THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2013 TERM

Docket No. 2013-0307

APPEAL OF PSNH RATEPAYERS

BRIEF OF APPELLEE
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Public Service Company of New Hampshire

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369-B:3 Authority to Issue Finance Orders to Finance RRB Costs. –

I. The commission is authorized, upon the petition of an electric utility and after a hearing, to issue one or more finance orders pursuant to which rate reduction bonds shall be issued, if the commission finds that the issuance of such finance order or finance orders is in the public interest as set forth in RSA 369-B:1, IX. Any finance order adopted pursuant to 1999, 289:3, I and II prior to the effective date of this chapter shall, following the effective date of this chapter, be deemed to be authorized by this chapter, provided the commission has made the required finding pursuant to RSA 369-B:3, IV(b).

II. Notwithstanding any law, rule, or regulation to the contrary, except as otherwise provided in RSA 369-B:4, III with respect to RRB property, the finance orders and the RRB charge authorized to be imposed and collected pursuant to such finance orders shall be irrevocable, and the commission shall not have authority either by rescinding, altering, or amending the finance order or otherwise, to directly or indirectly, revalue or revise for ratemaking purposes the RRB costs, or the costs of providing, recovering, financing, or refinancing the RRB costs, determine that such RRB charge is unjust or unreasonable, or in any way reduce or impair the value of RRB property either directly or indirectly by taking such RRB charge (other than any portion of such RRB charge constituting a servicing fee payable to the electric utility) into account when setting other rates for the electric utility; nor shall the amount of revenues arising with respect thereto be subject to reduction, impairment, postponement, or termination.

III. Notwithstanding any law, rule, or regulation to the contrary, any requirement under this chapter, under 1999, 289:3, I and II, under RSA 369-A, or under a finance order that the commission take action with respect to the subject matter of a finance order shall be binding upon the commission, and the commission shall have no authority to rescind, alter, or amend that requirement.

IV. The commission shall only issue finance orders that:

(a) Authorize the issuance of an aggregate principal amount of not more than $130,000,000 in rate reduction bonds to finance renegotiated agreements of the existing power purchase obligations requiring PSNH to purchase power from the 6 wood-to-energy facilities and the one trash-to-energy facility; and/or

(b) Authorize the issuance of an aggregate principal amount of not more than $670,000,000, minus $6,000,000 for each month from October 1, 2000 to competition day, in rate reduction bonds. This authorization is in addition to any amount authorized in subparagraph (a). This issuance must be part of a settlement approved by the commission under RSA 374-F to implement electric utility restructuring within the service territory of PSNH. As part of any finance order under this subparagraph (b), the commission must find that the rate reduction bonds authorized by the finance order are consistent with the April 19 order, with any subsequent modifications. Any finance order that is issued under this subparagraph (b) shall also contain a statement of the following conditions, and a finding of the commission that the finance order is consistent with the following conditions:

(1) (A) From competition day until the completion of the sale of PSNH's ownership interests in fossil and hydro generation assets located in New Hampshire, PSNH shall supply all, except as modified pursuant to RSA 374-F:3, V(f), transition service and default service offered

in its retail electric service territory from its generation assets and, if necessary, through supplemental power purchases in a manner approved by the commission. The price of such default service shall be PSNH's actual, prudent, and reasonable costs of providing such power, as approved by the commission;

(B) (i) Transition service for residential customers, street lighting customers, and general delivery service rate G customers shall be available until at least 24 months after initial transition service end day or as extended by the commission under RSA 374-F:3, V. From competition day until 21 months after competition day, the price of transition service for these customers shall be $0.044 per kilowatt-hour together with, for those customers choosing a renewable energy transition service option under RSA 374-F:3, V(f), the price of the renewable energy component. From 21 months after competition day until initial transition service end day, the price of transition service for these customers shall be $0.046 per kilowatt-hour together with, for those customers choosing a renewable energy transition service option under RSA 374-F:3, V(f), the price of the renewable energy component;

(ii) From initial transition service end day to the day that PSNH ceases to provide transition service, the price of transition service shall be PSNH's actual, prudent, and reasonable costs of providing such power, as approved by the commission, together with, for those customers choosing a renewable energy transition service option under RSA 374-F:3, V(f), the price of the renewable energy component. Thereafter, the price of transition service, if offered, shall be the competitively bid price for transition service, or as determined under RSA 374-F:3, V(e), together with, for those customers choosing a renewable energy transition service option under RSA 374-F:3, V(f), the price of the renewable energy component;

(iii) At the end of the transition service period, up to 25 percent of the residential customers, street lighting customers, and general delivery service rate G customers who have not chosen a competitive supplier may be assigned randomly to registered competitive suppliers other than the transition service supplier or suppliers, if the commission finds such random assignment to be in the public interest. The commission shall develop procedures and regulations for this assignment process. Any random assignment must be affirmatively approved by an individual customer;

(C) Transition service for all other customers shall be available until at least 12 months after initial transition service end day or as extended by the commission under RSA 374-F:3, V. From competition day to 21 months after competition day, the price of transition service for these customers shall be $0.044 per kilowatt-hour together with, for those customers choosing a renewable energy transition service option under RSA 374-F:3, V(f), the price of the renewable energy component. From 21 months after competition day to the day that PSNH ceases to provide transition service, the price of transition service shall be PSNH's actual, prudent, and reasonable costs of providing such power as approved by the commission, together with, for those customers choosing a renewable energy transition service option under RSA 374-F:3, V(f), the price of the renewable energy component. Thereafter, the price of transition service, if offered, shall be the competitively bid price for transition service, or as determined under RSA 374-F:3, V(e), together with, for those customers choosing a renewable energy transition service option under RSA 374-F:3, V(f), the price of the renewable energy component;

(D) Any difference between the price of transition service, exclusive of the portion attributable to the renewable energy component under RSA 374-F:3, V(f), from competition day to the day that PSNH ceases to provide transition service and PSNH's actual, prudent, and reasonable costs of providing such power as determined by the commission shall first be

separated between the 2 groups of customers described in subparagraphs (b)(1)(B) and (b)(1)(C), used first to offset any differences described in subparagraph (b)(1)(B), and the net then reconciled for each group of customers either by changing the recovery end date, or by decreasing the stranded cost recovery charge, or if the recovery end date has passed, by implementing some other form of equitable reconciliation, as the commission finds to be in the public interest;

(E) The commission shall retain the authority to reject any or all bids for transition service at its sole discretion if it finds such action to be in the public interest. Except as specifically provided in this section, the commission shall not accept any bid or implement any pricing strategy for transition service that creates any deferrals;

(F) The selection of a provider or providers of default service prior to 24 months after initial transition service end day may be combined with the selection of a provider or providers of transition service to the extent that the commission finds it to be in the public interest;

(2) No amount shall be securitized which was not listed as part of the $688,000,000 proposed for securitization in the April 19 order, as reduced by any subsequent amortization;

(3) Customer savings shall be not less than the total amount of $450,000,000, excluding savings from rate reduction financing and merger savings, including the $367,000,000 contained in the original proposed settlement, and the $6,200,000 resulting from the settlement of issues pertaining to New Hampshire Electric Cooperative, Inc. A commitment by PSNH to all of the following actions shall be deemed to satisfy this condition:

(A) PSNH shall credit customers with the higher return associated with accumulated deferred income taxes (ADITs) as proposed in PSNH's May 1, 2000 filing;

(B) PSNH shall credit customers with the value derived from using its own assets to provide transition service for a period of 9 months;

(C) PSNH shall extend from 30 months to 33 months the period during which the delivery service charge, exclusive of Hydro Quebec transmission support payments, is fixed at 2.8 cents per kilowatt-hour;

(D) PSNH shall absorb the first $7,000,000 of difference of costs that results in the event that transition service costs during the 12 months following the initial transition service end day exceed the transition service price for that 12 months, as provided in RSA 369-B:3,IV(b)(1)(B)(i);

(E) PSNH shall reduce the maximum amount of necessary and prudent costs associated with the issuance of and closing on the securitization financing and any premiums associated with the retirement of debt and preferred stock from these proceeds that may be recovered from $17,000,000 to $15,000,000. PSNH shall include in its costs the first $700,000 of the costs of the office of the state treasurer related to reviewing and issuing the rate reduction bonds;

(F) PSNH agrees to move the Recovery End Date (RED date) to 1 month earlier than it would otherwise be; and

(G) PSNH agrees that if competition day has not occurred by October 1, 2000, then effective October 1, 2000 PSNH shall temporarily reduce its current effective total rates (base rates plus FPPAC rates) by 5 percent across the board until either competition day or April 1, 2001, whichever occurs earlier.

(4) In the event that PSNH or its parent company is acquired or otherwise sold or merged:

(A) Such merger, acquisition, or sale shall be subject to the jurisdiction of the commission under RSA 369, RSA 374, RSA 378 or other relevant provisions of law, and the merger, acquisition, or sale shall be approved only if it is shown to be in the public interest;

(B) In recognition of the extraordinary benefits provided to PSNH from rate reduction financing, should PSNH or its parent company be acquired or otherwise sold or merged, such merger, acquisition or sale shall be subject to the jurisdiction of the commission under the standard set forth in the original proposed settlement. The commission may approve such a merger if such approval results in the receipt by PSNH customers of a just and reasonable amount of the cost savings that result from such merger, acquisition or sale.

(C) No acquisition premium paid by an acquiring company for the assets or securities of any acquired company, resulting from any such merger, acquisition or sale, may in any way increase rates at any time from what they would have been without the acquisition premium;

(5) The delivery service charge, exclusive of the Hydro-Quebec transmission support payments, shall be fixed for a period of 33 months from competition day at $0.028 per kilowatt-hour;

(6) The total system benefits charge shall be no greater than $0.003 per kilowatt-hour for 33 months from competition day divided between low-income assistance and energy efficiency/conservation programs. In the event that the commission finds that a significant amount of unencumbered dollars have accumulated in either program, and are not needed for program purposes, the commission shall refund such unencumbered dollars to ratepayers in a timely manner;

(7) All currently existing opportunities shall be continued for retail customers to generate or acquire electricity for their own use, other than through retail electric service, without an exit fee;

(8) To the maximum extent allowed by federal law, non-discriminatory, open access to PSNH's transmission system shall be available to customers, electricity suppliers, marketers, aggregators, and municipal electric utilities, with charges based only on rates set by federal regulations, plus the actual cost of service for any services not subject to federal price regulation plus, for retail customers, applicable stranded cost recovery charges, RRB charges, systems benefit charges, and taxes;

(9) The stranded cost recovery charge, averaged over all customers, shall not exceed $0.0340 per kilowatt-hour. Any changes in the delivery service charge, stranded cost recovery charge, transition service charge, systems benefit charge, or any other charge between the estimated amounts in the April 19 order and 24 months after competition day shall be applied as an equal change in the cost per kilowatt-hour for all rate classes to which they apply;

(10) The commission shall not order changes in the total rates of customers taking service under special contracts approved pursuant to RSA 378:18 for the duration of those special contracts in effect as of May 1, 2000. Special contract customers selecting option 2 of the original proposed settlement shall have the energy charges under the contract reduced by the initial transition service price;

(11) During any sale of electricity generation assets required by this settlement, neither PSNH, nor any affiliate of PSNH, nor any company that would become an affiliate of PSNH if an announced merger, acquisition or sale were to be consummated, may bid for those assets;

(12) During any competitive bid process to determine a provider or providers of transition service, or of default service to any customer belonging to a rate class that at the time of service is eligible to receive transition service, neither PSNH, nor any affiliate of PSNH, nor any company that would become an affiliate of PSNH if an announced merger, acquisition or sale were to be consummated, may bid to provide such service;

(13) The commission shall administer the liquidation of any electricity generation assets required to be sold by the settlement. Any sale of assets located in the state of New Hampshire that are administered by the commission pursuant to this paragraph shall be conducted in this state. The commission shall select the independent, qualified asset sale specialist who will conduct the asset sale process. PSNH shall be allowed to comment prior to the selection of any such specialist;

(14) The commission shall administer any competitive bid process for transition service or default service required by the settlement;

(15) Subject to the approval of the Federal Energy Regulatory Commission (FERC), in the event that the commission either rejects a proposed sale of Seabrook, or fails to act on such application within 180 days after North Atlantic Energy Corporation's (NAEC's) proposed sale application is filed with the commission, and the failure of the sale is through no fault of Northeast Utilities (NU) or PSNH, NAEC's return on equity shall be increased from 7 percent to 150 basis points more than the average 10-year Treasury bond yield for the preceding 6 months, but not less than 7 percent nor more than 11 percent, and then readjusted accordingly at the end of every 6 month period; and

(16) No finance order shall be final or effective until PSNH and NU have agreed to dismiss with prejudice on competition day PSNH's and NU's claims and causes of action in all pending litigation associated with the implementation of RSA 374-F, including civil action No. 97-97-JD (New Hampshire) / 97-121 L (Rhode Island).

V. Any finance order that expressly states each and every one of the conditions as set forth in RSA 369-B:3, IV, and finds that the finance order is consistent with all of these conditions, shall be deemed to satisfy the conditions and requirements of RSA 369-B:3, IV. If such finance order so satisfies the conditions and requirements of RSA 369-B:3, IV and satisfies the other requirements of this chapter, then such finance order shall be deemed to be authorized by, and issued pursuant to, this chapter.

Source. 2000, 249:2. 2001, 29:10, 11. 2002, 268:3. 2003, 21:2, 3, eff. April 23, 2003.

541:13 Burden of Proof. – Upon the hearing the burden of proof shall be upon the party seeking to set aside any order or decision of the commission to show that the same is clearly unreasonable or unlawful, and all findings of the commission upon all questions of fact properly before it shall be deemed to be prima facie lawful and reasonable; and the order or decision appealed from shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable.

Source. 1913, 145:18. PL 239:11. 1937, 107:24; 133:85. RL 414:13.

d. STATEMENT OF THE CASE AND FACTS

This is an appeal from the New Hampshire Public Utilities Commission's ("PUC" or "Commission") decision approving Public Service Company of New Hampshire's ("PSNH") default Energy Service, or ES, rate effective for service rendered on and after January 1, 2013, in Commission Docket No. DE 12-292. Order No. 25,448 (December 28, 2012) at 11, Addendum to Appellants' Brief ("Add.") at 31.

At the hearing regarding PSNH's ES rate, held December 18, 2012, the Office of Consumer Advocate noted that it had been over two years since PSNH had filed its last Least Cost Integrated Resource Plan ("LCIRP"), and asked the Commission to either waive the filing requirement or direct PSNH to file a new LCIRP. *See generally* RSA 378:37-:42; Appendix to Appellants' Brief ("Appx.") at 7-8. In response to a record request made by the commissioners at the hearing, PSNH filed an affidavit stating that: PSNH's last LCIRP was filed on September 30, 2010; as of the date of the affidavit, the 2010 LCIRP docket was still pending before the Commission; and PSNH's request to amend its ES rate was in conformity with the its 2007 LCIRP, which was the one most recently filed and found adequate by the Commission. Affidavit of Terrance Large (Dec. 18, 2012), Appx. at 10.

On December 28, 2012, the Commission issued Order No. 25,448 approving PSNH's request to amend its ES rate pursuant to RSA 369-B:3, IV(b)(1)(a) and finding that the amendment was in conformity with PSNH's 2007 LCIRP, the last such plan found adequate by the Commission. RSA 378:41; Add. at 30-31. On January 28, 2013, the Conservation Law Foundation, Inc. and six of PSNH's residential customers filed a motion for rehearing of Order No. 25,448, Appx. at 27, to which PSNH objected on January 30, 2013, Appx. at 40. In relevant part, the motion for rehearing asserted that the Commission lacked statutory authority to approve

PSNH's amendment to its ES rate because PSNH had not filed an LCIRP within two years of the date of its previous LCIRP filing. Appx. at 30.

By letter dated March 29, 2013, the parties to the motion for rehearing requested that the Commission issue an order on the motion for rehearing. Appx. at 55. On April 5, 2013, the Commission issued Order No. 25,485 denying the motion for rehearing and concluding, in pertinent part:

> PSNH correctly notes that the Commission has interpreted the statute to require a filing two years from the date the prior filing is found adequate by the Commission.
>
> We continue to find that an interpretation of the filing requirement to run from the date of a Commission decision to be the best approach from a practical and regulatory standpoint.

Order No. 25,485 at 9, Add. at 41.

On May 6, 2013, the residential customers who had been party to the motion for rehearing (the "Appellants") filed an Appeal by Petition with this Court. PSNH moved for summary disposition and summary affirmance, and the Appellants objected. By an order dated August 20, 2013, the Court denied PSNH's motions and accepted this appeal.

Consistent with the information stated in the Appellants' brief, PSNH notes that on May 2, 2013, PSNH filed a request to adjust its ES rate effective July 1, 2013. Order 25,535 (June 27, 2013) at 1; Appx. at 87. The Commission approved that request. *Id.* at 5, Appx. at 91. In conformance with RSA 369-B:3, IV(b)(1)(a) PSNH's ES rate was again amended on January 1, 2014. Order No. 25,614 (December 27, 2013), Supp. Appx. at 1.

Generally, PSNH is in agreement with the timeline of relevant events as set out in the Appellants' Statement of the Case and Facts. However, either due to oversight or omission, the Appellants did not note another relevant submission by PSNH. On June 21, 2013, PSNH

submitted a new LCIRP to the Commission consistent with the Commission's timing requirements in Order No. 25,459 (January 29, 2013) in Docket No. DE 10-261. Order No. 25,459 at 19-21, Appx. at 215-217. The Commission has docketed that filing as Docket No. DE 13-177. That filing was made prior to the Commission issuing Order Nos. 25,535 and 25,614 regarding PSNH's July 1, 2013 and January 1, 2014 ES rate amendments, respectively, and currently remains pending before the Commission.

e. SUMMARY OF THE ARGUMENT

While the Appellants' argue for certain specific readings of RSA 378:37-:42, they ignore the provisions of RSA chapter 369-B which govern the setting of PSNH's ES rate, the only rate at issue in this appeal. Pursuant to RSA 369-B:3, IV(b)(1)(A), PSNH's ES rate shall be set at PSNH's actual, prudent, and reasonable costs of providing power, notwithstanding any other law. Accordingly, regardless of the requirements of RSA 378:40, or any limitation on utility rate changes that could be said to exist there, the requirements of RSA 369-B:3, IV(b)(1)(A) control and PSNH's ES rate is mandated by statute to be set at its actual, prudent, and reasonable costs. In addition, to the extent any conflict between these statutes may exist, it must be resolved by giving precedence to the requirements of RSA 369-B:3 which control with respect to PSNH's ES rate. In that: (1) PSNH's ES rate was required to reflect its actual, prudent, and reasonable costs, notwithstanding any other law; (2) the Commission concluded that PSNH's ES rate amendment of January 1, 2013 did, in fact, reflect its actual, prudent, and reasonable costs; and (3) there is no claim that PSNH's ES rate did not reflect its actual, prudent, and reasonable costs, there is no basis for to the Court to overturn the Commission's order allowing PSNH to amend its ES rate on January 1, 2013 and the Commission's order must be affirmed.

Should the Court determine that it has cause to review RSA 378:37-:42, even though it need not do so, the Court should give deference to and uphold the Commission's determination that the "biennial" filing requirement in RSA 378:38 means that a utility must file a new LCIRP within two years of the Commission's order accepting a prior filing and it should reject the Appellants' claim that it means a plan must be filed every two years, regardless of the Commission's process. RSA 378:38 does not provide a date from which the two year period is to be measured, and the Appellants admit that the timing requirement may be waived by the

Commission under RSA 378:38-a, including by implication. Accordingly, it is not clear from the statute when the two year requirement begins or ends. In the absence of statutory clarity, the Commission has provided a long-standing, practical and plausible interpretation of the two year requirement by requiring that a utility file a new LCIRP within two years of the date a prior LCIRP is found adequate by the Commission. Furthermore, neither the legislative history nor the "purpose and structure" of the LCIRP statutes supports the Appellants' contention that filings must be made every two years, regardless of the Commission's process. In addition, to accept the Appellants' argument would mean that utility filings would be made without first knowing what changes would be required by the Commission for future filings, which would undermine the purpose of the statute and result in an unworkable regulatory obligation. Accordingly, the Court should uphold the Commission's interpretation and application of the filing requirement in RSA 378:38.

In addition to the above, pursuant to RSA 378:40, the Commission may allow a utility to amend its rates if that utility has filed an LCIRP and the Commission is in the process of reviewing that LCIRP in the ordinary course. On January 1, 2013, PSNH had on file such an LCIRP, and that LCIRP remained under review by the Commission in the ordinary course. Therefore, nothing in the statute prevented the Commission from permitting PSNH to amend its ES rate.

Lastly, with respect to the Commission's action or inaction relative to the Appellants' motion for rehearing, such Commission action is irrelevant to the rate change at issue in this docket. Because PSNH's ES rate was required by statute to be set at PSNH's actual, prudent, and reasonable costs, and because that is what was done, any delay in ruling upon the motion for rehearing makes no difference in the setting of that rate.

f. ARGUMENT

I. STANDARD OF REVIEW

A party seeking to set aside an order of the Commission has the burden of demonstrating that the order is contrary to law or, by a clear preponderance of the evidence, that the order is unjust or unreasonable. RSA 541:13; *see Appeal of Verizon New England*, 153 N.H. 50, 56 (2005). Findings of fact by the Commission are presumed *prima facie* lawful and reasonable. *Appeal of Pennichuck Water Works, Inc.*, 160 N.H. 18, 26 (2010). The appealing party may overcome this presumption only by showing that there was no evidence from which the Commission could conclude as it did. *Id.*

When the Court is "reviewing agency orders which seek to balance competing economic interests, or which anticipate such an administrative resolution, [the Court's] responsibility is not to supplant the PUC's balance of interests with one more nearly to [its] liking." *Appeal of Verizon New England*, 158 N.H. 693, 695 (2009) (quotation, ellipsis and brackets omitted). "The statutory presumption, and the corresponding obligation of judicial deference are the more acute when we recognize that discretionary choices of policy necessarily affect such decisions, and that the legislature has entrusted such policy to the informed judgment of the [PUC] and not to the preference of reviewing courts." *Pennichuck*, 160 N.H. at 26 (quoting *Appeal of Conservation Law Foundation*, 127 N.H. 606, 616 (1986)). While the Court gives the Commission's policy choices considerable deference, it does not defer to its statutory interpretation and will review the Commission's statutory interpretation *de novo*. *Pennichuck*, 160 N.H. at 26.

II. RSA 369-B:3 REQUIRED THE COMMISSION TO SET PSNH'S ENERGY SERVICE RATE AT A CERTAIN LEVEL IRRESPECTIVE OF ANY LIMITATION IN RSA 378:40

As an initial matter, PSNH notes that its bills to its retail customers are composed of rates and charges for several distinct services as set out by law and detailed in its tariff, including, among other things, default energy service, distribution service, transmission service, and stranded cost recovery. All of PSNH's tariffed rates are subject to the Commission's review and approval. Among PSNH's tariffed rates, the only rate at issue in this appeal is PSNH's default energy service rate, otherwise known as its Energy Service or ES rate. PSNH's ES rate is the rate applied to the actual energy used by a customer, presuming the customer purchases that energy from PSNH rather than a competitive electric power supplier. In other words, it is the cost of electric power supplied by PSNH (as opposed to delivery charges or public policy charges). The Appellants have raised no other rate or charge, or any other items under PSNH's tariff, as being at issue in this appeal.

The Appellants contend that because PSNH had not filed an LCIRP on the schedule that they contend was required – a contention PSNH rejects for the reasons discussed *infra* at sections III and IV of this brief – the Commission was without authority to permit PSNH to amend its ES rate on January 1, 2013. Regardless of whether utilities, in general, are permitted to amend their rates without an LCIRP having been filed on the Appellants' preferred schedule, the Legislature has determined that any such filing requirement does not apply to PSNH's ES rate. Throughout their brief, the Appellants argue for a specific reading of RSA 378:37-:42 as a whole, and RSA 378:38 and RSA 378:40 in particular, but make no reference to the requirements of RSA chapter 369-B, which mandates the level at which PSNH's ES rate must be set. RSA chapter 369-B dictates the setting of PSNH's ES rate and it, not RSA 378:37-:42, is the controlling law. By

failing to raise the requirements of RSA chapter 369-B, the Appellants have not addressed the statutory provisions most relevant to this appeal.

As noted by the Commission in Order No. 25,448 "Pursuant to RSA 369-B:3, IV(b)(1)(A), *the price of PSNH's ES [rate] shall be* its 'actual, prudent, and reasonable costs of providing such power, as approved by the commission.'" Order No. 25,448 at 7, Add. at 27 (emphasis added). The Commission has repeatedly made specific reference to the requirements of RSA 369-B:3, IV(b)(1)(A) in this very manner for years. *See, e.g.,* Order No. 25,380 (June 27, 2012) at 6, Supp. Appx. at 20; Order No. 25,313 (December 30, 2011) at 14, Supp. Appx. at 36; Order No. 25,242 (June 28, 2011) at 5, Supp. Appx. at 44; Order No. 25,187 (December 29, 2010) at 11, Supp. Appx. at 57; Order No. 25,121 (June 28, 2010) at 10, Supp. Appx. at 69; Order No. 25,061 (December 31, 2009) at 29, Supp. Appx. at 99; Order No. 24,991 (July 24, 2009) at 7, Supp. Appx. at 111; Order No. 24,924 (December 30, 2008) at 8, Supp. Appx. at 120. The Appellants did not move for rehearing on this conclusion, have not appealed this issue, do not now dispute this conclusion, and have, in fact, entirely ignored the requirements of this statute in their brief before this Court.[1] Yet, as the Commission has made clear, RSA 369-B:3 requires that PSNH's ES rate be set at its actual, prudent and reasonable costs of providing power.

Most relevant to the instant matter, RSA 369-B:3 provides:

> III. Notwithstanding any law, rule, or regulation to the contrary, any requirement under this chapter, under 1999, 289:3, I and II, under RSA 369-A, or under a finance order that the commission take action with respect to the subject matter of

[1] In their objection to PSNH's motion for summary disposition and summary affirmance in this case, the Appellants do acknowledge that "RSA 369-B:3 states that PSNH's default service rates must be based on PSNH's 'actual, prudent, and reasonable' costs." Appellants' Memorandum of Law in Support of Objection to Appellee's Motion for Summary Disposition and Summary Affirmance at 11, Supp. Appx. at 132. Accordingly, the Appellants are aware of the requirements of that statute, and have acknowledged its applicability, but have nonetheless elected to ignore it in their brief.

a finance order shall be binding upon the commission, and the commission shall have no authority to rescind, alter, or amend that requirement.

IV. The commission shall only issue finance orders that:

(b) Authorize the issuance of an aggregate principal amount of not more than $670,000,000, minus $6,000,000 for each month from October 1, 2000 to competition day, in rate reduction bonds. This authorization is in addition to any amount authorized in subparagraph (a). This issuance must be part of a settlement approved by the commission under RSA 374-F to implement electric utility restructuring within the service territory of PSNH. As part of any finance order under this subparagraph (b), the commission must find that the rate reduction bonds authorized by the finance order are consistent with the April 19 order, with any subsequent modifications. Any finance order that is issued under this subparagraph (b) shall also contain a statement of the following conditions, and a finding of the commission that the finance order is consistent with the following conditions:

(1) (A) From competition day until the completion of the sale of PSNH's ownership interests in fossil and hydro generation assets located in New Hampshire, PSNH shall supply all, except as modified pursuant to RSA 374-F:3, V(f), transition service and default service offered in its retail electric service territory from its generation assets and, if necessary, through supplemental power purchases in a manner approved by the commission. The price of such default service shall be PSNH's actual, prudent, and reasonable costs of providing such power, as approved by the commission.

Limited to the provisions directly relevant to this matter, the statute provides:

Notwithstanding any law, rule, or regulation to the contrary, any requirement under this chapter . . . shall be binding upon the commission, and the commission shall have no authority to rescind, alter, or amend that requirement

[And] . . . 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.

Therefore, through RSA 369-B:3 the Legislature has directed that the price of PSNH's default service "shall be" PSNH's actual, prudent and reasonable costs of providing power, as approved by the Commission, notwithstanding any other law to the contrary, and it has stated that the provisions of RSA 369-B:3 are binding upon the

Commission and that the Commission may not alter them. This is a clear statutory mandate regarding PSNH's ES rate.

As this Court has recently stated, "The use of the word 'shall' in a statute is generally regarded as a command, and 'notwithstanding' means, in relevant part, 'in spite of.'" *State v. Cheney*, __ N.H. __ (decided November 7, 2013), slip op. at 7 (citations omitted). Thus, RSA 369-B:3 is a command stating that PSNH's ES rate must reflect its actual, prudent, and reasonable cost, in spite of any limitation that may be said to exist in RSA 378:40, or any other statute. The Court further noted that this interpretation of "notwithstanding" was consistent with its prior interpretation of the term in other statutes. *Id.* Specifically, the Court cited to *King v. Sununu*, 126 N.H. 302, 306-07 (1985) where it held that "notwithstanding" in a statute expressed the Legislature's intent that the statute would "take precedence" over a conflicting statute pertaining to the same subject. *Cheney*, __ N.H. at __, slip op. at 7-8.

In this instance, the Legislature has required that PSNH's ES rate be set at its actual, prudent, and reasonable costs of providing power, and that this rate setting be done "notwithstanding" any other law. To read RSA 378:40 as either permitting or requiring the Commission to deny PSNH's ability to amend its ES rate to reflect its actual, prudent, and reasonable costs would mean that the mandatory statutory requirement in RSA 369-B:3 is not followed when the Legislature has specifically stated that it takes precedence over any other law. RSA 369-B:3 is the controlling, mandatory requirement and the Appellants' contentions that RSA 378:40 limits or controls the setting of PSNH's ES rate must be rejected.

The Appellants do not contend that PSNH's ES rate as of January 1, 2013 did not reflect its actual, prudent, and reasonable costs as determined by the Commission. The Appellants contend only that PSNH failed to meet a filing requirement of RSA 378:38 – a proposition

PSNH disputed and continues to dispute – and therefore that the Commission lacked authority to permit PSNH to amend its ES rate. Nevertheless, to the extent the Appellants could be said to challenge the Commission's conclusions that PSNH's ES rate as amended on January 1, 2013 reflected PSNH's actual, prudent, and reasonable costs (a challenge which they have not made) they would be challenging factual determinations by the Commission, to which the Court would owe "considerable deference." *Pennichuck*, 160 N.H. at 26. In that there is nothing in the record of this case to demonstrate that PSNH's ES rate did not reflect its actual, prudent, and reasonable costs of providing power, the Court is obliged to implement RSA 369-B:3, IV(b)(1)(A) as intended by the Legislature, and defer to the Commission on the issue. In sum, RSA 369-B:3 mandated that PSNH's ES rate be set at PSNH's actual, prudent, and reasonable costs of providing power as determined by the Commission, notwithstanding any other provision of law. On January 1, 2013, that is precisely what occurred.

As further evidence that PSNH and the Commission are required to follow RSA 369-B:3 rather than RSA 378:37-:42 in setting PSNH's ES rate, PSNH notes that RSA 369-B:3 was enacted in 2000 and was amended and updated in 2001, 2002 and 2003, while RSA 378:40 has remained unchanged since its enactment in 1994. Because this Court presumes "that when the legislature enacts a provision, it has in mind previously enacted statutes relating to the same subject matter," *Prof. Fire Fighters of Wolfeboro v. Town of Wolfeboro*, 164 N.H. 18, 22 (2012), the Court must presume that the Legislature was aware of RSA 378:40 when it enacted and amended RSA 369-B:3. As noted, RSA 369-B:3 clearly states that its provisions apply, "notwithstanding any law, rule or regulation to the contrary", *see Cheney*, __ N.H. at __ (slip op. at 7-8), which would include RSA 378:40. The Legislature, with knowledge of the requirements

and restrictions of RSA 378:40, nevertheless enacted RSA 369-B:3 and provided that it "shall" apply "notwithstanding" any other law, including RSA 378:40.

To the extent that the Court may conclude that there is a potential conflict between the requirements of RSA 369-B:3 and RSA 378:40, when interpreting two statutes dealing with a similar subject matter, the Court construes 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." *Wolfeboro*, 164 N.H. at 22. If "a conflict exists between two statutes, however, the later statute will control, particularly when the later statute deals with a subject in a specific way and the earlier enactment treats that subject in a general fashion." *Id.* Arguably, both RSA 378:40 and RSA 369-B:3 relate to similar subject matter – the setting and amending of utility rates. RSA 378:40 relates to numerous rates of several public utilities operating in New Hampshire. By contrast, RSA 369-B:3 relates to a single rate (Rate ES) of a single utility (PSNH) – the only rate and the only utility implicated in this appeal. RSA 369-B:3 is clearly more specific, and, as noted above, is later in time than RSA 378:40. Accordingly, to the extent any conflict may be found, it must be resolved by concluding that RSA 369-B:3 is the controlling law.

For the above reasons, the Commission did not err in approving changes to PSNH's ES rate on January 1, 2013 because that rate was required by a mandatory statute to reflect PSNH's actual, prudent, and reasonable costs of providing power, notwithstanding any other provision of law. Accordingly, the Appellants have not shown that the Commission's order permitting PSNH to amend its ES rate on January 1, 2013 is contrary to law or otherwise unjust or unreasonable as required by RSA 541:13 and the Commission's order must be upheld.

III. THE COMMISSION'S PRACTICE OF REQUIRING THE FILING OF A NEW LCIRP WITHIN TWO YEARS OF ITS COMPLETION OF REVIEW OF A PRIOR LCIRP IS REASONABLE AND ENTITLED TO DEFERENCE

Should the Court determine that it has cause to reach the Appellants' arguments about the requirements of RSA 378:37-:42 which, for the above reasons, PSNH contends the Court need not do, the Appellants' arguments should still be rejected. The Appellants argue that PSNH was not permitted to amend its ES rate on January 1, 2013 because it had not filed an LCIRP on the schedule they contend was required, and, therefore, the Commission was without authority to allow a rate amendment by RSA 378:40. The Appellants argument elevates form over substance and would result in an unworkable regulatory system.

In the words of the Appellants, "RSA 378:38 and RSA 378:40 together [did] not permit the PUC to grant PSNH's rate increase request." Appellants' Brief at 9. RSA 378:40 reads:

> No rate change shall be approved or ordered with respect to any utility that does not have on file with the commission a plan that has been filed and reviewed in accordance with the provisions of RSA 378:38 and RSA 378:39. However, nothing contained in this subdivision shall prevent the commission from approving a change, otherwise permitted by statute or agreement, where 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.

In pertinent part, RSA 378:38 provides "Pursuant to the policy established under RSA 378:37, each electric utility shall file a least cost integrated resource plan with the commission at least biennially."

For the reasons set out in section II of this brief, *supra*, there is no claim – nor could there be – that the rate amendment was not "otherwise permitted by statute or agreement." Thus, in the end, the Appellants' entire argument is that PSNH had not made "the required plan filing" under RSA 378:40 because it was not made within two years of the date the prior LCIRP was filed. This contention is incorrect.

As is clear from their brief, the Appellants contend that the term "biennially" as it appears in RSA 378:38 mandates a LCIRP filing by every electric utility every two years. What the statute does not provide, however, is a date or event from which the two year period is to run. There is nothing in the statute, and the Appellants do not point to anything in the law, stating when the two year period begins or ends. The Appellants contend, without any support in the statute, that the two year period runs, in all instances, from the date an LCIRP is filed and that the period of the Commission's review of a previously filed plan does not toll this period.[2] More specifically, the Appellants contend that the event against which the two year period referenced in RSA 378:38 is, and must be, measured is the date upon which the prior LCIRP had been filed unless that date is specifically amended by the Commission pursuant to the waiver provision in RSA 378:38-a. It appears from the Appellants' brief that they believe this waiver may be either express or implied, *see, e.g.*, Appellants' Brief at 15 ("the utility was provided with an effective wavier permitting it to file its LCIRP outside the biennial requirement.").[3]

As was noted by the Commission in Order No. 25,485, RSA 378:38 does not state what date or event triggers the two year timeframe referenced in the statute.[4] Order No. 25,485 at 8,

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[2] Notably, the Appellants also do not point out which historical LCIRP filing is to be the one that establishes the date from which the anniversary of all other LCIRP filings are to be measured. Presumably this is due to their conclusion that the Commission is vested with the authority to waive the timing requirement under RSA 378:38-a. *See also* footnote 3 to this brief. Thus, even if the Court were to adopt the Appellants' argument, it would provide no clarity on the timing of filing an LCIRP.

[3] PSNH notes that the Appellants do not make clear how a utility would determine whether it has been provided an "effective waiver." What is clear, however, is that the Appellants acknowledge that filing an LCIRP within two years of the date of a prior filing is not an absolute requirement.

[4] The Appellants contend that prior utility filings demonstrate that other utilities have interpreted RSA 378:38 as they have, and they support their contention by pointing to LCIRP filings made by Granite State Electric Company in May 2005 and May 2007, which were addressed together in an order dated February 29, 2008. Appellants' Brief at 7, fn. 3. The Appellants, however, fail to note that the next LCIRP filed by Granite State Electric Company was submitted in May 2010 – 3 years following its previously submitted LCIRP and with no waiver of the timing requirement having been either granted or even requested. *See* Docket No. DE 10-142. Accordingly, it is highly dubious that Granite State Electric Company has, in fact, interpreted RSA 378:38 as the Appellants contend, and those filings provide little, if any, support for the Appellants' contention. The Appellants also point to LCIRP filings made in 1992 and 1994 by the Connecticut Valley Electric Company ("CVEC"). Appellants' Brief at 7, fn. 3. The Appellants do not point to any CVEC filings after 1994, and PSNH notes that CVEC was acquired by PSNH

Add. at 40. If the Legislature had intended that the filing date of an LCIRP was to be determined by the date of a prior filing as the Appellants contend, it could have said so, but it did not. *Strike Four, LLC v. Nissan North America, Inc.*, 164 N.H. 729, 735 (2013) ("When examining the language of the statute, [the Court] ascribe[s] the plain and ordinary meaning to the words used. [The Court] will interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include.") In the face of the Legislature's omission of a triggering event or date, the Commission has stated that it would interpret the LCIRP filing requirement as having been met if an LCIRP is filed within two years from the date the prior filing is found adequate by the Commission. Order No. 25,485 at 9, Add. at 41. This interpretation has been applied, as concerns PSNH, since at least 2006. *See Public Service Company of New Hampshire's Motion to Strike and Objection to the December 17, 2012 Objection of Conservation Law Foundation* filed on December 19, 2012 in Docket No. DE 10-261 at 5, Supp. Appx. at 141.

The Appellants contend that the Commission cannot apply an administrative gloss to RSA 378:38 because "the statutory language is unambiguous." Appellants' Brief at 14. The Appellants are incorrect to claim that the Commission may not apply an administrative gloss in this instance.

"The doctrine of administrative gloss is a rule of statutory construction." *Petition of Kalar*, 162 N.H. 314, 321 (2011). It is "placed upon an ambiguous clause when those responsible for its implementation interpret the clause in a consistent manner and apply it to similarly situated applicants over a period of years without legislative interference." *Id.* "If an 'administrative gloss' is found to have been placed upon a clause, the agency may not change its

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in 2004. Given CVEC's filing history and the fact that it longer exists, those filings likewise offer no support for the Appellants' position.

de facto policy, in the absence of legislative action, because to do so would, presumably, violate legislative intent." *Id.* (quotations omitted). "Lack of ambiguity in a statute or ordinance, however, precludes application of the administrative gloss doctrine." *Id.* Similarly, "where a statute is of doubtful meaning, the long-standing practical and plausible interpretation applied by the agency responsible for its implementation, without any interference by the legislature, is evidence that the administrative construction conforms to the legislative intent." *Appeal of Milton School Dist.*, 137 N.H. 240, 246 (1993) (concluding that a series of decisions by the Public Employees Labor Relations Board over the approximately six years from 1986 to 1992 supported that body's interpretation of the term "status quo" as used in RSA chapter 273-A); *see also, Win-Tasch Corp. v. Town of Merrimack*, 120 N.H. 6, 9-10 (1980) (concluding that consistent administrative interpretation of a zoning ordinance by the Town's building inspectors over approximately twelve years was sufficient to support the underlying decision, and that if the "administrative gloss" applied to the ordinance over those years was to be changed, the town's voters must change it).

Here, the statute is ambiguous in that it requires an act to occur every two years, but provides no basis for determining the date or event from which that period is to be measured. In fact, the Appellants do not presume to establish a date for the commencement of the two year period, other than the date upon which a prior filing was made, and even then the Appellants concede that the Commission has authority to waive that period under RSA 378:38-a, including by implication. In that the statute provides no means for determining when the two year period begins or ends, and the two year period may be shifted by the Commission, the "biennial" requirement of RSA 378:38 is ambiguous.

In the face of the statutory ambiguity, the Commission has concluded that an LCIRP filing made within two years of the date of its order on the prior filing complies with the statutory filing requirement. The Appellants contend that this conclusion cannot stand because the Commission's decisions do not support "the proposition that an LCIRP is due two years after the last plan is approved." Appellants' Brief at 14. As noted above, however, the Commission has applied the same interpretation of the statute, at least as to PSNH, since at least 2006 and the Commission has acknowledged as much. *See* Order No. 25,485 at 9, Add. at 41. Thus, the Commission, without interference from the legislature, has applied a long-standing, practical and plausible interpretation of the statute – an interpretation the Commission has deemed necessary "to avoid redundancies and resultant unnecessary administrative burden." Order No. 25,459 at 21, Appx. at 217. This Court has often held that "it is well established in our case law that an interpretation of a statute by the agency charged with its administration is entitled to deference." *In re Town of Seabrook*, 163 N.H. 635, 644 (2012).[5]

The Appellants also contend that the Commission's "most recent analysis of filing requirements demonstrates that it does not follow the 'two years after approval' rule that it enunciated below." Appellants' Brief at 15. This is so, they argue, because the Commission required PSNH to file an abbreviated LCIRP within nine months of the order on its prior LCIRP. *See* Order No. 25,459 at 21, Appx. at 217. According to the Appellants, by shortening the filing window, the Commission issued an order "at odds" with its prior orders. Appellants' Brief at 15. Requiring that PSNH be required to file an abbreviated LCIRP within nine months of the order

[5] *See also Appeal of Morton,* 158 N.H. 76, 78–79 (2008) ("[W]e accord deference to the [agency's] interpretation [of the statute it administers]...."); *Appeal of Weaver*, 150 N.H. 254, 256 (2003) ("[S]tatutory construction by those charged with its administration is entitled to substantial deference...."); *Appeal of Salem Regional Med. Ctr.*, 134 N.H. 207, 219 (1991) ("[T]he construction of a statute by those charged with its administration is entitled to substantial deference." (quotation omitted)); *N.H. Retirement System v. Sununu*, 126 N.H. 104, 108 (1985) ("[T]he construction of a statute by those charged with its administration is entitled to substantial deference.").

on the prior LCIRP, however, does nothing to upset the Commission's conclusion that an LCIRP filed within two years of the order on the prior LCIRP complies with the statute. Nine months is clearly within two years.

Despite the above, and despite their contentions that the statute is clear on its face, the Appellants point to legislative history, and general concerns about the "purpose and structure" of RSA 378:37-:42, to support their contentions. While PSNH contends that there is no reason for the Court to review such matters, should the Court determine it worthwhile to explore them, it will find no support for the Appellants' position.

In reviewing legislative history, the Appellants rely upon a 1988 order of the Commission as forming the foundation for the "biennial" requirement. *See* Order No. 19,052 (April 7, 1988), Appx. at 93; Appellants' Brief at 10. That order states that the Commission "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." Appx. at 104. Putting aside that an order of the Commission is not, strictly speaking, legislative history, PSNH notes that the cited order contains the very date-specific requirements that RSA 378:38 lacks. Assuming, as the Appellants contend, that this order formed the basis for RSA 378:38, in 1990 the legislature was certainly aware of the deadline for filing an LCIRP the Commission had adopted. That deadline was clear and certain. Although this clear language was known to it, the Legislature made the decision not to include it. In that the Legislature rejected the Commission's language establishing a firm deadline, this order can hardly support any contention that the Legislature intended to implement the rigid filing requirement the Appellants now seek.

The Appellants also contend that statements by Representative Bradley in 1997 "demonstrate[] that the General Court understood there to be an ongoing planning requirement,

not one based on the stop-and-go of the adjudicative process." Appellants' Brief at 10. They base this contention on Rep. Bradley's single statement that utilities believed it unnecessary to have "yearly" filings and that a waiver of any filing requirement "seems appropriate to allow the commission to waive these responsibilities as we move hopefully forward into electric utility competition." Appx. at 250. Indicating a desire to permit a waiver from the filing requirement does not, in itself, create any other sort of filing obligation, and does not support the Appellants' argument for a specific filing date. Accordingly, the legislative history presented by the Appellants does nothing to advance their contentions.

In addition, the Appellants raise various arguments about the "purpose and structure" of RSA 378:37-:42 to support their contention that each LCIRP must be filed within two years of a prior filing, including that utility planning obligations are "important" and that having a planning period extending beyond two years "frustrates" the goals of the statute. Appellants' Brief at 11-12. According to the Appellants, "In the face of extension requests and postponements, planning documents become stale and under the PUC's interpretation, the regulated utility has no obligation to update or file a new, more relevant plan *in the meantime*." Appellants' Brief at 12-13 (emphasis added).

Assuming the law supported the Appellants' contentions, it would mean that utilities would have an essentially ongoing and unending obligation to prepare and submit information to the Commission, because utilities would need to supply new material "in the meantime" while a prior filing was under review. This would impose a constant and administratively unworkable filing obligation on utilities, rather than providing the periodic "spot check" that the Appellants contend is the purpose of the LCIRP filing requirement.[6] *See* Appellants' Brief at 12.

[6] Further, during the December 18, 2012 hearing on PSNH's January 1, 2013 amendment to its ES rate Commission Chair Ignatius noted: "I think you really need to read 378:40 and 378:41 together, that -- to be able to make sense of

Further, and more importantly, in its orders on prior LCIRP filings, the Commission has required, consistent with RSA 378:38-a, that certain information be included, excluded or altered from that explicitly described in RSA 378:38 for future LCIRP filings. *See, e.g.*, Order No. 24,695 (November 8, 2006) at 23-24, Appx. at 160-61 (setting out four criteria that PSNH was to follow in its next LCIRP filing); Order No. 24,945 (February 27, 2009) at 13-16, Appx. at 188-191 (setting out numerous modifications for PSNH's next LCIRP filing); and Order No. 25,459 (January 29, 2013) at 19-21, Appx. at 215-17 (setting out numerous modifications for PSNH's next LCIRP filing). Indeed, in Order No. 25,459, the Commission noted, "Future LCIRP filings would benefit from the delineation of more specific guidance from the Commission, to address concerns raised by the various parties, to avoid the inclusion of obsolescent or unnecessary material, and to reduce administrative burdens." Order No. 25,459 at 18, Appx. at 214. Further, in the order giving rise to this appeal, the Commission stated:

> The time for a utility to prepare a thorough LCIRP and for the Commission to review and analyze a utility LCIRP makes it impractical to require filings two years from the utility filing date. Such a filing schedule could cause wasteful expenditure of utility resources in instances where Commission guidance on future filings did not arrive early enough in the utility's LCIRP process.

Order No. 25,485 at 9, Add. at 41.

To accept the Appellants' overly literal reading of RSA 378:38, and require that LCIRP documents be filed every two years, irrespective of the Commission's process, would mean that while a prior filing sits before the Commission the utility will be required to file a document of

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what, to the extent you can, make sense of what this is requiring, it helps." Transcript of December 18, 2012 Hearing at 78, Appx. at 8. The Chair is correct. In addition to an unending filing requirement, the Appellants' view of the LCIRP filing requirement would potentially lead to a situation where no utility could amend its rates, regardless of when it filed its LCIRP, if the Commission was still reviewing previously filed LCIRPs, and that review was delaying the review of more recently filed LCIRPs. The Appellants also do not discuss what might happen in a scenario where, following an extensive Commission process, a utility's plan is not found to be adequate. If the Appellants' argument is accepted, the utility would still have to file a new plan to maintain its ability to amend its rates, but that plan would be based upon the same weak foundation that led to a finding of inadequacy in the previous plan. Such a filing would not serve any useful purpose whatsoever.

potentially limited value and one which speculates on the information that the Commission would find necessary or appropriate for future LCIRP filings. Such submissions would certainly not advance the goals of the statute.[7] Given the size and complexity of an LCIRP filing, and the Commission's history of amending the requirements for future LCIRP filings, the result urged by the Appellants is absurd. *Appeal of Geekie*, 157 N.H. 195, 202 (2008) (The Court "will not interpret statutory language in a literal manner when such a reading would lead to an absurd result." (internal quotation omitted)). There is no need to adopt an absurd result to effectuate the purposes of the statute. Adhering to the Commission's interpretation that a filing be made within two years of the date the prior LCIRP was ruled upon would mean that an LCIRP would be filed only when the requirements of the plan are known and when the utility has had an adequate opportunity to incorporate those requirements into its planning processes. Such filings would not "frustrate" the statutory goal, but will make it more likely that the purpose of the statute – periodic review of the adequacy of utility planning processes – is fulfilled.

For the above reasons, the Commission has properly interpreted and applied the LCIRP statute over a period of years, and the Appellants have provided no convincing reason for diverging from that interpretation. Accordingly, the Court should defer to the Commission's interpretation and the Commission's orders should be upheld.

IV. RSA 378:40 SPECIFICALLY ALLOWED THE RATE CHANGE AT ISSUE BECAUSE PSNH HAD MADE THE REQUIRED FILING AND THE COMMISSION'S REVIEW OF THAT FILING HAD NOT BEEN COMPLETED

In addition to the above arguments, PSNH also notes that regardless of whether the Court accepts the Appellants' arguments, which PSNH contends it should not do for the reasons set out

[7] In the instant case, Commission Chair Ignatius noted, "I think we're a little behind in getting that order out on the LCIRP docket, and working to be able to issue it. Asking for a new plan right now I don't think serves anyone's purposes." Transcript of December 18, 2012 Hearing at 77, Appx. at 8.

above, the plain terms of RSA 378:40 still permitted PSNH to amend its ES rate on January 1, 2013. Following the statement in RSA 378:40 that rate amendments are not permitted if an LCIRP plan is not on file, the statute states:

> However, nothing contained in this subdivision shall prevent the commission from approving a change, otherwise permitted by statute or agreement, where 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.

PSNH had made its LCIRP filing on September 30, 2010, and no party has contended that that filing was not in compliance with RSA 378:38, nor that that the January 1, 2013 rate amendment was not "otherwise permitted by statute or agreement." Further, as noted in Mr. Large's affidavit, Appx. at 10, and by the Commission itself at the December 18, 2012 hearing on PSNH's ES rate, Transcript of December 18, 2012 Hearing at 77, Appx. at 8, as of the ES rate hearing the Commission's process of review of PSNH's LCIRP was proceeding in the ordinary course but was not completed. That review was not completed until January 29, 2013, *see* Order No. 25,459, Appx. at 197, after the January 1, 2013 effective date of the ES rate amendment that is the subject of this appeal. Hence, there is no statutory provision preventing the Commission from approving the ES rate change that was required by law.

V. THE REQUIREMENTS OF RSA 541:5 ARE IMMATERIAL TO PSNH'S RATE AMENDMENT

For the reasons set out above, any failure by the Commission to act on the motion for rehearing within a particular time period is irrelevant to the January 1, 2013 amendment of PSNH's ES rate. PSNH's ES rate is required by statute to reflect PSNH's actual, prudent, and reasonable costs, notwithstanding any law, rule or regulation requiring that an LCIRP be filed prior to any rate changes. Furthermore, PSNH was in compliance with the requirements of RSA

378:37-:42 as interpreted and applied by the Commission at the time of its January 1, 2013 ES rate amendment and therefore any failure by the Commission to act in a particular timeframe is immaterial to the Appellants' claims. Lastly, PSNH notes that the issue is now moot because the Commission has issued its order on rehearing upholding PSNH's rate. *Appeal of Martino*, 138 N.H. 612, 616 (1994) ("Since this decision has been rendered – albeit late – we hold that the [thirty-day time limit] statute affords no remedy.") As such, there is no basis to conclude that the Appellants have been prejudiced by the Commission's actions. Accordingly, for these reasons PSNH declines to further address this question.

g. CONCLUSION

For all of the above reasons, PSNH respectfully requests that this Honorable Court affirm the Commission's orders below.

h. ORAL ARGUMENT

PSNH requests 15 minutes of oral argument.

Respectfully submitted,

Public Service Company of New Hampshire

Date: January 17, 2014

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that, on the date written below, I forwarded a copy of the foregoing Brief by first class mail, postage prepaid, to the parties of record in this Appeal, opposing counsel, and the Attorney General of the State of New Hampshire.

January 17, 2014
Date

_____
Matthew J. Fossum