

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT
2103 Term**

DOCKET NO. _____

**APPEAL OF PNE ENERGY SUPPLY, LLC
PURSUANT TO RSA 541:6 AND SUPREME COURT RULE 10
FROM ORDER OF PUBLIC UTILITIES COMMISSION**

James T. Rodier, Esq.
1465 Woodbury Ave., No. 303
Portsmouth, NH 03801-5912
NH Bar No. 8583
603-559-9987
jrodier@mbtu-co2.com

June 12, 2013

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

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NOW COMES PNE Energy Supply, LLC (“PNE”), by and through its attorney, and pursuant to RSA 541:6 and Supreme Court Rule 10, hereby appeals to this Honorable Court from the New Hampshire Public Utilities Commission Order No. 25, 509 (May 14, 2013) denying PNE’s Motion for Rehearing. In support hereof, PNE states as follows:

a. Parties and Counsel

Appellants

PNE Energy Supply, LLC
497 Hooksett Road, Suite 179
Manchester, NH 03104

Counsel: James T. Rodier, Esq.
1465 Woodbury Ave., No. 303
Portsmouth, NH 03801-5912
NH Bar No. 8583

Parties of Record:

Public Service Company of New Hampshire
780 N. Commercial St.
PO Box 330
Manchester, NH 03105-0330

Counsel: Matthew J. Fossum, Esq.
PSNH
780 N. Commercial St.
PO Box 330
Manchester, NH 03105-0330

Retail Energy Supply Association

Counsel: Joey Lee Miranda
Robinson & Cole LLP
280 Trumball Street
Hartford, CT 06103-3597

Office of Consumer Advocate
21 South Fruit St.
Suite 18
Concord, NH 03301-2429

Counsel: Susan W. Chamberlin, Esq.
Office of Consumer Advocate
21 South Fruit St., Suite 18
Concord, NH 03301-2429

Staff of Public Utilities Commission
State of New Hampshire
21 S. Fruit Street, Suite 10
Concord, NH 03301-2429

Counsel: Suzanne G. Amidon, Esq
N.H. Public Utilities Commission
21 S. Fruit Street, Suite 10
Concord, NH 03301-2429

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

b. Administrative Hearing Transcript, Pleadings and Orders

Annexed hereto are the following:

- (1) Order No. 25,320 of the Public Utilities Commission (“PUC” or “Commission”) dated January 26, 2012 (p. 1 hereto);
- (2) PUC Secretarial Letter dated June 19, 2012 granting PNE’s Petition for Intervention in Docket No. DE 11-216. (p. 20 hereto).
- (3) Transcript of Hearing (October 18, 2012) (p. 22 hereto).
- (4) Transcript of Hearing (November 26, 2012) (p. 201 hereto).
- (5) Order No. 25,488 of the Public Utilities Commission dated April 8, 2013 Conditionally Approving Alternative Energy Default Service Pilot Program (p. 259 hereto);
- (6) PNE’s Motion for Rehearing dated May 7, 2013 (p. 289 hereto);
- (7) Public Service Company of New Hampshire’s (“PSNH”) Objection to Motion for Rehearing dated May 8, 2013 (p. 293 hereto);
- (8) PNE’s “brief reply” to PSNH’s Objection dated May 9, 2013 (p. 298 hereto); and
- (9) Order No. 25, 509 dated May 14, 2013 denying PNE’s Motion for Rehearing (p. 299 hereto).

c. Questions Presented

1. Whether, in the context of PSNH’s Alternative Energy Default Service Rate ADE, the Commission’s Order No. 25,488 unlawfully ignores the plain meaning of RSA 374-F:2, I-a which mandates that Default Service be made available only to retail customers who are otherwise without an electricity supplier.

2. Whether the Commission’s Order unlawfully ignores the plain meaning of RSA 369-B:3, IV, (b)(1)(A) which requires that the price of default service shall be PSNH's actual, prudent, and reasonable costs of providing such power.

3. Whether the Commission's Order unlawfully ignores the plain meaning of RSA 125-O:18 which requires that all of the costs of the Scrubber must be recovered through default service.

d. Relevant Constitutional Provisions, Statutes and Rules

There are no Constitutional provisions involved in this appeal. The statutory provisions involved are:

RSA 374-F:2, I-a

RSA 374-F:3, V(c)

RSA 374-F:3, V(b)

RSA 369-B:3, IV(b)(1)(A)

RSA 125-O:18

e. Relevant Contractual Provisions

There are no contracts or related documents in this case.

f. Statement of the Case

This case is an appeal by PNE from the NHPUC's final Orders in Docket No. DE 11-216 authorizing PSNH to implement an Alternative Energy Default Service Rate ADE.

On September 23, 2011, PSNH filed a Petition for approval of an Alternative Energy Default Service Rate ADE. PSNH designed Rate ADE as a new energy service rate for customers who return to PSNH for energy service after taking energy service from a competitive supplier.

In Order No. 25,320 (January 26, 2012), the Commission denied PSNH's petition for Rate ADE as filed on September 23, 2011 and directed PSNH to redesign Rate ADE to address certain deficiencies identified by the Commission. On April 27, 2012, PSNH filed a revised Rate ADE that, according to PSNH, addressed the concerns identified in Order No. 25,320.

The Commission approved PNE as a Competitive Electricity Power Supplier on September 22, 2011. PNE's Petition for Intervention in Docket No. DE 11-216 was granted by the Commission on June 19, 2012.

Following discussions among the parties, PSNH, the OCA and Staff entered into a partial settlement agreement which was filed on October 12, 2012. The Settlement Agreement provided that PSNH would implement Rate ADE as a pilot program for a period of 36 months.

Hearings on the merits of the partial settlement agreement were held on October 18 and November 26, 2012. Subsequently, Order No. 25,488 (April 8, 2013) conditionally approved the Rate ADE Pilot Program. In so doing, the Commission ruled as follows:

After review of the Settlement and the testimony of parties to this docket, we find that the Settlement is just and reasonable and in the public interest, as conditioned herein. It is also consistent with prior orders and the relevant statutes. RSA 369-B:3, IV(b)(1)(A) requires PSNH to set the price of default service to be its “actual, prudent, and reasonable costs of providing such power, as approved by the commission.” *PSNH proposes to calculate Rate ADE at its marginal cost of providing power to the customers who take service under the rate, plus an adder that reflects the non-operating costs of the Scrubber, the latter of which is now known.* We find that the rates as now proposed by PSNH and as set forth in the Settlement addresses concerns reflected in our earlier orders in this proceeding. The calculation reflects PSNH’s incremental or marginal cost of providing service to those customers taking Rate ADE, as required by RSA 369-B:3, IV(b)(1)(A), plus an adder that is designed to provide benefits to Rate DE customers. As customers take service under Rate ADE, the adder would provide a source of additional revenue that will flow through to the Rate DE reconciliation, thereby resulting in a reduction to Rate DE, all else being equal. Under those circumstances, we find that the rates are just and reasonable as required by RSA 378:7.

Order No. 25,488 (April 8, 2013) at 16, 17. (Emphasis added.)

Notably, Order No. 25,488 includes a rather robust dissent by Commissioner Harrington.

In its Motion for Rehearing (May 7, 2013), PNE contended that final Order No. 25,488 fails to conform to: (1) RSA 374-F:2, I-a, defining default service customers as those otherwise without an electricity provider; (2) RSA 369-B:3, IV, (b)(I)(A) requiring default service rates to include PSNH’s actual, prudent and reasonable costs of providing such power; and (3) RSA 125-O:18 requiring the costs of the PSNH Scrubber to be recovered through default service rates.

This appeal arises from the PUC’s denial of PNE’s Motion for Rehearing by Order No. 25,509 (May 14, 2013), the crux of which is as follows:

We find that PNE in its motion fails to identify any new facts and merely restates arguments that it had previously made in this docket. Having already addressed

these arguments and the record in this case in Order No. 25,488, we will deny PNE's motion for rehearing.

Order No. 25,509 (May 14, 2013) at 2.

The Commission's rulings and Orders, as explained below, are unlawful and unreasonable because they are contrary to the plain language of the applicable statutes. The touchstone for statutory interpretation is the plain meaning of the statute considered as a whole:

Statutory interpretation is a question of law that we review *de novo*. We are the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole. In interpreting a statute, we first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning. Unless we find that the statutory language is ambiguous, we need not look to legislative intent. Furthermore, we interpret statutes in the context of the overall statutory scheme and not in isolation.

Bond v. Martineau, 164 N.H. 210, 213-14 (2012) (citations omitted).

Notwithstanding the Commission's statement in Order No. 25,509 that it had previously ruled on the issues raised in PNE's Motion for Rehearing earlier in the proceeding, the Commission has not ruled on the issue with respect to the plain meaning of RSA 374-F:2, I-a. RSA 374-F:2, I-a states that "Default Service means electricity supply that is available to retail customers who are otherwise without an electricity supplier." Accordingly, Rate ADE is a proposed default energy service rate that does not comply with the requirements of RSA 374-F:2, I-a. As noted above, default service is only "available to retail customers who are otherwise without an electricity supplier." (Emphasis added.) Under cross-examination by PNE, the PSNH expert witness testified as follows:

Q. ... Your position, let me see if I got it right. A customer is with a competitive supplier, they terminate their contract. So they qualify for Rate ADE, because they are otherwise without a supplier?

A. (Hall). Correct.

Transcript (10-18-12) at 53

The Commission apparently has implicitly ruled that Rate ADE is for any customer who, for whatever reason, elects not to have a competitive supplier supply their energy. Thus, the Commission interprets RSA 374-F:2, I-a as if it reads that default service is available to any customer that does not *choose* or *select* an electricity supplier. This is inconsistent with the plain,

literal meaning of RSA 374-F:2, I-a as it was enacted by the Legislature. According to the Commission's Order, a customer who terminates their contract with a supplier take service under Rate ADE would otherwise be without an electricity supplier.

Moreover, pursuant to RSA 374-F:3,V (c)¹, the context for and purpose of default service is to provide a safety net and to assure universal access and system integrity. The design of Rate ADE, most assuredly has nothing to do with providing a safety net or assuring universal access as envisioned by RSA 374-F and is inconsistent with the words of the statute taken as a whole. A default service rate that is only available to customers who are literally "otherwise without an electricity supplier" is entirely consistent with the statutory mandate that the purpose of default service is to provide a safety net and to assure universal access and system integrity. It is also quite clear that the Legislature did not intend default service to be used as a perpetual "option" by customers: "As competitive markets emerge, customers should have the *option* of stable and predictable ceiling electricity prices *through a reasonable transition period...*". RSA 374-F:3, V(b)². (Emphasis added.)

Secondly, the Commission's Orders also ignore the plain meaning of the statute which requires that "[t]he price of such default service shall be PSNH's actual, prudent, and reasonable costs of providing such power... ." RSA 369-B:3, IV, (b)(1)(A). According to the Commission, "PSNH proposes to calculate Rate ADE at its marginal

¹ Default service should be designed to provide a safety net and to assure universal access and system integrity. Default service should be procured through the competitive market and may be administered by independent third parties. Any prudently incurred costs arising from compliance with the renewable portfolio standards of RSA 362-F for default service or purchased power agreements shall be recovered through the default service charge. The allocation of the costs of administering default service should be borne by the customers of default service in a manner approved by the commission. If the commission determines it to be in the public interest, the commission may implement measures to discourage misuse, or long-term use, of default service. Revenues, if any, generated from such measures should be used to defray stranded costs. RSA 374-F:3,V (c).

² As competitive markets emerge, customers should have the option of stable and predictable ceiling electricity prices through a reasonable transition period, consistent with the near term rate relief principle of RSA 374-F:3, XI. Upon the implementation of retail choice, transition service should be available for at least one but not more than 5 years after competition has been certified to exist in at least 70 percent of the state pursuant to RSA 38:36, for customers who have not yet chosen a competitive electricity supplier. Transition service should be procured through competitive means and may be administered by independent third parties. The price of transition service should increase over time to encourage customers to choose a competitive electricity supplier during the transition period. Such transition service should be separate and distinct from default service. RSA 374-F:3, V(b)

cost of providing power to the customers who take service under the rate, plus an adder that reflects the non-operating costs of the Scrubber, the latter of which is now known.” *Order No. 25,488* (April 8, 2013) at 17.

PSNH’s proposed calculation of Rate ADE includes only the marginal cost of power, plus an “adder” that reflects only the non-operating costs of the Scrubber. There is no margin built into Rate ADE to cover any of the myriad of costs which will be incurred by PSNH in administering Rate ADE. According to Commissioner Harrington’s dissent,

[o]ur statutes provide that the costs of administering default service should be borne by the customers of such service. RSA 374-F:3, V(c) (“The allocation of the costs of administering default service should be borne by the customers of default service in a manner approved by the commission.”). Here, however, it appears that the costs of administering the alternative rate, or ADE, will not be borne by ADE customers at all, but will ultimately be charged to PSNH’s distribution customers, some of whom will be neither ADE nor DE customers – thus in direct conflict with the statute.

Order No. 25,488 (April 8, 2013) at 23.

Finally, the Commission’s Orders also ignore the plain meaning of RSA 125-O:18³ which requires that “all” of the Scrubber must be recovered through default service, if the utility so elects. PSNH has elected to do so through Rate DE. Accordingly, RSA 125-O:18 requires that all of the costs of the Scrubber, including operating costs, are required to be recovered through Rate ADE, not just some of them. The Commission’s Order allows PSNH to recover only the non-operating costs of the Scrubber through Rate ADE.

Again, according to Commissioner Harrington’s dissent,

ADE rates are based on PSNH’s forecast of the marginal cost to provide full requirements service to the New Hampshire load zone plus an adder that, under the latest proposal, will be set equal to the non-operating costs of the Scrubber. There is simply no justification for using the non-operating costs of the Scrubber to calculate the adder component of the ADE rate.

Id. at 27.

³ If the owner is a regulated utility, the owner shall be allowed to recover all prudent costs of complying with the requirements of this subdivision in a manner approved by the public utilities commission. During ownership and operation by the regulated utility, such costs shall be recovered via the utility's default service charge. In the event of divestiture of affected sources by the regulated utility, such divestiture and recovery of costs shall be governed by the provisions of RSA 369:B:3-a. *RSA 125-O:18*

Because the calculation of Rate ADE does not include operating as well as non-operating costs of the Scrubber, it does not comply with the plain meaning of RSA 125-O:18 and it is therefore unlawful.

g. Jurisdiction:

The jurisdictional basis for this Appeal is RSA 541:6 and RSA 365:21.

h. Statement of Reasons Why a Substantial Basis Exists for a Difference of Opinion on the Questions and Why Acceptance of the Appeal would Protect a Party from Substantial and Irreparable Injury, or Present the Opportunity to Decide, Modify, or Clarify an Issue of General Importance in the Administration of Justice:

This case presents questions of statutory construction which are reviewed *de novo* by the Court. As noted above, there is a substantial basis for the difference of opinion among the parties and the Commission itself regarding the meaning of the statutory requirements contained in RSA 374-F:2, I-a, defining default service customers as those without an electricity provider in the context of PSNH's Rate ADE; (2) RSA 369-B:3, IV, (b)(I)(A) requiring default service rates to include PSNH's actual, prudent and reasonable costs of providing such power; and (3) RSA 125-O:18 requiring the costs of the PSNH Scrubber to be recovered through default service rates.

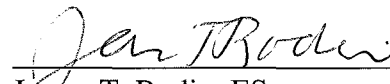
Moreover, questions of statutory construction arising at the PUC are an issue of general importance in the administration of justice because of the potential impact they have on energy and telecommunication consumers in New Hampshire.

i. Issues Preserved for Appellate Review

Every issue specifically raised has been presented to the administrative agency and has been properly preserved for appellate review by a properly filed pleading.

Dated: June 12, 2013

Respectfully submitted,
PNE ENERGY SUPPLY, LLC
By its Attorney


James T. Rodier, ESq
1465 Woodbury Ave., No. 303
Portsmouth, NH 03801-5912
NH Bar No. 8583
603-559-9987
jtrodier@mbtu-co2.com

CERTIFICATION OF COMPLIANCE

On June 12, 2013, I served copy of the foregoing on each party of record in this proceeding as listed below:

Parties of Record:

Public Service Company of New Hampshire
780 N. Commercial St.
PO Box 330
Manchester, NH 03105-0330

Counsel: Matthew J. Fossum, Esq.
PSNH
780 N. Commercial St.
PO Box 330
Manchester, NH 03105-0330

Retail Energy Supply Association

Counsel: Joey Lee Miranda
Robinson & Cole LLP
280 Trumball Street
Hartford, CT 06103-3597

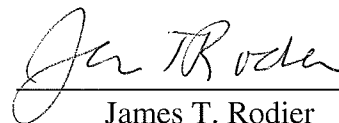
Office of Consumer Advocate
21 South Fruit St.
Suite 18
Concord, NH 03301-2429

Counsel: Susan W. Chamberlin, Esq.
Office of Consumer Advocate
21 South Fruit St., Suite 18
Concord, NH 03301-2429

Staff of Public Utilities Commission
State of New Hampshire
21 S. Fruit Street, Suite 10
Concord, NH 03301-2429

Counsel: Suzanne G. Amidon, Esq
N.H. Public Utilities Commission
21 S. Fruit Street, Suite 10
Concord, NH 03301-2429

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


James T. Rodier