

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

DOCKET NO. DRM 13-090

Puc 300 Rules for Electric Service

COMMENTS AND JURISDICTIONAL OBJECTIONS

NEW HAMPSHIRE ELECTRIC COOPERATIVE, INC.

New Hampshire Electric Cooperative, Inc. (“NHEC”) hereby respectfully submits comments and jurisdictional objections regarding the Commission’s Puc 300 Rules Initial Proposal, dated September 9, 2013, and also regarding certain proposed modifications to the Initial Proposal which would purport to make additional provisions of the proposed rules applicable to NHEC.¹

Prefatory Comments

The comments which follow primarily concern NHEC’s legal objections relating to the contemplated application of proposed Puc 306.09, Puc 306.10, and Puc 307:10 to NHEC through proposed changes to Puc 301.01(b) (collectively referred to herein as the “Additional Rules”). As NHEC’s comments will demonstrate, the Additional Rules, if adopted, would be beyond the Commission’s rulemaking authority and would be therefore invalid.

At the outset, however, it should be clear that NHEC’s jurisdictional objections are not intended to signal any general disagreement with the underlying objectives of the instant rulemaking initiative or the Commission’s understandable attention to issues which may impact safety and reliability. As to the importance of such broad policy principles there can be no

¹ Due to the lack of advance notice concerning the proposed application of the Additional Rules to NHEC, NHEC’s comments today are primarily limited to its initial jurisdictional objections. NHEC shall, under separate cover, file a motion addressing other related procedural issues, including schedule changes which may be required to accommodate NHEC’s potential additional comments.

dispute. So, while New Hampshire law does not authorize the application of the Additional Rules to NHEC, neither New Hampshire's statutory framework, the Commission's existing rules, nor NHEC's policies or practices limit NHEC's voluntary cooperation in, communications about, or coordination with, the Commission's ongoing efforts in the areas addressed by the Additional Rules. Indeed, since its filing of a Certificate of Deregulation more than thirteen years ago, such constructive cooperation, operating within the limits of the appropriate jurisdictional framework, has been, from NHEC's vantage point, a hallmark of its relationship with the Commission. Regardless of the inapplicability of the Additional Rules, NHEC fully intends to continue with and build upon this track record of constructive cooperation.

The Additional Rules

As stated in the Commission's Rulemaking Notice Form, "Puc 301.01(b) indicates the provisions of the rules that apply to the New Hampshire Electric Cooperative." This subparagraph reads:

(b) This chapter, except for the sections below, shall not apply to any rural electric cooperative for which a certificate of deregulation is on file pursuant to RSA 301:57: ...

Thus, in recognition of NHEC's deregulated status, The Puc 300 Rules are expressly inapplicable to NHEC except with regards to a limited set of enumerated provisions. Assuming, for the purposes of these comments, that the Staff recommendations, as set out in its letter of November 7, 2013, were incorporated into the proposed Puc 301.01(b), the "sections below" list in the proposed new Puc 301.01(b) would designate the following new rules as applicable to NHEC:

Puc 306.09, Emergency Response Standards;

Puc 306.10, Physical and Cyber Security Plans and Reporting;

Puc 307.10, Tree-Trimming Standards;

Puc 311, Transfer of Service by Utility of Customers Returning to Utility Energy Supply. As detailed in the comments which follow, there is no statutory authority for the application of the first three of these new rules to NHEC.²

Jurisdictional Analysis

In the context of a RSA Chapter 541-A rulemaking proceeding any jurisdictional analysis must, by necessity, begin with an acknowledgement that “rulemaking is lawmaking” and that agency rulemaking authority only exists to the extent that the legislature has expressly delegated that authority. See, New Hampshire Drafting and Procedural Manual for Administrative Rules, Ch. 3, section 1.2 (pp.19-20). The Commission’s Rulemaking Notice Form in the instant docket identifies RSA 365:8, XII as the source of its statutory rulemaking authority. See, Appendix II-C, Rulemaking Notice Form, Para.2. RSA 365:8, XII delegates to the Commission authority to adopt rules to provide for the implementation of Title XXXIV, PUBLIC UTILITIES. Title XXXIV vests the Commission with plenary regulatory authority over a wide variety of New Hampshire “public utilities,” and through RSA 365:8, XII provides the Commission with general rulemaking authority relative to those public utilities. In this way, Title XXXIV and RSA 365:8, XII allow the Commission to cast a wide rulemaking net with respect to “public utilities,” without a compelling need to closely scrutinize the specific Title XXXIV statutory provisions foundational to each proposed rule.

Pursuant to RSA 362:2, II, however, NHEC is not a “public utility” for purposes of Title XXXIV, except with regard to certain carefully delineated exceptions. Accordingly, the Commission’s RSA 365:8, XII rulemaking authority, as it relates to NHEC, is limited to those

² NHEC has no jurisdictional objection to the proposed Puc 311. NHEC considers this proposed rule as an implementation measure for RSA 374-F’s “customer choice” provisions, for which the Commission retains the same authority with regard to deregulated cooperatives as it does for other public utilities. See, RSA 374-F:4, XII (final sentence).

rules which implement the specific provisions of Title XXXIV which are applicable to deregulated cooperatives. Even within this subset of “applicable” statutory provisions, the Commission’s authority with regard to deregulated cooperatives may be further circumscribed by additional jurisdictional limitations imbedded within the underlying statutes. See, RSA 374-F:4, XII. In this sense, the Commission’s rulemaking net is considerably smaller when it comes to deregulated cooperatives, and the need for closer scrutiny of the underlying statutory basis of proposed rules is magnified.

A Lack of Statutory Authority

The Commission’s Rulemaking Notice Form for the instant docket contains a mandatory cross-reference table which is intended to identify the, “Specific section or sections of state statute or federal statute or regulation which the rule is intended to implement.” See, Rulemaking Notice Form, 6(c). Here it is important to note that this cross-reference table does not simply restate the statute which provides rulemaking authority, but rather itemizes the specific statutory provisions which establish the legal framework for which each specific proposed rule “provides the details.” See, New Hampshire Drafting and Procedural Manual for Administrative Rules, Ch. 3, section 2.4 (pp. 36-37). Thus, the mandatory cross-reference table provides a ready roadmap to determine which, if any, of the Title XXXIV provisions, which are applicable to deregulated cooperatives, are claimed as the statutory basis for any of the Additional Rules.

Importantly, none of the “implementing” statutes listed in the cross reference table in relation to the Additional Rules is a provision of Title XXXIV which is applicable to deregulated cooperatives. On its face, the Commission’s Rulemaking Notice Form claims no statutory authority for the application of the Additional Rules to NHEC.

Neither the text of Initial Proposal, the associated rulemaking notice, comments made at the November 6, 2013 public hearing, nor the Staff's November 7, 2013 letter provide any guidance whatsoever as to the presumed statutory basis for the intended application of the Additional Rules to NHEC. Far from the closer scrutiny required to explain the statutory basis for the application of the Additional Rules to NHEC, the record to-date reflects a complete absence of such scrutiny.

Deregulated Cooperatives and Restructuring Principles

In the absence of any affirmative articulation of the presumed statutory basis for the application of the Additional Rules to deregulated cooperatives, NHEC is left to simply comment upon what NHEC sees as the correct jurisdictional analysis. An outline of that analysis follows.

Because the Commission's rulemaking authority, as it relates to NHEC, is confined to rules which "provided the details" for those limited provisions of Title XXXIV which are applicable to deregulated cooperatives, any reasoned jurisdictional analysis must consider whether there are any such provisions, which the Additional Rules might be intended to implement. The record to-date identifies no such provision and NHEC believes that none exists. For the purposes of these comments, however, NHEC will assume that the Commission and Staff might assert that the Additional Rules could be characterized as implementing RSA 374-F:3, I. That statute is a "restructuring policy principle" which reads as follow:

I. System Reliability. Reliable electricity service must be maintained while ensuring public health, safety, and quality of life.

This statute, however, does not form a basis for the Commission to exercise jurisdiction over NHEC here. Although RSA 362:2, II provides that the provisions of RSA 374-F are among the itemized provisions of Title XXXIV which are generally applicable to rural electric cooperatives, RSA 362:2, II itself says that these provisions are applicable to cooperatives only to the extent not "otherwise provided" in the Title. Furthermore, RSA 374-F contains provisions which expressly

circumscribe the Commission's authority to implement the RSA 374-F:3 restructuring principles with regard to deregulated cooperatives. Indeed, except in certain limited circumstances and only following prescribed procedural prerequisites, neither of which are present in this docket, RSA 374-F:4 provides that:

...the active role of assuring that the restructuring policy principles are appropriately addressed within their service territories shall be reserved to the deregulated cooperatives.

See, RSA 374-F:4, XII. This general reservation and affirmation of the deregulated cooperatives' primary role as stewards of the restructuring principles on behalf of their members is contrasted against the statute's specific limitations on the Commission's exercise of authority in this same area.

...[T]he commission shall exercise its authority with regard to such deregulated cooperatives only when and to the extent that the commission finds, after notice and hearing, that such action is required to ensure that such deregulated cooperatives do not act in a manner which is inconsistent with the restructuring policy principles of RSA 374-F:3.³

Id. Thus, deregulated cooperatives, such as NHEC, are left themselves to "provide the details" and implement restructuring principles within their service territories as they deem appropriate. Though the Commission retains a "backstopping" role in the event a deregulated cooperative takes actions which are inconsistent with the over-arching restructuring principles, regulation of the details and means by which deregulated cooperatives address and implement those principles are expressly beyond the Commission's jurisdiction. Id. Under this statutory framework, RSA 374-F:3, I simply cannot serve the basis for the application of the Additional Rules to NHEC.

While RSA 374-F:4, XII does facilitate the Commission's backstopping role by authorizing

³ Clearly here there has been no notice, no hearing and no finding by the Commission that NHEC has acted in a manner inconsistent with any restructuring principle. In fact, over the past thirteen years of its deregulated status, NHEC is unaware of any formal, informal, written or verbal, communication from the Commission or the Staff alleging or suggesting that NHEC has acted in a manner inconsistent with any restructuring principle.

it to require deregulated cooperatives to participate in proceedings, answer requests for information and file reports “reasonably necessary to permit the commission to make an informed finding” concerning such deregulated cooperatives’ actions, this provision does not authorize rulemaking and is intrinsically circumscribed by its limited purpose of facilitating the Commission’s potential RSA 374-F:4 finding. As such, it cannot provide authority for a proposed rule of general applicability, such as the Additional Rules.

For all the foregoing reasons, the Additional Rules, if adopted, would be beyond the Commission’s rulemaking authority and would be therefore invalid.

Proposed Puc 308.16(a)

NHEC notes that proposed Puc 308.16(a) includes what appears to be a mistaken reference to NHEC in connection with a form E-36B. Puc 308.16 is not a rule proposed to be applied to NHEC.

Respectfully submitted,

New Hampshire Electric Cooperative, Inc.

By its attorney,


Mark W. Dean