

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2013 TERM

Docket No: 2013-0307

APPEAL OF PSNH RATEPAYERS

APPELLANTS' OBJECTION TO APPELLEE'S SUPPLEMENTAL MOTION
FOR SUMMARY DISPOSITION

NOW COME George Chase, Alexandra Dannis, James Dannis, William Hopwood, Amy Matheson, and Janet Ward (together "PSNH Ratepayers" or "Appellants"), by and through their attorneys, Orr & Reno, P.A., and respectfully object to Public Service Company of New Hampshire's ("PSNH" or the "Company") Supplemental Motion for Summary Disposition ("Supplemental Motion"). In support of their objection, the PSNH Ratepayers state as follows:

Introduction

As explained in detail in the Appellants' Memorandum of Law in Support of Objection to Appellee's Motion for Summary Disposition and Summary Affirmance ("Appellants' Mem."), this case concerns the Public Utilities Commission's ("PUC" or "Commission") approval of a rate increase in contravention of RSA 378:37 *et seq.*, which requires that a utility comply with the biennial filing requirements for its Least Cost Integrated Resource Plan ("LCIRP") prior to obtaining a rate change. *See generally Appellants' Mem.* Question Two presented in the Appeal by Petition is whether the PUC erred in permitting PSNH to raise its default service rates despite PSNH's failure to file its statutorily-required LCIRP biennially. PSNH's Supplemental Motion asserts that this

question has been rendered moot by two events: 1) PSNH's June 21, 2013 LCIRP filing, and 2) the PUC's decision approving a new default service rate effective July 1, 2013.

However, as explained below, neither of these events renders moot Appellants' Question Two.

PSNH May Not Supplement the Record

As a preliminary matter, PSNH should not be permitted to supplement the record pursuant to RSA 541:16 and New Hampshire Supreme Court Rule 25, because the criteria in the statute and rule have not been met. RSA 541:16 states:

If the commission shall rescind the order appealed from the appeal shall be dismissed; if it shall alter, modify, or amend the same such altered, modified, or amended order shall take the place of the original order complained of, and the court shall render judgment with reference thereto in said appeal as though said order had been made by the commission in the first instance, after allowing any amendments of the pleadings or other incidental proceedings desired by the parties which the changed situation may require.

RSA 541:16. First, the Commission has not rescinded the orders at issue in the Appeal by Petition. Further, as explained further below, the Commission's June order, adjusting the electricity rate beginning on July 1, 2013 did not "alter, modify, or amend" either the Commission's December order or its April order on rehearing. Therefore, RSA 541:16 does not support PSNH's argument concerning supplementing the record in this case. In addition, Rule 25(2) permits a motion for summary disposition to be filed more than 20 days from the filing of the appeal only if "such motion is for the purpose of bringing to the court's attention the effect that an opinion issued since the filing of the docketed case may have on the docketed case." N.H. Sup. Ct. R. 25(2). Because the rule does not reference administrative decisions (it appears to refer to court opinions that may change the legal disposition of a case) and, as explained below, because the PUC's June decision

has no effect on this case, PSNH does not meet the Rule 25(2) standard for late-filed motions for summary disposition. As a result, PSNH should not be permitted to supplement the record in this case, and it also should not be permitted to bring its supplemental motion before this Court.

Question Two Is Not Moot

As stated in the Appellants' Memorandum, the LCIRP requirement is a legislatively-mandated part of New Hampshire's state energy policy and must be performed biennially. *Appellants' Mem.* at 4, 10-11. A regulated utility must make this biennial filing before rates can be changed.¹ RSA 378:38; RSA 378:40. The Commission has recognized the importance of this process and that it is an ongoing "spot check" of a utility's planning efforts. *Order Accepting Integrated Resource Plan, and Delineating Parameters for Succeeding Integrated Resource Plans*, Order No. 25,459 (Jan. 29, 2013), Supp. A. at 18.

The "subsequent proceedings" referenced by PSNH – its June 2013 LCIRP filing and its energy service rate change beginning July 1 – do not render Question Two moot because they are irrelevant to this Court's consideration of the PSNH Ratepayers' Appeal by Petition. *Supp. Mot.* at 2. The Energy Service Rate is set annually, and sometimes a mid-year adjustment is provided to address over- or under-recoveries. *Order Granting Petition as Modified by Settlement Agreement*, Docket DE 05-178, at 13, 26 (Jan. 20, 2006), attached hereto as Exhibit A. The question before the Court is whether PSNH's initial 2013 Energy Services Rate could be increased by 34% without its compliance with

¹ PSNH inexplicably asserts that the second sentence of RSA 378:40 does not support the PSNH Ratepayers' assertion. *Supp. Mot.* at 4, n.4. That sentence merely indicates that the biennial filing must be made before a rate may be changed, whether or not the Commission has finished its review of the filed plan. RSA 378:40.

the dictates of RSA 378:37 *et seq.* If the answer to this question is “no,” then the rate increase that was charged to customers beginning in January simply may not be recovered by PSNH. To find otherwise would be to find that the biennial requirement is meaningless, and would permit a utility to ignore its statutory obligations.

PSNH asks this Court to find that because its 2013 Energy Service Rate was recently adjusted for over- or under-recoveries, its failure to meet the statutory LCIRP obligation before its January rate increase is moot. *Supp. Mot.* at 4. According to PSNH, even if it were not permitted to increase its rates in January, it could nonetheless retroactively recover its requested rate increase as a result of its June 2013 LCIRP filing. *Supp. Mot.* at 5. PSNH’s argument must fail as it would render the biennial filing requirement in RSA 378:38 meaningless. Allowing a utility to ignore its clear statutory biennial planning obligation, and allowing it to retroactively raise rates contravenes RSA 378:40. The statutory scheme set forth in RSA 378:37 *et seq.* certainly does not support this after-the-fact rate increase and attempted circumvention of unambiguous planning requirements. PSNH’s argument wishfully substitutes the *pro forma* under- and over-recovery accounting process² for the proper legal analysis required to determine whether

² To the extent that PSNH argues that its failure to file the obligatory LCIRP is or will be cured via rate reconciliation, *see Supp. Mot.* at 4, n. 4, the Commission has indicated that LCIRPs are not to be considered in *post hoc* reconciliation. *Order Defining Scope of the Proceeding and Granting Motion to Intervene*, Docket DE 13-108 (July 9, 2013), attached hereto as Exhibit B. According to this recent Order, regarding the reconciliation analysis which occurs after revenues and expenses have been actually incurred,

[w]ith the exception of whether power purchases and generation decisions are consistent with the company’s least cost integrated resource plan (LCIRP), PSNH’s planning process and least cost procurement protocols will not be considered [via reconciliation]. Least cost planning, forecasts of power needs, costs, or related factors are considered in the context of PSNH’s LCIRP filed pursuant to RSA 378:37 and 378:38, and will be considered in the context of an LCIRP docket or in a *future energy service rate setting docket*, as appropriate.

Id. (emphasis added). PSNH attempts to draw its noncompliance with the LCIRP requirements into a *post hoc* analysis, which is contrary to the PUC’s recent enunciation of LCIRP relevance. As a result, PSNH’s assertion that its rate increase should be permitted retroactively due to its late filed LCIRP is erroneous.

it can charge a 34% increase in its rates even though it failed to meet its planning obligations.

In support of its claim that the Appellants' second question presented is moot, PSNH further relies on RSA 369-B:3, IV(b)(1)(A), which requires recovery of "actual, prudent, and reasonable" costs. *Supp. Mot.* at 4. PSNH's mootness argument essentially rests on the premise that PSNH is entitled to recover *all* of its increased rates from ratepayers even though it failed to comply with its statutory obligations. This conclusion is untenable – PSNH's costs simply cannot be "prudent[] and reasonable" if it has violated its obligations set forth in RSA 374:37 *et seq.* *Appellants' Mem.* at 11-13. The Company's subsequent, late-filed LCIRP does not cure the violation or otherwise entitle it to recover improperly-imposed rate increases.

PSNH's Supplemental Motion should be denied as it attempts to narrow the remedies available to this Court. By arguing that Question Two should be eliminated from this appeal, PSNH is attempting to deprive the Appellants of the ability to argue for and obtain a refund of their unlawful overpayments to PSNH. More specifically, the PSNH Ratepayers' second question presented raises the question of whether PSNH's rate increase was unlawful because it contravened RSA 374:37 *et seq.* If this Court determines that PSNH's rate increase was unlawful, and that the increase may not be recovered, then the issue of how to return funds to customers would most likely be remanded to the Commission to assess rate impacts. *See, e.g., Public Service Co. of New Hampshire*, 113 N.H. 497 (1973). PSNH attempts to withhold this option from the Appellants and the Court by improperly assuming that the Company must be permitted to

recover the entirety of its requested rate increase despite its failure to comply with the LCIRP requirement. This attempt is inappropriate, and therefore must fail.

In conclusion, Question Two presents important issues of statutory interpretation for this Court's determination. N.H. Supreme Ct. R. 10(1)(h); *see Appeal by Petition Pursuant to RSA 541:6 and New Hampshire Supreme Court Rule 10* at 8-12 (May 6, 2013). For the reasons set forth above, the Question has not been rendered moot and should therefore be decided by the Court.

WHEREFORE, for the reasons discussed above and the reasons set forth in the Appellants' Objection to Appellee's Motion for Summary Disposition and Summary Affirmance, as well the Memorandum of Law submitted with that motion, the PSNH Ratepayers respectfully request that this honorable Court:

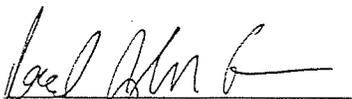
- A. Deny PSNH's request to supplement the record pursuant to RSA 541:16 and New Hampshire Supreme Court Rule 25;
- B. Deny the Supplemental Motion of Public Service of New Hampshire for Summary Disposition; and
- C. Grant such further relief as it deems just and appropriate.

Respectfully Submitted,
George Chase, Alexandra Dannis, James
Dannis, William Hopwood, Amy Matheson,
and Janet Ward

By their attorneys,

ORR & RENO, P.A.

July 19, 2013

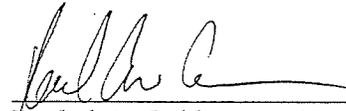
By: 
Susan S. Geiger, Esquire
N.H. Bar No. 925
sgeiger@orr-reno.com

Rachel A. Goldwasser, Esquire
N.H. Bar No. 18315
rgoldwasser@orr-reno.com

One Eagle Square
P.O. Box 3550
Concord, NH 03302-3550
(603) 224-2318

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of July, 2013, I caused a copy of the foregoing Objection to be sent via first class mail to the parties of record in this Appeal.



Rachel A. Goldwasser, Esquire