

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No: 2013-0307

APPEAL OF PSNH RATEPAYERS

**APPEAL BY PETITION PURSUANT TO RSA 541:6
AND SUPREME COURT RULE 10
(PUBLIC UTILITIES COMMISSION)**

**REPLY BRIEF FOR APPELLANT
PSNH RATEPAYERS**

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ARGUMENT

Public Service Company of New Hampshire (“PSNH”) and the State of New Hampshire (the “State”) make policy and practicality arguments that must fail because they ignore the plain and unambiguous language of New Hampshire’s statutory Least Cost Integrated Resource Planning (“LCIRP”) requirements which are set forth in RSA 378:37 through :42. Furthermore, the rate setting principles articulated in RSA 369-B:3, IV(b)(1)(A) do not negate the LCIRP requirements of RSA 378:38 *et seq.*; those statutes must be read together to determine whether a rate change is permissible under State law. PSNH’s and the State’s statutory and policy arguments must fail, and the Court should grant the relief requested by George Chase, Alexandra Dannis, James Dannis, William Hopwood, Amy Matheson, and Janet Ward (together “PSNH Ratepayers”).

I. “Policy” and “Practicality” Arguments Cannot Supersede the Plain Language and Meaning of RSA 378:37 through 42.

PSNH and the State urge this Court to ignore the unambiguous language of the statutes at issue and basic rules of statutory interpretation. They ascribe meaning to “practice” and “policies” rather than the plain language and intent of the legislature, disregarding the explicit and unambiguous text in RSA 378:37 through 42. *See Brief of Appellee Public Service Company of New Hampshire* at 13 [hereinafter “PSNH Brief”] (asserting that the LCIRP requirements and statutory intent is “unworkable”); *id.* at 17 (asserting that the Public Utilities Commission has applied a “practical” and “plausible” interpretation of the LCIRP statute); *Brief for the State of New Hampshire as Amicus Curiae* at 3 [hereinafter “State Brief”] (asserting that the PSNH Ratepayers’ reading of RSA 378:40 leads

to “illogical and unworkable results”). These assertions, however, cannot be excuses for failing to meet clear and unambiguous statutory requirements.

Further, the State cannot rely on *Town of Seabrook*, 163 N.H. 635 (2012) to support its conclusions, because deference is not owed to the Commission where its interpretation “clearly conflicts with the express statutory language, or if it is plainly incorrect.” *Id.* At 644.

First, that RSA 378:38 requires “at least biennial[]” LCIRP filings by utilities is undeniable. Neither the State nor PSNH cite a definition for “biennial” to support their claim that the statute does not require an LCIRP filing “every other year.” The plain meaning of the statute is further clarified by the Public Utilities Commission (“PUC” or “Commission”) Order that the legislature relied upon in promulgating RSA 378:38. *Appendix to Brief for Appellant PSNH Ratepayers* [hereinafter “App.”] at 221 (indicating reliance on the PUC’s “current practice of requiring electric utilities to file least cost energy plans at least biennially”); *id.* at 222-228 (providing, as part of legislative history, a memorandum from PUC to the legislature indicating reliance on Commission Order 19,052); *Re Public Service Company of New Hampshire*, Order No. 19,052 (April 17, 1988), App. at 93, 104 (“We will require the utilities to provide the reports and analyses of the integrated least cost resource plan to the commission by April 15th, *biennially in even numbered years.*”) (emphasis added).¹ Claims

¹ PSNH claims that Order 19,052, which states that the biennial requirement means that LCIRPs must be filed “biennially in even number years” should not stand for the proposition that the legislature intended the word “biennially” to have its dictionary meaning, as set forth in the PSNH Ratepayers’ brief. *PSNH Brief* at 18. However, the legislative history clearly demonstrates that the General Court relied upon Order 19,052, as well as indications from the Commission that it was statutorily enacting the Commission’s already-standing policies with respect to LCIRP filings. See *PSNH Ratepayer Brief* at 9-10. Thus, PSNH’s claims are unfounded.

that the phrase “at least biennially” is ambiguous or that it is unclear when the two-year period begins ignore the statute’s plain meaning.

PSNH claims that the statute is ambiguous because it is unclear “what date or event triggers the two year timeframe” *PSNH Brief* at 14, 15-17. The term “at least biennially” requires no “triggering event.” Absent a waiver under RSA 378:38-a, a utility must file its LCIRP every other year, which PSNH failed to do.² During the period at issue in this case, PSNH had filed its last LCIRP on September 30, 2010, but had not made another LCIRP filing within two years of that date, nor sought a waiver of that filing requirement. It nonetheless received approval to increase its rates by 34% on December 28, 2012. *PSNH Ratepayers Brief* at 1-2. Both the dictionary definitions and the legislative history indicate the meaning of “at least biennially” is every other year.³ *PSNH Ratepayer Brief* at 6-13. This is unambiguous. Under no circumstances could the requirement to file “at least biennially” mean “two years after the last approval.” There is no ambiguity in the statute that would permit PSNH’s and the State’s reading, and the legislature need not have used additional words to indicate its intent.

Second, in attempting to assert that the biennial requirement does not apply, PSNH and the State ignore the plain language of RSA 378:40. *PSNH Brief*

² To the extent that PSNH claims that the Commission implicitly waived the biennial filing requirement, such an argument is without merit. *PSNH Brief* at 16. In prior orders regarding LCIRP deadlines, the Commission has granted a waiver providing a brief extension to the filing requirement. See *PSNH Ratepayers Brief* at 14-15. In the orders at issue here, the Commission specifically refused to recognize any obligation to waive the biennial filing requirement. Therefore, no implicit waiver can be found. See *Addendum to PSNH Ratepayers Brief* at 28-29, 40-41.

³ PSNH apparently agrees with this conclusion. *PSNH Brief* at 16 (admitting that the statute requires an “act to occur every two years”).

at 22; *State Brief* at 4-5.⁴ They erroneously argue that the second sentence of RSA 378:40 stands for the proposition that PSNH need not file its LCIRP “at least biennially” because RSA 378:40 also permits a rate change to go into effect if 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 378:38, RSA 378:40. RSA 378:40 plainly allows the PUC to approve a rate change so long as an LCIRP filing has been made “in compliance with RSA 378:38,” *even if* the review process is ongoing. In other words, if PSNH had filed a new LCIRP on September 29, 2012 (in compliance with RSA 378:38) and the Commission was continuing to review that LCIRP, the rate change at issue in this case may have been appropriately granted. RSA 378:40 allows rate changes to go into effect if review of the required biennial filing is ongoing.⁵ *Id.* However, RSA 378:40 does not obviate the plain meaning of RSA 378:38, that an LCIRP filing must be made “at least biennially.”

Third, PSNH and the State argue that the plain meaning of the statute is not practical but they fail to recognize that the statutory structure permits flexibility to address special circumstances. *See, e.g., PSNH Brief* at 20; *State Brief* at 5-6. To be clear, the filing requirement falls on the utility. PSNH can

⁴ The State appears to misunderstand the PSNH Ratepayers’ argument. It asserts that “Appellants argue that because the 2010 LCIRP was not filed within two years of the filing of the 2007 LCIRP, it was not filed in compliance with RSA 378:38 and, consequently, could not form the basis for approval of a rate change.” *State Brief* at 4. While it is factually true that PSNH failed to meet the “at least biennially” requirement for its 2010 LCIRP, the LCIRP at issue in this case is the one that PSNH was obligated to file (or obtain a waiver for) in 2012. PSNH filed an LCIRP on September 30, 2010, and, as of the Commission’s approval of PSNH’s rate increase in December 2012, PSNH had not filed its next LCIRP or obtained a waiver from that requirement. That failure is at issue in this case.

⁵ The State’s assertion that RSA 378:40 permits rate changes “regardless of whether LCIRPs are filed on a strict two-year basis” has no foundation in the statutory text or intent, and the State provides no support for its conclusion. *State Brief* at 6.

control whether or not it files a timely LCIRP, and whether or not it seeks a waiver provision as permitted under RSA 378:38-a.⁶ In addition, while PSNH and the State assert that utilities require guidance from the Commission before filing their next LCIRP, there is nothing in the statutory scheme that would prevent a utility from seeking, and the Commission from providing, said guidance even if a previous LCIRP is still undergoing review. *See, e.g., State Brief at 5.*

PSNH and the State attempt to amend the statutory requirements with practicality and policy arguments that fail to acknowledge the statute's plain meaning. Changes to the clear statutory LCIRP filing mandates must be made by the legislature, not PSNH or the Commission. In the meantime, the PUC's order on PSNH's 34 percent rate increase must be reversed.

II. RSA 369-B Does Not Render the LCIRP Filing Requirements a Nullity

A. RSA 369-B and RSA 378 work in tandem, not in opposition.

PSNH claims that RSA 369-B obligates the Commission to approve a rate increase *even if* a utility has not complied with RSA 378:38. This argument fails to recognize that the two statutes are procedurally and substantively related and fully complementary. A PSNH energy service rate cannot meet the RSA 369-B standard of "actual, prudent and reasonable" if PSNH has failed to meet its statutory LCIRP obligations, set forth in RSA 378:37 through 42. RSA 369-B:3, IV(1)(A). Chapter 378 and Chapter 369-B work together to protect ratepayers by assuring that PSNH conducts a periodic and comprehensive planning process to ensure that energy needs are met at the

⁶ It is clear from the legislative history that the waiver provision in RSA 378:38-a was implemented to address the types of concerns raised by PSNH. *See PSNH Brief at 19; App. at 250.*

lowest reasonable cost and the rates it charges for default service are actual, reasonable and prudent.

PSNH argues that RSA 369-B:3, IV's statement that "[n]otwithstanding any law, rule, or regulation to the contrary . . ." precludes enforcement of the LCIRP requirements in RSA 378:37 through 42. *PSNH Brief* at 9-10. However, PSNH fails to demonstrate that the LCIRP requirements are contrary to the requirements in RSA 369-B:3. Nor can it. The LCIRP process, including the filing requirement, is one part of the analysis that the PUC must undertake when it sets rates under RSA 369-B. As a matter of law, to determine the prudence and reasonableness of PSNH's rate, the Commission must take into account whether the utility acted in accordance with the statutory requirements set forth in RSA 378:37 *et seq.* See RSA 378:40 (indicating that rates may not be increased if the biennial filing requirement has not been met); RSA 378:41 (stating that "[a]ny proceeding before the commission initiated by a utility shall include, within the context of the hearing and decision, reference to conformity of the decision with the least cost integrated resource plan most recently filed and found adequate by the commission") Thus, there is no statutory conflict. Moreover, PSNH's argument must fail as it is tantamount to advocating that RSA 378:40 was repealed by implication, a result that is disfavored. *Professional Fire Fighters of Wolfeboro v. Town of Wolfeboro*, 164 N.H. 18, 22 (2012) (indicating that repeal by implication is disfavored).⁷ To the contrary, RSA 369-B:3 and RSA 378:37-41 complement one another and can be read harmoniously.

⁷ "Repeal by implication occurs when 'the natural weight of all competent evidence demonstrates that the purpose of [a] [new] statute was to supersede [a] former statute,' but the legislature nonetheless failed to expressly repeal the former statute." *In re Regan*, 164 N.H. 1, 7 (2012) (quoting *Ingersoll v. Williams*, 118 N.H. 135, 138 (1978)). Repeal by implication is "disfavored." *Professional Fire Fighters of Wolfeboro*, 164 N.H. at 22. The Court recently identified two exceptions to this general rule: (1) where the "later act conflicts with the earlier act" and (2) "the later act clearly is intended to occupy the entire field covered by the prior enactment." *Professional Fire Fighters of Wolfeboro*, 164 N.H. at 22. Neither of these exceptions to the general rule disfavoring repeal by implication exists in this case.

Grand China v. United Nat'l Ins. Co., 156 N.H. 429, 431 (2007) (“When interpreting two statutes that deal with a similar subject matter, [the Court will] construe them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statutes.”).

More specifically, “[t]he primary objective” of the LCIRP process is to “develop and implement an integrated resource plan that satisfies customer energy service needs at the lowest overall cost consistent with maintaining supply reliability.” *Order Approving Partial Settlement Agreement and Resolving Disputed Issue*, Order No. 24,695 (Nov. 8, 2006), App. at 138, 160. It is “a ‘spot-check’ of PSNH’s planning efforts in the various statutory areas of consideration . . .” *Order Accepting Integrated Resource Plan, and Delineating Parameters for Succeeding Integrated Resource Plans*, Order No. 25,459 (Jan. 29, 2013), App. at 197, 213. Part of the legislature’s requirement regarding planning is that it occurs on an ongoing basis, biennially. RSA 378:38. In the context of this biennial requirement, the legislature provided an enforcement mechanism – rates cannot be changed unless a utility is meeting its ongoing planning obligation. RSA 378:40.

Meanwhile, RSA 369-B was enacted as part of the State’s efforts to restructure the electric industry and to “securitize” the rights of PSNH’s bondholders. See RSA 369-B:1. When the legislature halted the divestiture of PSNH’s electric generation facilities it directed the PUC to issue a financing order in accordance with the General Court’s dictates. *See generally* RSA 369-B:1. RSA 369-B:3 states that PSNH’s default service rates must be based on PSNH’s “actual, prudent, and reasonable” costs. RSA 369-B:3, IV(b)(1)(A). In determining whether PSNH’s costs are “prudent[] and reasonable” the

PUC must consider whether the utility's power supply activities comply with its most recent LCIRP. *See RSA 369-B:3, IV(b)(1)(A); RSA 378:41* (requiring the PUC to indicate conformity with LCIRP in its orders); *Order Approving 2010 Energy Service Rate*, Order No. 25,061 (Dec. 31, 2009), *Supplemental Appendix to Brief of Appellee Public Service Company of New Hampshire* at 71, 101-102 (discussing compliance with LCIRP in context of PSNH ratesetting); *Order Approving 2013 Energy Service Rate*, Order No. 25,448 (Dec. 28, 2012), *Addendum to PSNH Ratepayers Brief* at 21, 28-29 (same). PSNH is the only electric utility in New Hampshire which continues to be vertically integrated, thereby making its ongoing planning obligations even more important. *Order on Request for RSA 378:38-a Waiver*, Order No. 24,435 (Feb. 25, 2005), App. at 132-35. RSA 369-B permitted PSNH to maintain ownership of its generation resources at a time when other utilities divested. RSA 369-B:3, IV(b)(1)(A); RSA 374-F:3, III. The fact that PSNH continues to be vertically integrated underscores the need for it to engage in proper planning. *See PSNH Ratepayers Brief* at 12. The State's assertions regarding the import of LCIRPs for PSNH in particular underscore this need. *State Brief* at 6-7. LCIRPs are *more* important for PSNH than for other utilities, and PSNH should be held to the statutory standards which were put into place before deregulation occurred. Accordingly, "at least biennial" consideration of PSNH's LCIRP is entirely consistent with the PUC's obligation to determine PSNH's rates based on its "actual, prudent and reasonable" costs.

Finally, PSNH provides no evidence that "the later act [RSA 369-B:3, IV] clearly is intended to occupy the entire field covered by the prior enactment." *Professional Fire Fighters of Wolfeboro*, 164 N.H. at 22. RSA 369-B makes no mention of planning

requirements, and no reference to how the PUC must determine that PSNH’s costs are “prudent[] and reasonable.” RSA 369-B:3, IV(b)(1)(A). Under PSNH’s analysis, the PUC would be compelled to find that PSNH’s rates are prudent and reasonable even though it failed to meet a legislatively-mandated planning requirement. This position fails to recognize that in enacting RSA 369-B, the legislature could have repealed the LCIRP requirements, but did not. PSNH essentially urges this court to find the requirements of RSA 378:38 and :40 superfluous – a result that is illogical and improper. *See State v. Rollins-Ercolino*, 149 N.H. 336, 341 (2003) (court will not interpret statute to require an illogical result). The PUC has continued to require LCIRP filings, and the legislature has not amended the requirements set forth in RSA 378:38 and :40, even though more than ten years have passed since RSA 369-B:3 was enacted. RSA 369-B provides no exemption from the LCIRP requirement and plainly does not repeal it.

B. PSNH’s procedural claims must fail.

PSNH’s assertion that the PSNH Ratepayers failed to raise required arguments is without merit. *PSNH Brief* at 8. PSNH asserts that the PSNH Ratepayers “contend only that PSNH failed to meet a filing requirement” and that they should have appealed the PUC’s conclusions under RSA 369-B. The PSNH Ratepayers plainly argued in their motion for rehearing and on appeal that the PUC did not have the authority to approve the PSNH rate increase because, as a matter of law, PSNH failed to meet its obligations under RSA 378:40. *See, e.g., PSNH Ratepayers’ Brief* at 18 (“This Court should determine ... that the PUC was prohibited from granting PSNH its 34% rate increase as of January 1, 2013.”). The PSNH Ratepayers have replied herein to PSNH’s claim that RSA 369-B precludes a finding that RSA 378:40 applies. The PSNH Ratepayers were

not obligated to raise and respond to PSNH's RSA 369-B arguments in their opening brief.

Further, while PSNH claims that this Court must examine the PUC's "factual determinations" *PSNH Brief* at 11, it is clear from the record that the issues before this Court are simple and legal in nature – whether or not, under the relevant statutory provisions, the PUC can approve a rate increase when the required LCIRP has not been filed. *See PSNH Ratepayers Brief* at 6-13. No factual determination is necessary.

C. PSNH's attempt to add questions presented to this appeal is untimely and must be rejected.

This appeal was filed by the PSNH Ratepayers pursuant to RSA 541:6 and New Hampshire Supreme Court Rule 10. PSNH filed no appeal or cross appeal, and did not provide any questions presented to the Court or the Parties pursuant to Rule 10. It now seeks to add questions presented to this case. *PSNH Brief* at (v). PSNH has no authority to do so at this juncture – after the opening brief has been filed. Thus, PSNH's questions presented should be disregarded.

CONCLUSION

For the reasons set forth above and for the reasons set forth in the Appellant's Brief, this Court should determine that the PUC's construction of the "at least biennially" mandate was unlawful and unreasonable, and that the PUC was prohibited from granting PSNH its 34% rate increase as of January 1, 2013. This case should be remanded for the purpose of determining how to address refunds due to ratepayers for amounts overpaid during the period of January 2013 through June 2013. *See, e.g., Public Service Co. of New Hampshire v. State*, 113 N.H. 497, 511 (1973).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief has on this 6th day of February, 2014 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 Street, Concord, NH 03301.

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