THE STATE OF NEW HAMPSHIRE

PUBLIC UTILITIES COMMISSION

DE 23-009

SQUAM RIVER HYDRO, LLC

Petition for Reconnection of a Qualifying Facility, Payment of Avoided Costs, and Payment of Lost Revenues

Brief of Squam River Hydro, LLC Regarding the Jurisdiction of the New Hampshire Public Utilities Commission

Introduction

Squam River Hydro, LLC ("SRH") is submitting this brief pursuant to the New Hampshire Public Utilities Commission's (the "Commission," "NH PUC," or "PUC") May 10, 2023, procedural order. As set forth below, federal and New Hampshire state law establish the Commission's jurisdiction over this matter and the authority to order SRH's requested relief.

I. PURPA and LEEPA confer jurisdiction on the Commission over the subject matter of this dispute.

SRH filed this action after the Town of Ashland terminated the purchase power agreement between the parties, tripled the local property tax assessment of the SRH facilities, and disconnected its facilities from the electric grid causing it to lose the ability to collect RECs and sell power to others. *See* Petition for Reconnection of a Qualifying Facility, Payment of Avoided Costs, and Payment of Lost Revenues at ¶7-8. The Commission has jurisdiction over this matter because Ashland's actions fall within the scope of the Public Utilities Regulatory Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (1978) ("PURPA") which confers jurisdiction on it for violation of its provisions.

More particularly, "In a rare instance of State and federal legislative coincidence, the New Hampshire Legislature and the United States Congress each enacted similar provisions in

1978 designed to diversify electrical power production through the encouragement of small power producers and cogenerators." *Appeal of Public Service Co. of New Hampshire*, 130 N.H. 285, 287 (1988). The New Hampshire Legislature enacted the Limited Electrical Energy Producers Act (LEEPA), stating that "[i]t is found to be in the public interest to provide for small scale and diversified sources of supplemental electrical power to lessen the state's dependence upon other sources which may, from time to time, be uncertain." RSA 362-A:1. The legislature also found it "to be in the public interest to encourage and support diversified electrical production that uses indigenous and renewable fuels and has beneficial impacts on the environment and public health." *Id.* That statute "requires an electric utility, in certain circumstances, to purchase the entire output of electric power produced by a limited electrical energy producer, RSA 362-A:3 (Supp. 1979), at a rate set by the PUC." *Appeal of Granite State Elec. Co.*, 121 N.H. 787, 789 (1981).

That same year, the United States Congress enacted the Public Utilities Regulatory Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (1978) (PURPA), "which contained similar provisions requiring the Federal Energy Regulatory Commission (FERC) to prescribe rules to encourage, inter alia, small power production, including rules requiring electric utilities to purchase power from small power production facilities." *Id.* (citing PURPA § 210, 16 U.S.C. § 824a-3 (Supp. 1981)).

The New Hampshire Supreme Court has recognized the Commission's jurisdiction and authority conferred by LEEPA and PURPA over conduct that violates their provisions in *Appeal of Granite State Electric.* There, the Court noted: "On October 18, 1979, the New Hampshire Public Utilities Commission, 'pursuant to authority of RSA 362-A:4 (Supp. 1979) and PURPA § 210(f), 16 U.S.C.A. § 824a-3(f) (Supp. 1981), initiated hearings to determine the proper rate that

an electric utility would be required to pay for energy produced by an SPP [small power producer].'" *Appeal of Granite State Elec. Co.*, 121 N.H. at 789. "Although LEEPA . . . does not set standards for determination of that rate, PURPA does." *Id.* Specifically, PURPA § 210(b), 16 U.S.C. § 824a-3(b) (Supp. 1981) required that, under FERC rules, "the rates for purchases by electric utilities 'shall be just and reasonable to the electric consumers of the electric utility and in the public interest' and shall not exceed 'the incremental cost to the electric utility of alternative electric energy.'" *Id.* "The FERC rules implementing PURPA § 210 changed the term 'incremental cost' to 'avoided costs,' 18 C.F.R. § 292.101(b)(6) (1980), and defined it to include both the fixed and the running costs on an electric utility system which can be avoided by obtaining energy or capacity from qualifying facilities." *Id.* at 790.[1]

As the New Hampshire Supreme Court has recognized, "Section 210 of PURPA, 16 U.S.C.A. § 824a-3, directs the FERC to promulgate rules for implementation by State regulatory commissions." *Appeal of Public Service Co. of New Hampshire*, 130 N.H. at 291; 16 U.S.C. § 824a-3(f)(1). "Among other things, the FERC authorized State commissions to grant to qualifying facilities (small power producers and cogenerators) the option to obtain rates for purchases pursuant to a legally enforceable obligation for delivery over a specified term on the basis of either: (i) the avoided costs calculated at the time of delivery; or (ii) the avoided costs calculated at the time the obligation is incurred." *Id.* (cleaned up); 18 C.F.R. § 292.304(d)(2)(i) and (ii) (1980).

The Eighth Circuit Court of Appeals recognized that "FERC enacted Rules 303 and 304 to implement §210 of PURPA." *Swecker v. Midland Power Co-op.*, 807 F.3d 883, 884 (8th Cir.

[1] Today, "[a]voided costs means the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source." 18 C.F.R. § 292.101(b)(6) (Supp. 2020).

2015). "Rule 303 provides that '[e]ach electric utility shall purchase, in accordance with [Rule 304], any energy and capacity which is made available from a qualifying facility: (1) Directly to the electric utility; or (2) Indirectly to the electric utility in accordance with paragraph (d) of this section." *Id.* at 884-85, citing 18 C.F.R. § 292.303(a). "Rule 304 reiterates the statutory mandates regarding rates and provides that a rate equaling avoided costs satisfies PURPA." *Id.* at 885, citing 18 C.F.R. §§ 292.304(a), (b)(2).

It is clear from *Appeal of Granite State Elec. Co.* that the Commission has jurisdiction, pursuant to the authority of PURPA, to establish the proper rate – i.e., avoided costs – "that an electric utility would be required to pay for energy produced by an SPP." *Id.* at 789. "Under PURPA's statutory scheme, 'the states play the primary role in calculating avoided costs and in overseeing the contractual relationship between QFs and utilities operating under the regulations promulgated by [FERC].'" *Allco Renewable Energy Limited v. Massachusetts Electric Company*, 208 F.Supp.3d 390, 393 (D. Mass. Sept. 23, 2016) (*affirmed*, 875 F.3d 64 (1st Cir. 2017)). As noted above, states have "'latitude in determining the manner in which the regulations are to be implemented' and can choose to meet their mandate 'by issuing regulations, by resolving disputes on a case-by-case basis, or by taking any other action reasonably designed to give effect to FERC's rules.'" *Id.*, quoting *F.E.R.C. v. Mississippi*, 456 U.S. 742, 751 (1982). ". . . [S]tate agencies, not FERC, are responsible for implementing FERC's rules with respect to determining specific avoided cost rates . . . ." *Allco*, 875 F.3d at 75.

The Commission has recognized in other proceedings that it has authority to promulgate regulations related to establishing avoided costs under PURPA, although it declined to do so at that time:

> We recognize that the determination of PURPA purchase obligations and avoided cost rates are important issues that may need to be revisited. We also recognize

> that there are more parties interested in these issues than those participating in the Asset Proceeding. Therefore, if there remains an interest in revisiting PURPA obligations following the completion of the Asset Proceeding, we will open a generic avoided cost docket. In that docket, interested parties will be permitted to litigate generally applicable requirements and the avoided cost rate methodology or methodologies for utility purchase of QF power pursuant to PURPA. In the meanwhile, each of our utilities, including Eversource, has a tariffed methodology on file for determining PURPA avoided cost rates.

NH PUC Order No. 25-814 (Sept. 18, 2015) (denying Eversource's petition for rulemaking regarding methodology for determining avoided costs). Although the NH PUC declined to issue regulations on this subject, it implicitly recognized that it must meet FERC's regulatory mandate by "resolving disputes on a case-by-case basis" or by "taking any other action reasonably designed to give effect to FERC's rules." *FERC*, 456 U.S. at 751.

On several occasions, the Commission has recognized its authority under PURPA to adjudicate disputes on a case-by-case basis. *See* DE 80-246, Supp. Order No. 14,797, 66 NH PUC 83 (March 20, 1981) (agreeing to provide arbitration under PURPA and LEEPA and noting that PURPA rules § 292.401(a) "provides that the state regulatory agency may implement PURPA § 210 by undertaking to resolve disputes between qualifying facilities and utilities arising under that portion of the rules which deals with arrangements such as rates for sale by utilities, rates for sale by QF's, interconnection costs, system emergencies and system operating reliability as well as other utility obligations; e.g. wheeling on demand."); DE 11-250 and 14-238, Order No. 25,920 (July 1, 2016) (resolving dispute between Granite State Hydropower Association and Eversource regarding methodology for calculating avoided costs under PURPA); DE 78-232 and DE 78-233, Order No. 13,589, 64 NH PUC 82 (April 18, 1979) (establishing rate at which energy and capacity must be purchased under PURPA and LEEPA).

II. SRH is a qualifying facility under PURPA and LEEPA.

SRH owns two hydropower electric generating facilities that are qualifying facilities

under the Public Utilities Regulatory Policy Act of 1978, 16 U.S.C. § 824a-3(a) and its implementing regulations, 18 C.F.R. Part 292 ("PURPA"). These facilities are also limited electrical energy producers under state law, RSA 362-A, and are Class IV Renewable Energy Certificate ("REC") facilities under RSA 362-F and N.H. Code Admin Rules Puc 2505.02.[2] These facilities are located in the service boundaries of the Ashland Electric Department; one is located at 6 Mill Street (.21 MW facility) and the other is located at 22 Main Street (.039 MW facility), both in Ashland, New Hampshire. Both facilities were originally put in service in the 1880s, before the creation of the Federal Energy Regulatory Commission (FERC). *See* Exhibit 1 hereto (September 11, 2015 letter to NH PUC enclosing Purchased Power Agreement between Squam River Hydro, LLC and Town of Ashland Electric Department). As a small power producer with a net power production capacity of less than 1 MW, SRH is exempt from the filing and certification requirements of the Federal Energy Regulatory Commission (FERC) that are traditionally required to establish qualifying facility (QF) status. 18 C.F.R. § 292.203(d). SRH's facilities meet the criteria for qualifying small power production facilities in 18 C.F.R. § 292.204, making SRH a qualifying facility (QF) under PURPA.

The United States Supreme Court has explained why qualifying facilities like SRH were given protection under state and federal law, including the protection of regulations that are enforced by the Commission. It stated: "Section 210 of PURPA's Title II, 92 Stat. 3144, 16 U.S.C. § 824a-3, seeks to encourage the development of cogeneration and small power production facilities." *F.E.R.C. v. Mississippi*, 456 U.S. 742, 750 (1982). "Congress believed that increased use of these sources of energy would reduce the demand for traditional fossil fuels." *Id.* "But [Congress] also felt that two problems impeded the development of

[2] The Commission authorized SRH for Class IV REC eligibility on October 12, 2015. *See* REC 15-293 and REC 15-294.

nontraditional generating facilities: (1) traditional electrical utilities were reluctant to purchase power from, and to sell power to, the nontraditional facilities, and (2) the regulation of these alternative energy sources by state and federal utility authorities imposed financial burdens upon the nontraditional facilities and thus discouraged their development." *Id.* at 750-51.

"In order to overcome the first of these perceived problems, § 210(a) directs FERC, in consultation with state regulatory authorities, to promulgate 'such rules as it determines necessary to encourage cogeneration and small power production,' including rules requiring utilities to offer to sell electricity to, and purchase electricity from, qualifying cogeneration and small power production facilities." *Id.* at 751. "Section 210(f), 16 U.S.C. 824a-3(f), requires each state regulatory authority and nonregulated utility to implement FERC's rules." *Id.*

Pursuant to its statutory authorization, FERC has adopted regulations relating to purchases and sales of electricity to and from cogeneration and small power facilities. *See* 18 C.F.R pt. 292. These regulations "afford state regulatory authorities and nonregulated utilities latitude in determining the manner in which the regulations are to be implemented." *F.E.R.C. v. Mississippi*, 456 U.S. at 751. "Thus, a state commission may comply with the statutory requirements by issuing regulations, by resolving disputes on a case-by-case basis, or by taking any other action reasonably designed to give effect to FERC's rules." *Id.*

III. The Commission has jurisdiction over the Town of Ashland Electric Department because it is subject to PURPA.

Under PURPA, an "electric utility" is defined as "any person, State agency, or Federal agency, which sells electric energy." 16 U.S.C. § 2602(4). "State agency" means "a State, political subdivision thereof, and any agency or instrumentality of either." *Id.* § 2602(16). The Town of Ashland Electric Department, therefore, is an "electric utility" covered by PURPA.

The Ashland Electric Company was founded in 1888 and the Town purchased the power

company in 1918 as a publicly owned utility.[3] The Town of Ashland Electric Department is a municipal electric utility under state law, RSA 38, exempt from the definition of "public utility" under RSA 362:2 as a municipal corporation operating within its corporate limits, but still subject to state and PUC jurisdiction for a number of purposes, including PURPA. *See* RSA 362:4-a, I. For example, Ashland has obligations under RSA 362-A, see below, and RSA 125-O. *See* DE 14-048 and DE 03-155. It is also well-established that the PUC has jurisdiction over the Town of Ashland for purposes of RSA Chapter 38 and RSA Chapter 374. *Appeal of Ashland Elec. Dept.*, 141 N.H. 336, 338 (1996).

For the purposes of SRH's Petition, it is clear that Ashland is an "electric utility" under PURPA and thus subject to PURPA requirements. *See* 16 U.S.C sec. 824a-3(a); 16 U.S.C. § 2602(4). The simple fact that Ashland operates within its corporate boundaries does not exempt Ashland from all Commission oversight.

In *Appeal of Ashland Elec. Dept. (New Hampshire Public Utilities Comm'n)*, Ashland petitioned the Commission for a declaratory ruling that neither RSA chapter 38 nor RSA 364:1 (1995) require it to obtain PUC approval before expanding its service area within town limits. *Appeal of Ashland Elec. Dept.*, 141 N.H. 336, 338 (1996). After a hearing, the PUC mandated that Ashland follow the procedures set forth in chapter 38 before continuing with the proposed expansion. *Id.* On appeal, one of Ashland's arguments was that the PUC has general supervisory powers over "all public utilities" and Ashland, as a municipal utility, was not subject to the jurisdiction of the PUC with regard to activities within town limits. *Id.* at 341. The New Hampshire Supreme Court rejected that argument, based on the "well-established rule of statutory construction that 'when interpreting two statutes which deal with a similar subject

[3] https://ashlandnh.org/about-ashland/

matter, we will construe them so that they do not contradict each other, and so that they will … effectuate the legislative purpose of the statute.'" *Appeal of Ashland Elec. Dept.*, 141 N.H. at 341 (quoting *Petition of Public Serv. Co. of N.H.*, 130 N.H. 265, 282 (1988)). Accordingly, the Court determined that Ashland was subject to NH PUC jurisdiction for purposes of RSA Chapter 38. Similarly, Ashland is subject to NH PUC jurisdiction for purposes of PURPA, because it is an electric utility as defined in PURPA and PURPA directs state regulatory authorities to implement FERC's rules promulgated under PURPA.

The New Hampshire Legislature has also spoken on this subject. "The rates established in orders by the commission for the purchase of energy or energy and capacity from qualifying small power producers and qualifying cogenerators under this chapter or under applicable federal law exist under the legislative and regulatory authority of the state and shall be deemed a state approved legally enforceable obligation." RSA 362-A:8, II(a) [Emphasis added.]. In other words: the Commission has authority to evaluate whether a legally enforceable obligation (LEO) exists, and if a LEO exists under PURPA, it "shall be deemed a state approved legally enforceable obligation." *Id.*

Ashland was required to purchase the electricity generated by the two SRH Qualifying Facilities, including the energy and capacity made available by SRH, at full avoided costs, and to make such physical interconnections to the electric grid to effectuate purchases or sales of electricity authorized by RSA 362-A and PURPA, as well as the production and sale of RECs under RSA 362-F. 18 C.F.R sec. 292.306; *see also Appeal of Public Service Co. of New Hampshire*, 130 N.H. 285, 287 (1988), *Appeal of Granite State Electric Co.*, 121 N.H. 787,789 (1981), and Small Power Producers and Cogenerators, 68 NH PUC 531, 537 (1983).

18 C.F.R sec. 292.303(c) and 292.306 require that an electric utility shall make such

interconnection as may be necessary to effect purchases and sales to a QF. Ashland has chosen to disconnect the SRH facilities from the electric grid, contrary to state and federal law. This Commission is charged with enforcing the provisions of PURPA under 16 U.S.C. sec. 824a-3(f)(1) and 18 C.F.R sec. 292.401(a). Further, as noted above, RSA 362-A:8, II(a) provides that:

> Energy or energy and capacity provided by qualifying small power producers and qualifying cogenerators under commission orders or negotiated power purchase contracts are part of the energy mix relied on by the commission to serve the present and future energy needs of the state. The rates established in orders by the commission for the purchase of energy or energy and capacity from qualifying small power producers and qualifying cogenerators under this chapter *or under applicable federal law* exist under the legislative and regulatory authority of the state and shall be deemed a state approved legally enforceable obligation. [Emphasis added.]

Thus, the energy SRH agreed to produce in accordance with its Purchased Power Agreement with Ashland, *see* Exhibit 1, and which it has been and is prepared to produce in accordance with PURPA, was and is "part of the energy mix relied on by the commission to serve the present and future energy needs of the state" and the rates established by the PUC "shall be deemed a state approved legally enforceable obligation" consistent with PURPA and RSA 362-A:8, II(a). *See also Appeal of Pub. Serv. Co. of New Hampshire*, 130 N.H. at 292 ("The PUC's articulated policy is to treat the filing of a rate petition accompanied by an interconnection agreement signed by the small power producer as a legally enforceable obligation" which "is consistent with subsection (ii) of 18 C.F.R. Sec. 292.304(d)(2)."). As FERC has explained:

> Thus, under our regulations, a QF has the option to commit itself to sell all or part of its electric output to an electric utility. While this may be done through a contract, if the electric utility refuses to sign a contract, the QF may seek state regulatory authority assistance to enforce the PURPA-imposed obligation on the electric utility to purchase from the QF, and a non-contractual, but still legally enforceable, obligation will be created pursuant to the state's implementation of PURPA. Accordingly, a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments result either

in contracts or in non-contractual, but binding, legally enforceable obligations.

JD Wind 1, 129 FERC ¶ 61,148, 61,633 (2009).

As FERC recently clarified in a July 16, 2020 ruling, to be relieved of an obligation to purchase, an electric utility must prove that the qualifying facility has nondiscriminatory access to wholesale markets, and that there is a rebuttable presumption that qualifying facilities smaller than 5 MW do not have this access. 172 FERC 61,041, Order No. 872, Rates and Requirements Implementation Issues Under PURPA, July 16, 2020, ¶¶19, 334; *see also* 18 C.F.R. § 292.309 (circumstances in which an electric utility can terminate its purchase obligation); *see also* 145 FERC 61,121, Docket No. QM13-4-000, November 13, 2013 (Petition of the City of Burlington, VT to terminate mandatory purchase obligation based on utility's nondiscriminatory market access). Ashland has not petitioned FERC to be relieved of its obligation to purchase, and nor can it prove that SRH has "nondiscriminatory access to wholesale markets" because SRH is a qualifying facility smaller than 5 MW.

Ashland's unilateral decision to disconnect SRH from the electric grid is a violation of PURPA that the Commission has jurisdiction and authority to correct – and award damages for:

> Cessation of purchases under § 292.304(f) [of PURPA] would not be justified by normal fluctuations in utility generation. Although such normal fluctuation results in positive and negative variations from average avoided costs, such variations have already been taken into account in establishing avoided costs purchase rates. The commission orders that cessation of purchases from QF's is permitted under the circumstances outlined above [§292.304(f)]. Further, a utility shall notify QF's, to the best of its ability, as soon as it realizes it may cease purchases. **Subsequent failure to demonstrate to the commission adherence to the limitations described herein shall require payment to all affected QF's for purchases that would have been made by the utility. It is believed that such cessations will rarely be justified.**

DE 80-246, Supp. Order No. 14,797, 66 NH PUC 83, 91 (March 20, 1981) (emphasis added).

Thus, Ashland's purchase obligation under PURPA never legally terminated, and remains

ongoing. This Commission is statutorily charged with implementing FERC's rules under PURPA, and therefore has jurisdiction and authority to require Ashland, a PURPA electric utility, to purchase energy and capacity from SRH at avoided costs, re-connect SRH to the grid, and pay SRH for purchases that should have been made by Ashland under PURPA.

Conclusion

For the reasons set forth above, the Commission has jurisdiction to order the relief requested in SRH's Petition, and this matter should proceed to be scheduled for a prehearing conference.

Respectfully submitted,

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Dated: June 16, 2023

Certificate of Service

I hereby certify that a copy of the foregoing petition has on this 16th day of June, 2023 been provided to the Department of Energy, the Office of Consumer Advocate, and the Ashland Electric Department/Town of Ashland.

By: _____
Lynnette V. Macomber

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