

SHAHEEN & GORDON, P.A.

A T T O R N E Y S A T L A W

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VIA ELECTRONIC SERVICE (executive.director@puc.nh.gov)
AND HAND DELIVERY

Ms. Debra A. Howland
Executive Director and Secretary
New Hampshire Public Utilities Commission
21 S. Fruit Street, Suite 10
Concord, NH 03301

NHPUC 27DEC18PM3:26

Re: Docket No. DE 18-002
Public Service Company of New Hampshire d/b/a Eversource Energy
Petition for Approval of Filing Pursuant to SB 365

Dear Director Howland,

Intervenors Springfield Power LLC, DG Whitefield LLC, Bridgewater Power Company, L.P., Pinetree Power Tamworth LLC and Pinetree Power LLC (“Intervenors”) file these supplemental comments following the Prehearing Conference and Technical Session held on December 18, 2018 in order to address two items concerning RSA 362-H. First, whether a hearing is needed. Second, Eversource’s request to impose additional extra-statutory terms and financial obligations on Intervenors. These issues were not briefed in the December 4, 2018 Eversource Petition filed in this docket and were not addressed in Intervenors’ December 17, 2018 Motion for Determination that Agreements Conform with RSA 363-H.

Intervenors submit this letter, given that other parties may also address these issues discussed for the first time during the December 18, 2018 proceeding.

I. A hearing is not necessary and will impede the timely implementation of Intervenors’ power purchase agreements.

Attorney Amidon’s correspondence of December 19, 2018 concerning a Proposed Procedural Schedule states: “In the event that a hearing may be necessary in this matter, the parties requested that the Commission hold a hearing date in early January 2019.”

No party requested a hearing and a hearing date is not necessary. Unnecessary hearings risk the timely implementation by February 1, 2019 of the power purchase agreements that are required by RSA 362-H.

RSA 362-H does not call for a hearing. The only action required of the Commission in this proceeding is for it to determine whether Intervenors’ power purchase agreements conform with the requirements of New Hampshire law, which can and must be accomplished with a

review of the documents submitted in Intervenors' motion and the Eversource petition. *See* RSA 362-H:2, IV. ("All such eligible facility agreements shall be subject to review by the commission for conformity with this chapter in the same proceeding in which it undertakes the review of the electric distribution company's periodic default service solicitation and resulting rates.").

II. Eversource's suggestion that the Commission should impose financial obligations on Intervenors, if followed, will add impermissible terms to RSA 362-H.

During the Prehearing Conference and Technical Session, Eversource suggested that in lieu of implementing RSA 362-H as written, the Commission could impose extra-statutory financial obligations like letters of credit or escrow withholdings upon Intervenors' power purchase agreements.¹ However, nothing in RSA 362-H imposes such an obligation and to do so is to add terms to the statute. Eversource should not be allowed to succeed in rewriting RSA 362-H more to its liking now. It had the opportunity to seek changes during the legislative process.

This is particularly true where the General Court's "findings" in support of RSA 362-H determined that "it is in the public interest to promote the continued operation of, and the preservation of employment and environmental benefits associated with these sources of indigenous-fueled renewables, and thereby promote fuel diversity as part of the state's overall energy policy." *See* SB 365, 2018 N.H. Laws Ch. 379:1 (underline added). These findings do not include the need for any of the financial obligations Eversource seeks to impose.

The legislative history of RSA 362-H explains the General Court's decision to require Eversource to purchase Intervenors' energy in the manner provided for by law:

This bill is critical to the six independent biomass power plants and the 900 statewide jobs in the forest products industry the plants support. [...] This approach is consistent with federal law and a recent 2016 United States Supreme Court case (*Hughes v. Talen Energy*) addressing lawful actions states may take in developing energy policies. [...] If we let these plants fail, not only do we lose all the local jobs, forestry benefits, municipal benefits, environmental benefits, and economic activity, but we will in fact increase our electricity prices.

See 27 April 2018 House Record, p. 24 (SB 365, relative to the use of renewable generation in default service. Majority: Ought to pass with amendment. Minority: Inexpedient to Legislate.").

The express language of RSA 362-H requires Eversource to purchase Intervenors' energy at an adjusted energy rate, under the present default rate filing, to allow those purchases to take effect as of February 1, 2019. RSA 362-H makes no mention of allowing Eversource to impose the kinds of extra-statutory financial obligations that it suggests the Commission should order. *See* RSA 362-H:2, I(a) (requiring Eversource to purchase Intervenors' energy "at the adjusted energy rate derived from the default service rates approved by the commission in each applicable default service supply solicitation and resulting rates proceeding.").

¹ Intervenors did not address these suggestions in their Motion because Eversource did not brief them in its Petition and the Commission did not identify them in its Supplemental Order of Notice.

Eversource's initial rationale during the Prehearing Conference for its suggestion was "prudence" – *i.e.*, Eversource expressed concern that the Commission might later challenge its prudence of entering into the legislatively mandated power purchase agreements. However, a Commission order that simply requires Eversource to comply with RSA 362-H resolves the question of potential prudence issues. Eversource then changed its argument to one focused on customer protection – *i.e.*, that in the unlikely event that the Federal Energy Regulatory Commission ("FERC") were to grant the requested declaratory order petition filed by the New England Ratepayers Association ("NERA"), then customers should not be required to pay for the costs incurred pursuant to RSA 362-H. However, Eversource in promoting its suggested financial impositions on Intervenor, seeks to use the RSA 362-H review-for-conformity process as an opportunity to seek to add statutory obligations that the General Court did not include in its legislation.

Eversource should not be permitted to use the Commission's review process in this manner. The Commission is not a forum for re-legislating policy and laws that have been enacted by the General Court.

Finally, as Intervenor explained in their Motion, in the unlikely event that FERC were to grant the declaratory order requested by NERA, such a determination would have no legal moment unless and until a district court adopts that interpretation. If any party was seriously concerned that a court of competent jurisdiction would find that RSA 362-H is preempted by federal law, then that party would have sought immediate relief in such a court to protect ratepayers. As no party has done so, it is indicative that Eversource's suggestions in this regard are intended simply to undermine and delay the implementation of RSA 362-H.

Thank you for this opportunity to comment on these two items.

Very truly yours,



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TJM/jdb

cc: Service List