STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

Public Service Company of New Hampshire d/b/a Eversource Energy

2018 Default Energy Service Solicitations

Docket No. DE 18-002

OBJECTION OF THE OFFICE OF THE CONSUMER ADVOCATE TO MOTION FOR CLARIFICATION OR REHEARING

On February 8, 2019, the five PURPA[1] Qualifying Facilities (QFs) that have jointly intervened in this docket (Springfield Power LLC, DG Whitefield LLC, Bridgewater Power Company LP, Pinetree Power LLC and Pinetree Power Tamworth LLC) (collectively, the PURPA QFs) filed a motion for clarification of Order No. 26,208 as entered in this docket on January 11, 2019.[2] The Office of the Consumer Advocate ("OCA"), a party to this docket, opposes the pending motion. In support of this position, the OCA states as follows:

1. Introduction

Order No. 26,208 concerns the implementation of RSA 362-H, which was enacted last year (over the veto of the Governor) as Chapter 379 of the 2018 New

[1] PURPA is the Public Utility Regulatory Policies Act of 1978, codified in relevant part as 16 U.S.C. § 824a-3 (commonly referenced as PURPA section 210).

[2] *See* "Motion for Determination that Agreements Conform with RSA 362-H and to Direct Eversource to Comply with RSA 362-H" (Dec. 17, 2018) at 13 (confirming that each is indeed a PURPA QF).

Hampshire Laws and is commonly referred to as SB 365. The purpose of SB 365 is to provide a subsidy, at ratepayer expense, to certain independent power producers in New Hampshire that burn low-grade wood or garbage to produce electricity. The five PURPA QFs that have jointly appeared here are among the independent power producers covered by SB 365.

As PURPA QFs, they have collected hundreds of millions of dollars in over-market subsidies from Eversource ratepayers since the 1980s,[3] based on state-determined "avoided cost" rates mandated by PURPA section 210 and the implementing regulations of the Federal Energy Regulatory Commission (FERC), 18 CFR Part 292. But the advent of an open market for wholesale electricity in New England has, in effect, made the avoided cost for PURPA purposes equivalent to the prevailing wholesale market rate. *See, e.g., Public Service Co. of N.H.*, Order No. 25,920 (Docket No. DE 14-238, July 1, 2016) at 82, 88 (approving provisions of Eversource asset divestiture agreement that "preserve the current methodology for determining avoided cost payments to QFs . . . based on ISO-NE real-time energy market prices").

[3] Total PURPA-related subsidies since the advent of PURPA have been estimated to be as high as $2 billion in New Hampshire. *See, e.g.*, Hearing Transcript of February 1, 2011 in Docket No. DE 10-195 at 139 (testimony of OCA Witness Kenneth Traum) and Michael O'Leary, "Setting the Record Straight on Biomass," Aug. 23, 2018, available at http://indepthnh.org/2018/08/23/opinion-setting-the-record-straight-on-biomass/ (in which the manager of one of the PURPA QFs contests not the $2 billion figure but its characterization as a subsidy because New Hampshire's PURPA avoided cost rates were based on longterm cost projections). As noted recently in a study conducted by the Office of Strategic Initiatives, these PURPA-derived subsidies basically ended in the early 2000s with the expiration of Commission-approved rate orders, with payments for state-mandated renewable energy credits pursuant to RSA chapter 362-F picking up the slack thereafter. New Hampshire Office of Strategic Initiatives, "Study Pursuant to New Hampshire Chaptered Law 156:228 (2017)" (2018), available at https://www.nh.gov/osi/energy/programs/documents/osi-biomass-study.pdf, at27.

Accordingly, the General Court concluded that the revenues available to such independent power producers via the regional wholesale electricity market, as overseen by the FERC under the Federal Power Act, is inadequate to keep these facilities in business and that the continued operation of these facilities is important for both economic reasons and to promote fuel diversity in the state's electricity generation. However, under the Federal Power Act, the FERC -- not state legislatures -- has the authority to regulate wholesale power rates. The FERC, in turn, relies on open and competitive wholesale power markets (in those regions, such as New England, which have established them) to assure that wholesale rates are just and reasonable as required by section 205 of the Federal Power Act. *See* 16 U.S.C. § 824d(a).

If the rates available to the PURPA QFs via the wholesale power markets operated by regional transmission organization ISO New England are the just and reasonable rates under the Federal Power Act, then by definition any state-law mandate that establishes a different wholesale rate for PURPA QF power is inconsistent with the Federal Power Act and therefore void as violative of the Supremacy Clause of the U.S. Constitution. Thus, the New England Ratepayers Association (NERA) has filed a request at the FERC (in Docket No. EL19-10) for a declaratory order to the effect that SB 365 is preempted by federal law and therefore unconstitutional. Although the OCA respects the policy judgment of the General Court concerning New Hampshire's economy and generation fuel diversity, the OCA has filed comments in Docket No. EL19-10 in support of NERA's petition

in light of the OCA's duty to protect the interests of residential utility customers – including, in this instance, interests that Congress recognized via the Federal Power Act.

Order No. 26,208 is likewise, *inter alia*, a reasonable effort to protect those interests in light of the pendency of a constitutional challenge to SB 365. It was entered in this docket (opened in early 2018 for the purpose of overseeing two semi-annual competitive default service solicitations conducted by Public Service Company of New Hampshire d/b/a Eversource Energy (Eversource)) because SB 365 ties the provision of subsidies to independent power producers to the default service solicitations conducted by their local electric distribution utilities. In essence, the independent power producers covered by SB 365 in the Eversource service territory are entitled to 80 percent of the *retail* default service rate approved following the solicitations (minus costs associated with renewable energy credits (RECs) acquired pursuant to the state's Renewable Portfolio Standard). There are six such independent power producers in the Eversource territory; five of them are the PURPA QFs that appear jointly here. By its terms, SB 365 applies not just to the default service solicitation whose results were placed into effect on February 1, 2019 (via Order No. 26,203 entered in this docket on December 20, 2018) but also to the five next ensuing semi-annual solicitations.

In Order No. 26,208, the Commission:

(1) ruled that it would abstain from deciding the constitutional issues that have been raised at the FERC, given that the parties to the instant proceeding have specifically asked the Commission to so abstain;

(2) rejected a request from the PURPA QFs that the Commission direct Eversource to sign power purchase agreements with them;

(3) declined a suggestion by Eversource that the Commission implement SB 365 by issuing "rate orders" setting forth terms and conditions for SB 365 power purchases, the method by which the Commission previously effectuated many QF power purchases under PURPA in the 1980s and 90s;

(4) concluded that the purchases of "net energy output" referenced in SB 365 include only energy, as distinct from the separate wholesale product of capacity as traded via ISO New England;

(5) concluded that "adjusted energy rate" within the meaning of SB 365 (i.e., the rate set by SB 365 for PURPA QF power, less REC costs) is indeed based on i.e., is 80 percent of) the retail default service rate;

(6) concluded that the PURPA QFs are not required to maintain their status as QFs in order to enjoy the benefits of SB 365;

(7) encouraged Eversource and the PURPA QFs "to adopt commercially reasonable terms that effectuate the purpose of [SB 365], including compliance with any applicable ISO-NE rule or procedure that may be necessary to implement the transactions" even though SB 365 "does not

expressly require the eligible facilities to participate in regional wholesale energy markets," *see* Order No. 26,208 at 22;

(8) ruled that the payment term Eversource had proposed to the PURPA QFs, based on prevailing wholesale energy market rates at ISO New England rather than the utility's default service rate, was not permissible under RSA 365 even in light of the pending constitutional challenge;[4]

(9) ruled that "[u]ntil the constitutionality of the statute is determined, and the authority for recovery of over-market charges from customers is upheld, the Commission cannot order rate recovery of over-market costs associated with compliance with the statute," *id.* at 24;[5]

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[4] This ruling had the salutary effect of illustrating in stark terms the extent of the unconstitutional subsidy provided by RSA 365. The Commission noted that under the most recent Eversource default service solicitation, effective on February 1, "the residential energy service rate was calculated to be 9.985 cents per kilowatt-hour (kwh) . . . or approximately $99.85 per megawatt hour. Adjusted for removal of the renewable portfolio standard adder, and multipled by 80 percent . . . the adjusted energy rate would be 7.768 per kWh, or $77.68 per megawatt hour. In 2018, the average locational marginal price for New Hampshire [i.e., the market price of wholesale eelectricity as determined by ISO New England] was approximately $43 per megawatt hour." Order No. 26,208 at 23.

The Commission further referenced Eversource's calculation that SB 365 will result in $11 million in unconstitutional subsidies paid from February 1, 2019 to July 31, 2019. *Id.* Given that SB 365 requires recovery of these subsidies via the utility's stranded cost charge, *see* RSA 362-H:2, V, and given that residential utility customers are responsible for 48.75 percent of Eversource's recoverable SB 365 costs, *see id.* ('[t]he recovery of the nonbypassable charge shall be allocated among Eversource's customer classes using the allocation percentages approved by the commission in its docket DE 14-238 order 25,920 approving the 2015 Public Service Company of New Hampshire Restructuring and Rate Stabilization Agreement) *and* Order No. 25,920 (July 1, 2016) at 37 (specifying such cost allocations), residential customers would be responsible for approximately $5.4 million over six months or, on an annualized basis, $10.8 million.

[5] Consistent with this aspect of Order No. 26, 206, the Commission separately ruled on January 28, 2019 (via Order No. 26,215 entered in Docket No. DE 18,182) that Eversource could not, as requested, include over-market SB 365 costs in its stranded cost recovery charge (SCRC) in light of the reconciling nature of the charge. The Commission stated that "[i]n the event that Eversource and the eligible facilities enter into agreements under SB 365, we will use an expedited process to review and determine whether and how to update the SCRC rate." *Id.* at 8.

(10) relatedly, declined to provide assurances to Eversource that it could recover over-market SB 365 costs while there is a constitutional cloud over the statute; and

(11) refused, in the absence of authorizing language in SB 365, an Eversource request (also supported by the OCA) that the Commission impose certain measures intended to preserve for potential refund any over-market payments made by Eversource under SB 365.[6]

In the wake of these rulings, the PURPA QFs and Eversource exchanged a series of letters, many but not all of which were served on the parties, in an apparent effort to conclude power purchase agreements that would be compliant with SB 365 and the Commission's determinations. This effort was unsuccessful and, accordingly, the PURPA QFs have now timely sought rehearing or clarification of certain aspects of Order No. 26,208.

Specifically, the PURPA QFs seek additional rulings on issue no. 2 (the determination that the Commission lacks authority under SB 365 to order Eversource to sign power purchase agreements), and issue no. 9 (the determination that the Commission cannot order rate recovery while the constitutional challenge to SB 365 is pending elsewhere). The arguments of the PURPA QFs lack merit and,

[6] Specifically, Eversource had requested that the Commission either order the PURPA QFs to escrow the over-market payments until the constitutional challenge has run its course or provide letters of credit as security while the challenge is pending. Eversource described this request as one seeking customer protections but, as the Commission correctly noted, it is more accurately a matter of protecting customers *and* Eversource shareholders. *See* Order No. 26,208 at 24.

therefore, the Commission should neither clarify Order No. 26,208 nor grant rehearing on the issues challenged by the PURPA QFs.

II. The Commission's Authority to Order Eversource to Sign Power Purchase Agreements

The PURPA QFs do not contest the determination by the Commission that SB 365 confers no authority on the agency to order Eversource to sign power purchase agreements with the PURPA QFs. They argue, nevertheless, that the Commission should rule that the draft agreements it most recently forwarded (on January 31, 2019) to Eversource conform to the requirements of SB 365. The PURPA QFs note that these January 31 drafts conform in all respects to the terms proposed by Eversource except for offering a more time-limited version of the escrow provision the utility had sought. The PURPA QFs seek a ruling that Eversource must select and submit for Commission approval SB 365 agreements that conform to the statutory requirements (as interpreted by the Commission) regardless of whether Eversource actually signs such agreements. According to the PURPA QFs, absent such a ruling the Commission will be allowing Eversource to thwart the will of the General Court by denying the PURPA QFs their $22 million in annual subsidies. Moreover, the PURPA QFs contend that in these circumstances, the Commission should invoke RSA 374:41 and direct the Attorney General to file a civil action in the name of the state against Eversource for relief in the form of "mandamus, injunction or otherwise," PURPA QF Motion at 24, presumably to require Eversource to sign power purchase agreements with the PURPA QFs.

The Commission should reject these arguments in light of longstanding principles of statutory construction. When interpreting a statute, the Commission must "look first to the statutory language, and whenever possible construe that language according to its plain and ordinary meaning." *Rogers v. Rogers*, 2019 WL 405605 (N.H., Feb. 1, 2019) at *3 (citation omitted). The imperative is to "interpret legislative intent from the statute as written" and "not consider what the legislature might have said or add language that the legislature did not see fit to include." *Id.* (citations omitted).

The SB 365 directive to the Commission is specific and unambiguous. Pursuant to RSA 362-H:2, IV, the Commission's sole job is to "review . . . for conformity with" SB 365 "[a]ll such eligible facility agreements" – i.e., agreements into which the utility has entered after conducting the solicitations and selection processes specified elsewhere in the statute. SB 365 confers no authority on the Commission to order Eversource to select proposals, or to issue what would amount to advisory opinions on draft agreements in circulation between the potential parties to power purchase agreements. *See Petition of Public Service Co. of N.H.*, 125 N.H. 595, 598 (1984) (declining to issue advisory opinion on regulatory question that was "not a matter pending before the PUC" even though it presented "the hydraulic pressure of a hard case") and *Freedom Logistics, LLC*, Order No. 25,744 in Docket No. DE 14-346 (2014) at 2 (declining to issue "advisory opinion on complicated legal and regulatory issues that may in fact be entirely hypothetical").

The PURPA QFs' frustration notwithstanding, the General Court could have but did not confer on the Commission the authority the PURPA QFs would impute to the agency here: the authority to order Eversource to sign agreements or the authority to impose contract terms on Eversource by order. "Administrative tribunals . . . have only the authority that is 'expressly granted or fairly implied by statute.'" *In re Chase Home for Children*, 155 N.H. 528, 533 (2007), quoting *Appeal of Public Service Co. of N.H.*, 130 N.H. 285, 291 (1988). The authority to issue the directives sought by the PURPA QFs is not fairly implied by the authority expressly granted in SB 365. To the contrary, the General Court reasonably assumed that Eversource would willingly sign agreements, as it has done in other similar contexts, *see, e.g., Public Service Co. of N.H.*, Order No. 25,411 (Docket No. DE 11-184, 2012) (concerning most of the same five PURPA QFs litigating here) and *Public Service Co. of N.H.*, Order No. 25,213 (Docket No. DE 10-195, 2011) (concerning the Berlin biomass facility), in the absence of hurdles to cost recovery of the sort that exist here. What the PURPA QFs characterize as an impermissible effort by Eversouce to thwart the implementation of SB 365 is, in reality, something the Commission should deem a deliberate legislative choice to put the utility in a position to reject power purchase agreements that meet the requirements of SB 365 but are inappropriate (i.e., here, illegal) for other reasons.

To put it another way, the Commission must "presume that the legislature intended to confine [the] statute's scope within constitutional limits," *In re Rupa*, 161 N.H. 311, 315 (2010) (citation omitted). Therefore, the Commission must

presume here (in the absence of an explicit directive) that the Legislature did not intend to have the Commission force upon Eversource contracts that it reasonably believes to be voidable on constitutional grounds. There is, after all, no hint here that Eversource is acting in bad faith or, indeed, in anything other than a manner calculated to protect both its customers and its shareholders from the consequences of power purchase transactions that are in the process of being constitutionally challenged for their inconsistency with federal law.

It follows, therefore, that the Commission should not take up the PURPA QFs' suggestion that the Commission invoke RSA 374:41 and "lay the facts before the attorney general" and "direct him immediately to begin an action in the name of the state praying for appropriate relief by mandamus, injunction, or otherwise." By the terms of RSA 378:41, the Commission may take such steps when it concludes "that a public utility is failing or omitting . . . to do anything required of it by law or by order of the commission." That is not the situation the Commission confronts here. For sound reasons, the Commission has expressly declined to order Eversource to take the steps the PURPA QFs wish the utility to take. There are serious doubts over whether Eversource can lawfully enter into power purchase contracts with the PURPA QFs at SB 365 rates. Those doubts are now pending before a federal tribunal for resolution. Accordingly, it would be improvident in the extreme for the Commission to ignore or otherwise interfere with that process by directing the Attorney General to seek equitable relief "in the name of the state."

III. The Commission's Refusal to Allow Rate Recovery While a Constitutional Challenge is Pending

The PURPA QFs contend that the Commission erred by refusing to permit Eversource to recover SB 365 costs, to the extent they cannot be covered by resale of SB 365 power in wholesale markets, from customers. According to the PURPA QFs, the FERC is not obligated to rule on the NERA petition challenging the constitutionality of SB 365, any such ruling favorable to NERA (and the OCA) would not be binding in any event, "the mere possibility of challenge does not invalidate a law or the need to implement a law," and even if a court eventually determined that SB 365 is unconstitutional it would not necessarily preclude rate recovery because Eversource "would have purchased energy in compliance with existing law." PURPA QF Motion at 31.

The Commission should reject these arguments for several reasons.

First, the PURPA QFs lack standing to seek rehearing (or, ultimately, appeal) of this issue. Rehearing pursuant to RSA 541:3 is limited to those parties who are "directly affected" by the decision in question. The PURPA QFs are not directly affected by a Commission determination about SB 365 rate recovery – indeed, they are indifferent to what Eversource does once the Company has complied with any power purchase obligations under the statute. No other party, including Eversource, has sought rehearing of the Commission decision to withhold rate recovery while the constitutional challenge is pending, and Eversource is to be commended for its decision not to make the very argument the PURPA QFs now

seek to make on its behalf (that rate recovery would be possible even of sums paid for power purchases that violate the Federal Power Act).

Second, the Commission should not accept the PURPA QFs' self-serving claim that any order issued by the FERC on the NERA petition would be merely advisory in nature and thus of "no legal moment" for the reasons stated by the U.S. Court of Appeals for the District of Columbia Circuit in the case repeatedly invoked by the PURPA QFs, *Xcel Energy Services, Inc. v. FERC*, 407 F.3d 1242, 1244 (CADC 2005). As the D.C. Circuit recognized in *Midland Power Co-op v. FERC*, 774 F.3d 1, 7 (CADC 2014), there is a distinction to be made between orders that merely advise parties of how the FERC thinks an enabling statute (i.e., PURPA or the Federal Power Act in which it nests) should be judicially interpreted, and orders that the FERC characterizes as mandatory (e.g., orders to which Federal Power Act noncompliance penalties as high as $1,000,000 a day might apply). The Commission should not assume that the FERC's decision in EL19-10 will be a mere advisory opinion.

Third, the Commission should not allow any party to evade the effects of its tactical decision to leave the serious preemption issues implicated by SB 365 for resolution in another forum, regardless of whether the arbiter turns out to be the FERC or a trial court. Nothing precluded the PURPA QFs from asking the Commission to address the constitutionality of SB 365, either directly or via certifying such questions to the New Hampshire Supreme Court. In these circumstances, the Commission appropriately invoked RSA 374:2, which sets forth

the General Court's command that "[a]ll charges made or demanded by any public utility," implicitly including any charges arising by virtue of SB 365, "shall be just and reasonable and not more than is allowed by law." *See* Order No. 26,208 at 24. The Commission's decision to withhold rate recovery while there is serious reason to believe that such charges would not be "allowed by law" (for reasons of federal preemption) was a sound and reasonable exercise of this authority – and, indeed, the PURPA QFs do not challenge this implicit interpretation of RSA 374:2.

The suggestion of the PURPA QFs notwithstanding, this is not a situation in which the Commission confronts the "mere possibility" of a constitutional challenge. The NERA petition raises compelling arguments – so compelling, indeed, that the State in its FERC pleadings has focused not on the constitutionality of the statute but, rather, on (unpersuasive) claims that it would be premature for the FERC to rule. See Motion for Leave to Answer and Answer of the State of New Hampshire (filed on January 4, 2019 in FERC Docket No. El19-10) and Protest of the State of New Hampshire (filed on Dec. 3, 2018 in the same docket).[7] In these circumstances, the Commission did not err and should not change its mind about withholding rate recovery.

Finally, the PURPA QFs are incorrect when they suggest that Eversource could recover from customers charges the utility believed were the result of an unconstitutional command by the General Court. "When a utility has exhibited inefficiency, improvidence, economic waste, abuse of discretion, or action inimical to

[7] All of the pleadings in Docket No. EL10-10 are available on the electronic litigation web site of the FERC, www.elibrary.ferc.gov.

the public interest, the costs incurred may not be passed on to the ratepayers." *Appeal of Seacoast Anti-Pollution League*, 125 N.H. 708, 723 (1984), quoting *Appeal of Public Service Co. of N.H.*, 122 N.H. 1062 1076 (1982). If Eversource simply acquiesced here to the demands of the PURPA QFs while knowing that SB 365 may ultimately determined to be void pursuant to the Supremacy Clause, and if Eversource then sought cost recovery based on a contention that costs incurred under the statute were prudent until the statute was voided, the OCA would vigorously contest such an effort on the ground that the utility incurred the expenses in question improvidently and in a manner inimical to the public interest.

The General Court has declared that "[u]tilities have had and continue to have an obligation to take all reasonable measures to mitigate stranded costs." RSA 374-F:3,XII(c). The costs Eversource would have to recover from customers under SB 365 after reselling the power via ISO New England's wholesale power markets meet the statutory definition of "stranded costs," *see* RSA 374-F:2, IV (referencing both "[e]xisting commitments" and "[n]ew mandated commitments"), and RSA 365 makes them recoverable on a nonbypassable basis in exactly the same fashion as other stranded costs are currently recoverable. See RSA 362-H:2, V (applying allocation percentages among rate classes from the stranded cost recovery provisions of the 2015 Eversource asset divestiture agreement). Simply signing agreements, making payments to the PURPA QFs, incurring $22 million in annual over-market costs, without regard to whether the whole proposition will pass constitutional muster would, in the present circumstances, be a risky strategy

indeed for the state's largest electric utility. As the statutory arbiter between utility shareholders and utility customers, see RSA 363:17-a, the Commission has appropriately refused to expose Eversource and its shareholders to such risk.

IV. Conclusion

RSA 541:3 provides that rehearing or reconsideration of an order may be granted when a party states good reason for such relief. Good reason may be shown by identifying new evidence or specific matters that could not have been presented in the underlying proceeding or that were overlooked or mistakenly conceived by the deciding tribunal. *See Liberty Utilities,* Order No. 26,130 (Docket No. DG 18-852, 2018) at 3. To prevail, a party filing a motion for reconsideration should not merely reassert prior arguments and request a different outcome. *Id.*

No valid grounds for rehearing, reconsideration or clarification are stated in the PURPA QF motion. To the contrary, Order No. 26,208 is lawful, reasonable, and appropriately calculated to protect the interest of ratepayers, utility shareholders and others in the face of a constitutional challenge to a controversial and recently enacted statute. The order should be left undisturbed.

WHEREFORE, the OCA respectfully request that this honorable Commission:

A. Deny the pending motion of Springfield Power LLC *et alia* for clarification or rehearing of Order No. 26,208 and

B. Grant any other such relief as it deems appropriate.

Sincerely,

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February 15, 2019

Certificate of Service

I hereby certify that a copy of this Objection was provided via electronic mail to the individuals included on the Commission's service list for this docket.

D. Maurice Kreis