

STATE OF NEW HAMPSHIRE

before the

PUBLIC UTILITIES COMMISSION

DE 16-693

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE d/b/a EVERSOURCE ENERGY
Petition for Approval of a Power Purchase Agreement with Hydro Renewable Energy Inc.

OFFICE OF ENERGY AND PLANNING'S LEGAL BRIEF

NOW COMES the Office of Energy and Planning (OEP), through its counsel the Office of the Attorney General, and pursuant to the October 25, 2016 Order of Notice, respectfully submits this legal brief addressing the legality of Eversource's proposal.

Procedural Background

On June 28, 2016, Public Service Company of New Hampshire d/b/a Eversource Energy (hereafter "Eversource") filed a petition with the New Hampshire Public Utilities Commission (hereafter the "Commission") seeking approval, pursuant to RSA 374:57, of a proposed 20-year Purchase Power Agreement (hereafter the "PPA") between Eversource and Hydro Renewable Energy, Inc. for the purchase of power from the proposed Northern Pass Transmission line. Pursuant to the Petition and supporting testimony filed by Eversource, Eversource proposes that the power and any environmental attributes purchased through the PPA would be "sold bilaterally or into the wholesale market, with the net proceeds credited to the Stranded Cost Recovery Charge." Testimony of James G. Daly (hereinafter the "Daly Testimony") at 9:18-20.¹

On October 25, 2016, an Order of Notice was issued by the Commission raising, *inter alia*, issues related to:

¹ Citations are to the page and lines of the referenced testimony, with the page number appearing before the colon and line numbers appearing after the colon.

- (1) Whether Eversource has the corporate authority to enter into the PPA under RSA 374:57;
- (2) Whether Eversource entering into the PPA would violate the Restructuring Principles of RSA Chapter 374-F or any other New Hampshire or federal law;
- (3) Whether the inclusion of PPA costs in the SCRC would be permitted under RSA Chapter 374-F, RSA 374:57, RSA Chapter 378, the terms of the 2015 Restructuring Settlement Agreement as approved by the Commission in Order No. 25,920 (July 1, 2016); and
- (4) Whether Eversource's decision to forego a competitive solicitation process comports with the requirements of N.H. Code Admin. Rules Puc 2100.

Order of Notice at 2-3. The Order of Notice further directed interested persons to file legal briefs "regarding the legality of Eversource's proposal no later than November 21, 2016." Order of Notice at 4.

A pre-hearing conference was held by the Commission on November 7, 2016.

Legal Argument

OEP's legal argument focuses on the proposed recovery of the PPA costs via the Stranded Cost Recovery Charge ("SCRC"), which OEP submits is not permitted under New Hampshire law as proposed by Eversource. OEP takes no position at this time on the authority of Eversource to enter into the PPA pursuant to RSA 374:57 or whether Eversource, as a restructured distribution utility, may enter into long-term contracts for power outside of a competitive solicitation process. OEP notes, however, the important distinction between purchased power agreements entered into for financial reasons and purchased power agreements entered into pursuant to RSA 362-F:9 to meet reasonably projected renewable portfolio requirements and default service needs, where the legislature has expressly authorized restructured distribution utilities to enter into the latter type of purchased power agreements with Commission approval.

I. The Costs of the Proposed PPA Do Not Qualify as Stranded Costs Under Current Law and Are Not Eligible for Inclusion in the Stranded Cost Recovery Charge

Pursuant to the Petition and supporting testimony, Eversource proposes that the “net financial impacts of th[e] PPA be recovered via the Stranded Cost Recovery Charge (‘SCRC’) rate as a means to offset stranded costs.” Testimony of Eric H. Chung (hereinafter the “Chung Testimony”) at 2:19-21. Specifically, Eversource proposes to “estimate the net revenue impact of the PPA for [each] upcoming year and include the estimated difference as an offset to stranded cost” with subsequent reconciliation to actual net revenues. Id. at 6:13-18. However, Eversource has failed to establish that the PPA costs constitute “stranded costs” eligible for inclusion in the SCRC. While the stated purpose of mitigating stranded costs is an admirable one, the rate recovery methodology proposed is not authorized by law.

As a starting point, it is instructive to review what constitutes a “stranded cost” under current law. Pursuant to RSA 374-F:2, IV, “stranded costs” means:

costs, liabilities, and investments, such as uneconomic assets, that electric utilities would reasonably expect to recover if the existing regulatory structure with retail rates for the bundled provision of electric service continued and that will not be recovered as a result of restructured industry regulation that allows retail choice of electric suppliers, unless a specific mechanism for such cost recovery is provided.

Stranded costs may only include costs of:

- (a) Existing commitments or obligations incurred prior to the effective date of this chapter;
- (b) Renegotiated commitments approved by the commission;
- (c) New mandated commitments approved by the commission, including any specific expenditures authorized for stranded cost recovery pursuant to any commission-approved plan to implement electric utility restructuring in the territory previously serviced by Connecticut Valley Electric Company, Inc.;
- (d) Costs approved for recovery by the commission in connection with the divestiture or retirement of Public Service Company of New Hampshire generation assets pursuant to RSA 369-B:3-a; and
- (e) All costs incurred as a result of fulfilling employee protection obligations pursuant to RSA 369-B:3-b.

RSA 374-F:2, IV. Similarly, in the June 10, 2015 Public Service Company of New Hampshire Restructuring and Rate Stabilization Agreement (hereinafter the “2015 Settlement Agreement”), approved by the Commission in Order No. 25,920, stranded costs were defined as:

Prudently incurred costs, liabilities, revenues, and investments that PSNH would reasonably expect to recover from customers, but which would likely not be recovered as a result of restructuring of the electric industry unless a specific mechanism for such cost recovery is provided, as detailed within this Agreement. See RSA 374-F:2, IV; RSA 369-B:3-a, I; RSA 125-O:18; 2002 N.H. Laws 130:1. As set forth herein, examples of Stranded Costs include: PSNH’s net book investment in generation assets to the extent such amount exceeds the sale price of those assets upon divestiture; the net of ongoing expenses and revenue requirements (including, *inter alia*, prudently incurred decommissioning, retirement, environmental, and employee protection costs or liabilities, and penalties imposed based upon capacity obligations) for any generating unit, entitlement or obligation that has not been sold as part of the asset divestiture process (such as due to a Failed Auction); all over-market or under-market costs related to the PPAs and IPPs; employee protection-related costs; and property tax stabilization payments.

2015 Settlement Agreement at lines 189-201. The term “PPAs” as used in the 2015 Settlement Agreement was defined as: “*Existing commitments* created by contract for PSNH to purchase power from the Burgess BioPower facility in Berlin, New Hampshire and the Lempster Wind Power Project in Sullivan County, New Hampshire,” id. at lines 133-35 (emphasis added), and does not include subsequently executed PPAs.

As is made clear by both definitions, as well as by long-standing precedent in New Hampshire, stranded costs are limited to costs or obligations already incurred or unavoidable at the time that regulatory change renders such costs unrecoverable. New costs or obligations incurred *after* regulatory change, such as the proposed PPA, clearly are not stranded costs as defined by current law. Nevertheless, Eversource’s proposal to recover the costs of the PPA through the SCRC amounts to a request to transform the PPA costs into stranded costs, thereby guaranteeing full recovery from ratepayers of all over-market costs associated with the PPA.

Eversource presents no rationale, let alone legal authority, to treat the costs of the PPA as stranded costs entitled to guaranteed recovery from ratepayers through the non-bypassable SCRC.

II. The Possibility of the PPA Mitigating Stranded Costs Does Not Create Legal Authority to Recover PPA Costs Through the SCRC.

Lacking legal authority to characterize PPA costs as stranded costs, or to recover such costs through the SCRC, Eversource instead suggests that the net revenue of the PPA, when applied to the SCRC, will mitigate stranded costs in compliance with RSA 374-F:3, XII(c). See Petition at 3, 4 (stating that “the proposed PPA is consistent with . . . RSA 374-F:3, XII (requiring utilities to take all reasonable measures to mitigate stranded costs)” and that “the PPA is expected to produce economic benefits to PSNH’s customers that will mitigate stranded costs to consumers . . . ”). However, RSA 374-F:3, XII does not authorize Eversource to create new stranded costs.

The flaw in Eversource’s rate proposal is that the PPA results in both revenues *and costs*, with no guarantee that the net revenue will be positive. Pursuant to RSA 374-F:3, XII(c), “Utilities have had and continue to have an obligation to take all reasonable measures to *mitigate* stranded costs” (emphasis added); utilities do not have an obligation to enter into any financial transaction that “could potentially” result in savings to customers. Daly Testimony at 7:11-18. While Eversource “*expects* that the PPA will result in many millions of dollars of benefits to customers via low cost energy,” Chung Testimony at 4:6-8 (emphasis added), in today’s admittedly volatile and unpredictable energy markets it is also possible that the PPA will result in millions of dollars of costs to customers. See, e.g. Daly Testimony at 10:1-9 and Attachment B thereto (Admitting that there “may be years where the market falls faster than the contract price” resulting in annual losses to ratepayers, and even the possibility of a net \$6.8 million loss

to customers over the life of the PPA). Neither Eversource, OEP, nor the Commission can accurately predict how energy markets will change over the next 20 years.

The methodology proposed by Eversource—to recover the net financial impacts of the PPA through the SCRC—would result in the economic risks of the PPA being shifted from Eversource’s shareholders to Eversource’s customers through a non-bypassable charge. This is precisely the type of scenario that the Restructuring Act was intended to put an end to by providing customers with the choice of energy supply and responsibility for the consequences of their choices. See RSA 374-F:3, II (“Customers should be able to choose among options [for energy supply and] . . . expect to be responsible for the consequences of their choices”). Allowing Eversource to make a 20-year commitment on behalf of its customers, while leaving the risk of unfavorable market conditions solely on ratepayers, is contrary to the principles of customer choice at the heart of the Restructuring Act. For these reasons, Eversource’s proposal that the net financial impacts of the PPA be recovered via the SCRC, regardless of whether the net financial impact is positive or negative, is contrary to current law.

III. Mitigation of Stranded Costs Through the SCRC Is Permissible if Appropriately Structured.

While the proposed rate treatment of the PPA is inconsistent with the Restructuring Act because it shifts risks to customers and could results in the unauthorized creation of new stranded costs, there is no legal prohibition on Eversource mitigating stranded costs by directing revenue to offset the SCRC in customer rates. For example, Eversource could voluntarily write-off a portion of its stranded costs and recalculate the SCRC to reflect the lower costs to be recovered. Relevant to the instant proposal, Eversource could adjust the proposed methodology for capturing the benefits of the PPA in customer rates through the SCRC in such a way that eliminates the possibility of increasing stranded costs.

As set forth above, the flaw in Eversource's rate proposal is that it has the potential to increase stranded costs and puts the risk of market changes on customers. However, an alternative methodology could eliminate those flaws by applying only the annual net benefits of the PPA to the SCRC. By passing only the up-side benefits of the PPA to customers, while leaving the down-side risk of any annual net costs on Eversource's shareholders, Eversource could achieve its stated goal of conferring a benefit to its customers from the Northern Pass project through a PPA without running afoul of the principles of the Restructuring Act.² Such an alternative methodology would be consistent with the obligation of RSA 374-F:3, XII(c) to mitigate stranded costs, without contradicting the fundamental principles of the Restructuring Act.

Conclusion

For the above stated reasons, OEP asserts that Eversource's proposed recovery of the net financial impacts of the PPA via the SCRC is not authorized by current law as it would potentially increase stranded costs and would be fundamentally inconsistent with the purposes of the Restructuring Act. The PPA, as proposed, is a purely financial transaction that is not part of Eversource's delivery service or part of Eversource's competitively procured default energy service. Accordingly, there is no legal justification or authority to include the costs of the PPA in Eversource's rates via the SCRC. OEP takes no position at this time on the legality of the PPA or Eversource's authority to enter into the PPA, and OEP's legal argument regarding the proposed method of recovering the net financial impacts of the PPA is not intended to imply that the PPA is or is not legally authorized.

² To compensate Eversource shareholders for assuming the down-side risk of the PPA, Eversource could propose to share the up-side benefits between customers and shareholders. For example, Eversource could direct 80% of all positive annual net revenue of the PPA to the SCRC, with the remaining 20% paid to Eversource shareholders in exchange for the shareholders assuming the risk of any negative annual net revenue.

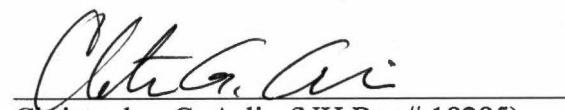
Respectfully submitted,

OFFICE OF ENERGY AND PLANNING

by its attorney,

Joseph A. Foster
Attorney General

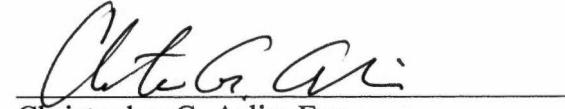
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Christopher G. Aslin (NH Bar # 18285)
Assistant Attorney General
Environmental Protection Bureau
33 Capitol Street
Concord, New Hampshire 03301-6397
(603) 271-3679
Christopher.aslin@doj.nh.gov

Certificate of Service

I hereby certify that a copy of the foregoing Brief has been sent by e-mail this day to the members listed on the service list in DE 16-693.

Dated: November 21, 2016


Christopher G. Aslin, Esq.