

**THE STATE OF NEW HAMPSHIRE
BEFORE THE
NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DRM 15-340

**Eversource Energy Request for Rulemaking
Pursuant to Puc 205.01 and 205.03 –
Avoided Costs for Mandatory Purchases under PURPA and LEEPA**

GSHA’S OBJECTION TO PSNH’S REQUEST FOR RULEMAKING

NOW COMES Granite State Hydropower Association, Inc. (“GSHA”), and respectfully objects to the request for rulemaking filed by Public Service Company of New Hampshire d/b/a Eversource Energy (“Eversource” or “PSNH”) on August 21, 2015. In support of this Objection, GSHA states as follows:

Introduction

1. PSNH has requested that the Commission “convene a generic rulemaking to address the appropriate methodology for determining the avoided cost rates that should be paid to QFs¹ when those QFs assert their right under PURPA² to put their output to one of the state’s utilities.” *Rulemaking Request* (Aug. 21, 2015), p. 2.

2. In support of its rulemaking request, PSNH argues that the avoided cost issue is a generic one, “as all the State’s utilities should be operating similarly going forward.” *Id.* PSNH also argues that “convening a rulemaking proceeding would be the most administratively efficient and fair process to address the issue of establishing an avoided cost methodology at this time” *Id.*, at 3, and would “avoid any potential discriminatory effect from a Commission determination of PSNH’s avoided costs under a different methodology approved for the other New Hampshire electric utilities...” *Id.* at 2.

¹“QF” refers to qualifying small power production facilities under 16 U.S.C. §824a-3.

² “PURPA” refers to the Public Utility Regulatory Policies Act of 1978 as amended, 16 U.S.C. §824a-3.

3. For the following reasons, and as discussed in greater detail below, PSNH's arguments must fail and its rulemaking request must be denied: a) the avoided cost issue is contested, and therefore should be considered in an adjudicative proceeding, not a rulemaking docket; b) a "generic" rulemaking proceeding is inappropriate because PSNH's avoided costs are different than other electric utilities'; c) the avoided cost issue arises from language in the 2015 Public Service Company of New Hampshire Restructuring and Rate Stabilization Agreement ("2015 Settlement Agreement") and therefore must be considered in Docket DE 14-238 ("the Divestiture Docket") along with all other issues implicated by the 2015 Settlement Agreement; and d) opening a separate docket at this juncture would be inefficient, duplicative, and unfair.

**A Contested Matter Should Be Resolved In An Adjudicative Proceeding-
Not A Generic Rulemaking Docket**

4. The avoided cost issue is contested and therefore should be considered in an adjudicative proceeding, not a rulemaking docket. *See* RSA 541-A:31, I. and II. ("[a]n agency shall commence an adjudicative proceeding if a matter has reached a stage at which it is considered a contested case...and may commence an adjudicative proceeding at any time with respect to a matter within the agency's jurisdiction.")

5. The issue of PSNH's avoided costs for PURPA purchases arises as the result of language appearing in the 2015 Settlement Agreement. This issue is squarely before the Commission in a pending adjudicative proceeding, DE 14-238 (the Divestiture Docket), which is well underway. As PSNH's rulemaking request acknowledges, in Docket DE 14-238, GSHA has challenged the definition of avoided cost appearing in the 2015 Settlement Agreement. That definition is as follows: "avoided cost rates for purchases of IPP power pursuant to PURPA and

LEEPA³ shall be equal to the market price for sales into the ISO-NE power exchange, adjusted for line losses, wheeling costs, and administrative costs.” *2015 Settlement Agreement*, Section III.C., lines 305-307. GSHA has asserted that this definition is improper because it conflicts with New Hampshire case law which defines “avoided cost” as “the marginal cost that the utility would incur to generate or purchase the energy from another source.” *Appeal of Marmac*, 130 N.H. 53, 55 (1987). This state law definition is consistent with PURPA provisions which require that rates for QF purchases cannot exceed “the incremental cost to the electric utility of alternative electric energy”, *i.e.*, “the cost to the electric utility of the electric energy which, but for the purchase of from...[the] small power producer, such utility would **generate or purchase from another source.**” 16 USC §824a-3(b) and (d)(emphasis added).

6. There are significant disagreements between GSHA’s and PSNH’s positions regarding the calculation of PSNH’s avoided costs for PURPA purchases. For example:

A. GSHA has argued that the proper avoided cost rate PSNH should pay to IPPs until PSNH divests its generation assets is a rate that reflects PSNH’s cost of producing energy and any additional energy purchases to serve PSNH’s default service load. DE 14-238, *Motion to Compel Public Service Company of New Hampshire to Respond to Data Requests*, ¶ 4. In response, PSNH has indicated that it “does not agree that its avoided costs rate will be based upon the cost it incurs to purchase retail default energy...” DE 14-238, *Objection of Public Service Company of New Hampshire to Motion to Compel of Granite State Hydropower Association, Inc. (“Objection”)*, p.3 (DE 14-238).

B. PSNH states that the 2015 Settlement Agreement avoided cost methodology for determining rates for short term PURPA purchases continues the same methodology as that contained in the 1999 Restructuring Settlement Agreement, and that the methodology “uses the

³ Limited Electrical Energy Producers Act, N.H. RSA 362-A.

price PSNH receives for bidding IPP generation output into the ISO-NE regional wholesale spot market.” *Rulemaking Request* (Aug. 21, 2015), p. 3. However, discovery in the Divestiture Docket indicates that PSNH treats the power differently, in that PSNH purchases generation from QFs and uses it to meet its load requirements for default service customers. *See* Response of Thomas C. Frantz to GSHA 1-3 (attached). This apparent contradiction merits further investigation in an adjudicative proceeding. Moreover, upon information and belief, GSHA understands that the vast majority (i.e. usually over 97%) of ISO-NE’s power sales occur in the day-ahead market - not the “wholesale spot market.” In these circumstances, PSNH’s use of wholesale real-time market prices as its PURPA avoided costs is highly questionable.

C. PSNH has asserted that a study prepared by LaCapra Associates found that “[a]ll states except Vermont use short term ISO-NE marginal energy prices (spot prices and not forward prices)’ as the PURPA avoided cost standard.” *Objection*, p. 4. However, the LaCapra study itself states otherwise. More specifically, page 38 of the study (which is appended to PSNH’s *Objection*) indicates that Rhode Island uses standard offer price or hourly clearing prices (but does not specify whether those prices are day-ahead or real-time). Furthermore, the fact that other states may use real-time market prices to set avoided costs under PURPA is irrelevant. PSNH’s avoided costs for the pre- and post-divestiture periods must be based on PSNH’s actual costs to serve default service customers. Discovery requests bearing directly on this issue have been propounded and remain unanswered in the Divestiture Docket. Those issues must be explored further in that pending adjudicative proceeding, not a rulemaking docket.

D. Upon information and belief, PSNH’s recent⁴ payments to IPPs under the 1999 Settlement Agreement are below PSNH’s actual avoided costs as defined by applicable federal and state law. As applied by PSNH, the provisions of the 1999 Settlement Agreement (which are

⁴ This recent period is January 1, 2015 through June 30, 2015.

similar to those found in the 2015 Settlement Agreement) have recently had adverse financial impacts upon IPPs. In these circumstances, GSHA vigorously contests perpetuating the 1999 avoided cost language in the 2015 Settlement Agreement.

E. PSNH essentially argues that because the avoided cost language in the 2015 Settlement Agreement is similar to that contained in the 1999 Agreement and in net metering rules, the 1999 language should continue, and neither the parties to the Divestiture Proceeding nor the Commission need to examine it. In response, GSHA asserts that approximately 15 years have passed since the first Settlement Agreement was approved, and circumstances have changed. GSHA disputes the continuation of the 1999 provisions as well as PSNH's interpretation of them, as they have negatively impacted GSHA's members, are inconsistent with PURPA, and are improper in today's energy environment. For example, many if not most of PSNH's IPP purchases in 1999 were not "short term purchases" but were instead made pursuant to long term rate orders or contracts which are no longer in effect. Due to changed circumstances, the IPP purchase language in the 1999 Agreement is of greater significance now than it was 15 years ago, and therefore must be examined carefully in the context of today's environment. In addition, although both Agreements define avoided costs as "the market price for sales into the ISO-NE power exchange..." it is important to note that ISO-NE markets are different than the markets that existed in 1999. Because it is unclear which market prices (i.e. real-time, day-ahead or some other market price) apply to IPP purchases by a New Hampshire utility that has not divested its generation resources, that issue must be examined in an adjudicative proceeding. Lastly, the fact that the Commission's net metering rules contain language similar to the avoided cost provisions in the 1999 and 2015 Settlement Agreements is irrelevant because those rules do not apply to PSNH's purchases from GSHA's members.

However, even if those rules did apply, it is noteworthy that PSNH could elect to pay for surplus generation produced by net metering customers at a rate equal to the generation component of PSNH's default service rate. *See* N.H. Admin. Rule Puc 903.02(k).

7. In addition to contesting the 2015 Settlement Agreement's definition of avoided costs, GSHA also contests the statement at lines 84-85 of the 2015 Settlement Agreement that the Settling Parties "agree that this Agreement is consistent with New Hampshire law and policy..." Because GSHA submits that Section III. C. of the 2015 Settlement Agreement does not comport with the legal definition of avoided costs, an adjudicative proceeding is needed for considering GSHA's contention. The Commission and non-settling parties in the Divestiture Docket must be able to probe- through legal and factual analysis in an adjudicative proceeding- whether the 2015 Agreement actually *is* "consistent with New Hampshire law and policy." Severing the avoided cost issue from the Divestiture Docket and casting it into a rulemaking docket would deprive the Commission and parties to the Divestiture Docket of the opportunity to examine in an adjudicative proceeding the important issue of whether the avoided cost language in the 2015 Settlement Agreement comports with New Hampshire law and policy. The Commission must consider this and the other contested matters in the context of an adjudicative proceeding rather than a generic rulemaking docket. RSA 541-A:31, I.

8. Even if the Commission were to determine that an adjudicative proceeding is not mandatory, the interests of justice require that the Commission invoke its discretionary authority under RSA 541-A:31, II. These important financial and legal issues are best vetted in a traditional adjudicative proceeding which affords all interested parties the opportunity to present evidence and legal arguments, *see* RSA 541-A:31, IV, and allows for the development of evidence through discovery, technical sessions, prefiled testimony and cross-examination. A

rulemaking would limit GSHA and others to simply commenting on PSNH's proposed rules (rules that PSNH has drafted and that do not include any supporting data regarding PSNH's avoided costs) and would not afford the Commission and other interested parties an opportunity to fully examine all of the fact-specific elements that go into determining PSNH's avoided costs under PURPA. *See, e.g.*, 18 C.F.R. §292.304(e).

9. As the foregoing discussion clearly demonstrates, there are several serious disagreements surrounding avoided costs and related issues. As such, these are contested matters which should be considered in the context of an adjudicative proceeding, not a rulemaking docket. *See* RSA 541-A:31, I. and II. Moreover, as discussed below, given PSNH's unique situation, its avoided costs must be examined and adjudicated independently of other electric utilities.

PSNH's Circumstances Are Unique - A Generic Proceeding Is Improper

10. PSNH's arguments regarding a generic docket are unpersuasive because they fail to consider that, during the pre-divestiture period when PSNH will continue to own generating assets, PSNH's avoided costs are calculated differently than those of other distribution utilities that purchase power for default service customers. Therefore, because PSNH is not situated similarly to other New Hampshire electric utilities during the pre-divestiture period, a generic docket (rulemaking or otherwise) to establish PSNH's avoided costs for QF purchases is inappropriate.

11. Until PSNH divests its generating assets and begins to procure default service in the same manner as New Hampshire's other electric utilities, the methodology for establishing PSNH's avoided costs is different than the other utilities'. Because PSNH's avoided costs

during the pre-divestiture period must reflect the costs of its own generation⁵, a “generic” docket involving the other New Hampshire electric distribution companies that procure default service through a competitive solicitation process would be inappropriate. If, at some point in the future, PSNH procures all of its default service energy in a manner identical to that employed by other New Hampshire distribution companies, the methodology for determining the avoided cost rate paid to IPPs should be the same for all of New Hampshire electric utilities. However, as explained below, that rate should not be as described in the 2015 Settlement Agreement and should be set as the result of an adjudicative process, not a rulemaking.

**The Avoided Cost Provisions of the 2015 Settlement Agreement
Should Be Reviewed In DE 14-238**

12. The 2015 Settlement Agreement as presently drafted raises legal issues that cannot adequately or appropriately be addressed in a rulemaking or other proceeding apart from DE 14-238. PURPA obligates electric utilities to offer to purchase electrical output of QFs that are equal to the electric utilities' “avoided cost” for electricity. “Avoided cost” is defined as “the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or facilities, such utility *would generate for itself or purchase from another source.*” 18 C.F.R. §292.101(b)(6). Currently, PSNH generates electricity which it uses to serve default service customers. However, that situation will change post-divestiture. Paragraph III. B. of the 2015 Settlement Agreement states that no later than six months after final financial closing from divestiture of PSNH’s assets, PSNH will transition to a competitive procurement process for default service consistent with the process the Commission will determine in Docket No. IR 14-338. Once the competitive process begins, the costs

⁵ PURPA requires that rates for QF purchases cannot exceed “the incremental cost to the electric utility of alternative electric energy”, *i.e.*, “the cost to the electric utility of the electric energy which, but for the purchase of from ...[the] small power producer, such utility would generate or purchase from another source.” 16 USC §824a-3(b) and (d)(emphasis added).

associated with PSNH's default service procurement will form the basis for PSNH's avoided costs, not ISO-NE market prices. Post-divestiture, the ISO-NE market prices - be it the day ahead or the real time prices - will not establish PSNH's "avoided cost" as defined by PURPA. Yet, the 2015 Settlement Agreement at lines 305-306 specifically states that PSNH's avoided cost rates for QF and IPP power purchases under PURPA will be at ISO-NE market prices. As indicated above, this provision is contrary to PURPA. Therefore, the parties to DE 14-238 should have the opportunity to litigate this issue in that docket.

Administratively Efficiency and Fairness Require that PSNH's Avoided Costs Be Examined in the Pending Adjudicative Proceeding

13. PSNH's request to divert the avoided cost issue to another proceeding will create unnecessary delay and duplication of efforts that have occurred in DE 14-238. Discovery on the avoided cost issue has commenced and is ongoing, and a merits hearing in the Divestiture Docket is scheduled for November 16-17, 2015. Requiring interested parties to participate in two proceedings that consider the same issues would be inefficient, duplicative and time consuming, and will prejudice GSHA's interests in resolving this important financial issue expeditiously. In these circumstances, opening a separate docket (rulemaking or adjudicative) to consider a provision of the 2015 Settlement Agreement (the totality of which must be examined in DE 14-238, as explained above) would be improper. Thus, contrary to PSNH's assertions, it would be more administratively efficient and fair to proceed with adjudicating the avoided cost issue in the pending adjudicative proceeding (DE 14-238) rather than convening a separate rulemaking or adjudicative docket.

14. Opening a rule making will not halt the ongoing proceedings in DE 14-238. A redundant, parallel rulemaking proceeding under RSA 541-A will take several months to complete and cannot be placed on a "fast track" given that the deadlines for a rulemaking are

prescribed by statute. *See* RSA 541-A:4, :6, :11-:14. And, placing the avoided cost in a separate adjudicative docket with an unknown procedural would create duplication, delay and uncertainty. For example if the avoided cost issue is considered in a separate adjudicative proceeding, it is unclear how that proceeding will interface with DE 14-238, a proceeding that is considering an agreement containing the very language at the center of the avoided cost dispute. Because consideration of the avoided cost issue, of necessity, must be undertaken in the docket in which the disputed provision is currently being examined (along with all of the other 2015 Settlement Agreement provisions), it would be inappropriate, inefficient and unfair to GSHA and other parties to convene a second docket on that issue.

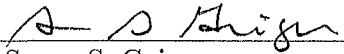
15. In view of the foregoing, opening a new docket - rulemaking or otherwise- to consider the avoided cost issue for PSNH would be administratively inefficient and unfair at this juncture, as it would require a duplication of the effort that has occurred thus far in the Divestiture Docket, and duplicate the effort that must, of necessity, be undertaken in that docket to consider the Settlement Agreement provisions relating to avoided costs. A new docket would also be unfair as it would cause delay, and would prejudice GSHA's interests in resolving this important financial issue expeditiously.

WHEREFORE, GSHA respectfully requests that this honorable Commission:

- A. Deny PSNH's request for a rulemaking proceeding; and
- B. Grant such further relief as it deems appropriate.

Respectfully submitted,

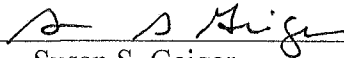
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September 4, 2015

Certificate of Service

I hereby certify that on this 4th day of August, 2015 a copy of the foregoing objection was sent by electronic mail to the Service List in this docket.


Susan S. Geiger

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