, 2008, as reported on December 2, 2008—a 343% increase in just two months. *See Re: PSNH Proposed Default Energy Service Rate*

Charge for 2009, DE 08-113, Transcript of Proceedings (Dec. 4, 2008) at p. 64, lines 22-24; p. 65, lines 1-12.

13. PSNH's current energy service rate is 9.03 cents per kilowatt hour, while ISO New England reports that the average real time locational marginal price for the New Hampshire Zone in June, 2009, was 3.4 cents per kilowatt hour. *See ISO New England, Inc. Monthly Market Operations Report 2009* (July 10, 2009) at § 4.1. PSNH's customers, therefore, can buy power at a much lower cost from competitive suppliers, and they have migrated in large numbers as the price of electricity has fallen.
14. As set forth in CLF's Motion to Compel, a continuation of this pattern will result in increased rates for PSNH's remaining customers that, for practical purposes, can not avail themselves of competitive supply. In the event PSNH's current level of load departure does not reverse and / or increases, the costs of the Scrubber Project, and all other generation capital projects proposed to be funded with this financing, will be borne by an increasingly small pool of customers—those that are least able to afford the increase in rates that would be imposed.
15. CLF-01, Q-CLF-003 sought information related to how the decline in electric power demand will impact PSNH's ability to complete the projects to be funded with the proposed financing.³ PSNH is proposing to take on

³ As CLF demonstrated in its Motion to Compel, the U.S. Energy Information Administration's ("EIA") June 2009 Electric Power Monthly³ ("EPM") reports that net generation in the U.S. dropped by 4.3 percent from March 2008 to March 2009, and that "[t]he drop in coal-fired generation was the largest absolute fuel-specific decline from March 2008 to March 2009 as it fell by 24,656 thousand megawatt hours, or 15.3 percent." EPM at 1. Additionally, the EPM reports that, "year-to-date, total net generation was down 4.6 percent from 2008 levels. Net generation attributable to coal-fired plants was down 11.7 percent." *Id.*

substantial new borrowings at a time when it is losing a significant portion of its net customer base and overall demand for generation is down, which plainly could affect future rates.

16. CLF-01, Q-CLF-004 sought information relating to whether, in light of current gas prices, departure of load, decline in electricity demand, and other altered assumptions, PSNH's September 2, 2008, analysis submitted to the Commission regarding the impact of the Scrubber Project on energy service rates remains accurate. *See* Docket No. DE 08-103, *PSNH Merrimack Station Scrubber Project Request for Information* (Sept. 2, 2008) at §§ III (Effect of Clean Air Project on Energy Service Rates) and IV (Effect on Energy Service Rates if Merrimack Station Is Retired), pp. 14-15. PSNH's analysis of the impact of the Scrubber project on rates is flawed, *see* CLF Motion to Compel at ¶¶ 21, 22, and PSNH's projections of the Project's effects on rates never accounted for the possibility that it would lose such a large segment of its commercial customers.
17. The information sought by CLF is highly relevant to the inquiry the Commission must undertake in its *Easton* review, pursuant to *Appeal of Conservation Law Foundation*. Because PSNH has refused to respond to CLF's data requests, CLF—and the Commission—have been deprived of facts that would allow an assessment of whether, “at a later ratemaking proceeding a reasonable rate can be set that will allow the company to support the capitalization that will result from the use of the proceeds of the proposed financing.” *Appeal of Conservation Law Foundation*, 127 N.H. at 641.

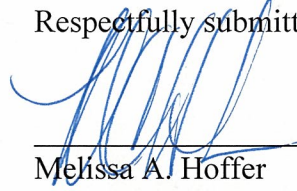
18. Simply put, without taking into account migration, drop in demand for PSNH's expensive generation, and the rate impact of the proposed uses of the financing, it is not possible to determine whether PSNH's customers can afford the proposed financing. Contrary to the Discovery Order, the Commission may not artificially limit its analysis to the rate impacts caused solely by the financing (and indeed, as was clear during Mr. Shoop's testimony on August 11, even those impacts have not been adequately established by PSNH).
19. "*Easton* and its progeny mandate that the commission's consideration of the company's financing plans must cover the possible results of the ratemaking process that will follow approval of the financing request." *Id.* at 633. The rate impacts of the financing will be magnified by the additional real world impacts of PSNH customer migration, drop in demand, and the costs that will be funded with the proceeds of the financing and must be considered in light of those factors. The Commission cannot comply with *Easton*, for example, without considering the likely impact on rates in the 2012 rate case when the capital costs of the Scrubber Project will be included in PSNH's rate base.
20. It is far from clear, based on the record currently before the Commission in this matter, that the Commission will be able to set a reasonable rate that will permit PSNH to support the capitalization resulting from PSNH's planned use of the proceeds of the proposed financing. There are constitutional limits on the Commission's ratemaking authority that, notwithstanding RSA 125-O, require the Commission to "engage in a rationale process of balancing

consumer and investor interests to produce a rate that is just and reasonable.” *Petition of Public Service Company of New Hampshire*, 130 N.H. 265, 274 (1988). “[T]he constitution is only concerned with the end result of a rate order; *i.e.*, that it be just and reasonable.” *Id.* at 275 (citing *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944)). “A just and reasonable rate is one that, after consideration of the relevant competing interests, falls within the zone of reasonableness between confiscation of utility property or investment interests and ratepayer exploitation.” *Id.* at 274 (citing *Appeal of Conservation Law Foundation*, 127 N.H. at 635). The constitutional guarantee of a reasonable rate would trump the mandate of the Scrubber Law should the facts—including the information CLF has requested—show that erosion of the project’s economic feasibility, customer migration, and drop in demand would, in the aggregate, require future rates to be set outside the “zone of reasonableness.” *Easton* and *Appeal of Conservation Law Foundation* require the Commission to undertake that analysis now.

Wherefore, CLF respectfully requests that the Commission provide the following relief:

- A. Rehear and reconsider its Order denying CLF’s Motion to Compel;
- B. Compel PSNH’s responses to CLF-01, Q-CLF-002(b)&(c); CLF-01, Q-CLF-003; and CLF-01, Q-CLF-004; and
- C. Grant such other relief as justice requires.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on this 14th day of September, 2009, a copy of Conservation Law Foundation's Corrected Motion For Rehearing On The Commission's Order Denying Conservation Law Foundation's Motion To Compel PSNH's Responses To Data Requests was served by electronic and First Class Mail on

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