

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

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

In its briefing, Ashland does not deny that it is an “electric utility” subject to PURPA; however, Ashland asserts it is a “nonregulated electric utility in PURPA parlance and is therefore subject to FERC jurisdiction, not the PUC’s.” Ashland’s Br., p.9. Yet, the operative provisions of PURPA and its regulations promulgated by FERC impose an obligation on all *electric utilities* to purchase capacity and output from QFs at avoided costs:

(a) Cogeneration and small power production rules

Not later than 1 year after November 9, 1978, the Commission shall prescribe, and from time to time thereafter revise, such rules as it determines necessary to encourage cogeneration and small power production, and to encourage geothermal small power production facilities of not more than 80 megawatts capacity, **which rules require electric utilities to offer to--**

- (1) sell electric energy to qualifying cogeneration facilities and qualifying small power production facilities¹ and
- (2) **purchase electric energy from such facilities.**

16 U.S.C.A. § 824a-3 (emphasis added).

(a) Obligation to purchase from qualifying facilities. **Each electric utility shall purchase**, in accordance with § 292.304, unless exempted by § 292.309 and § 292.310, 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.

18 C.F.R. § 292.303 (emphasis added). Because Ashland is an “electric utility” within the meaning of PURPA, it is subject to these mandates. While it is true that PURPA also refers to a “nonregulated electric utility,” this definition does not divest the PUC of its recognized jurisdiction over disputes between electric utilities and QFs under PURPA. The language “nonregulated electric utility” appears in sections requiring implementation of PURPA regulations – something the Town of Ashland as a purported “nonregulated electric utility” has not done – and is separate and apart from the provisions mandating a purchase obligation by “electric utilities.” *See* 16 U.S.C. § 824a-3(a); 18 C.F.R. § 292.303(a); U.S. Dept. of Energy “List of Covered Electric Utilities under the Public Utility Regulatory Policies Act of 1978”, Energy.gov., 2009¹ (The ““must-consider”” requirement of PURPA Title I, Subtitle B should NOT be confused with the PURPA Title II, Sec. 210 requirement for mandatory purchase by electric utilities of cogeneration and small power production[.]”). Even if Ashland were a nonregulated electric utility under PURPA, which it has apparently never held itself out to be, the PUC still has independent jurisdiction to adjudicate this dispute between a qualifying facility and a PURPA electric utility.

In any event, despite Ashland’s argument to the contrary, Ashland’s Br. at pp. 4-8, the New Hampshire PUC does have jurisdiction and ratemaking authority over it for certain purposes: *see Appeal of Ashland Elec. Dept.*, 141 N.H. 336, 338 (1996) (Ashland is subject to PUC jurisdiction for purposes of RSA Chapter 38); *see also* RSA 38:17 (“Any such municipality may contract to supply electricity, gas, or water to individuals, corporations, other municipalities, or any person for any of the purposes named or

¹ <https://www.energy.gov/oe/articles/list-covered-electric-utilities-under-public-utility-regulatory-policies-act-1978-1>

contemplated in this chapter, and make such contracts, and establish such regulations and such reasonable rates for the use thereof, *as may from time to time be authorized by the commission.*”) (emphasis added)²; *see* RSA 362-A:8, II(a) (“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.”); *see also* RSA 125-O:23 and PUC Docket 14-048 (Ashland comments regarding RSA 125-O obligations).

While Ashland may be exempt from the definition of “public utility” under certain provisions of New Hampshire law (and only if it is operating within its corporate limits)³, that does not completely exempt it from PUC oversight – a critical point that Ashland overlooks.

The New Hampshire legislature clearly intended the New Hampshire PUC to implement and enforce PURPA. *See* RSA 362-A:8, II(a) (rates established by the PUC under state *or* federal law for purchases from QFs constitutes a state-approved legally enforceable obligation). Similar to the Court’s analysis in *Appeal of Ashland Elec. Dept.*, for purposes of implementing PURPA’s mandates and enforcing same, the PUC has

² Arguably, pursuant to this section, the electricity supply contract Ashland entered into with VPPSA is void *ab initio* as Ashland did not obtain PUC approval under this statute, and the contract is not in the public interest because it does not represent the lowest cost for ratepayers and impermissibly excludes purchases from SRH, a qualifying facility under PURPA and limited electrical energy producer under LEEPA.

³ It has not been established yet in this docket whether Ashland only operates within its corporate limits. There is some indication in Docket 14-048 that Ashland may not, in fact, be operating solely within those limits, or that it has not always done so. *See* PUC Docket 14-048, Letter from New Hampton Village Precinct in the Town of New Hampton (“Any electric work that needs to be done in the Village Precinct is done by the Ashland Electric Department on a fee basis. The Precinct purchases electric power from the Vermont Electric Power Supply Authority (VPPSA) through the Ashland Electric Department.”). If Ashland is operating outside of its corporate limits, then it is a “public utility” subject to PUC jurisdiction under LEEPA in addition to PURPA. RSA 362:2, I; RSA 362-A:3.

jurisdiction over Ashland. New Hampshire's definition of "public utility" does not preclude the PUC from supervising all of a municipal utility's activities within town limits. *See Appeal of Ashland Elec. Dept.*, 141 N.H. at 341 ("[i]f it were true that RSA 374:3 precludes the PUC from supervising all of a municipal utility's activities within town limits, then RSA 38:10 could not apply when a town attempts to establish a new municipal utility. Ashland's interpretation of the PUC's role thus clearly contradicts the plain meaning of both RSA 38:3 and RSA 38:10, and is unpersuasive.").

Thus, the PUC has some level of ratemaking authority over Ashland Electric Department, making it a "State regulated electric utility" under PURPA. *See* 16 U.S.C. § 2602(18) ("State regulated electric utility" means "any electric utility with respect to which a State regulatory authority has ratemaking authority."); 16 U.S.C. § 2602(11) ("ratemaking authority" means "the designation of the rates which an electric utility charges for electric energy."); 16 U.S.C. § 2602(10) ("rate" means "(A) any price, rate, charge, or classification made, demanded, observed, or received with respect to sale of electric energy by an electric utility to an electric consumer, (B) any rule, regulation, or practice respecting any such rate, charge, or classification, and (C) any contract pertaining to the sale of electric energy to an electric consumer."); RSA 38:17, *supra* (PUC approval of rates for supply contracts).

The New Hampshire legislature granted the N.H. PUC such ratemaking authority for purposes of RSA chapter 38 and for PURPA. RSA 362-A:8, II(a) ("rates" established under state (LEEPA) *or* federal law (PURPA) exist under the "regulatory authority" of the state). In other words, it cannot be said that the PUC has *no* oversight of Ashland Electric Department, or that it has *no* ratemaking authority over Ashland; therefore, the

definition of “nonregulated utility” under PURPA does not divest the N.H. PUC of its recognized authority to enforce PURPA in New Hampshire. “Section 210 of PURPA . . . directs the FERC to promulgate rules for implementation by State regulatory commissions.” *Appeal of Public Service Co. of New Hampshire*, 130 N.H. 285, 291 (1988). The PUC has recognized its authority under PURPA to arbitrate disputes between qualifying facilities and PURPA electric utilities. *See* DE 80-246, Supp. Order No. 14,797, 66 NH PUC 83 (March 20, 1981) (“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 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 by an electric utility under PURPA).

The PUC having jurisdiction to establish rates for “electric utilities” under PURPA is consistent with PURPA’s statutory scheme, where “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)).

Conversely, the Town's interpretation of PURPA would require Squam River Hydro, a small qualifying hydroelectric facility of less than 1 MW, and Ashland Electric Department, a small electric utility, to incur significant costs to litigate in Washington, D.C., despite that being contrary to the very purpose of PURPA – to encourage the proliferation and reliability of renewable resources and small power production, “including rules requiring electric utilities to purchase power from small power production facilities.” *Appeal of Granite State Elec. Co.*, 121 N.H. 787, 789 (1981) (citing PURPA § 210, 16 U.S.C. § 824a-3); *see also Winding Creek Solar LLC v. Peterman*, 932 F.3d 861, 863 (9th Cir. 2019) (PURPA aims to eliminate “(1) the reluctance of traditional electric utilities to purchase power from and sell power to non-traditional facilities, and (2) the financial burdens imposed upon alternative energy sources by state and federal utility authorities.”). SRH should not have to incur the financial burden of litigating a dispute before FERC when the statutory scheme under PURPA makes clear that State regulatory authorities are charged with enforcing PURPA's mandates and that such issues are properly addressed at the local level.

In addition, part of SRH's claim involves lost renewable energy credits (RECs) under RSA 362-F. The PUC has clear jurisdiction over N.H. RECs under RSA 362-F, and FERC does not. Thus, deferring to a ruling from FERC – which is unnecessary for the reasons discussed above – would still require SRH to return to the PUC. As a matter of administrative efficiency, SRH's claims should all be tried together in this forum.

Finally, to the extent Ashland makes passing reference to SRH's notice of, and response to, Ashland's decision to terminate its Purchased Power Agreement (PPA) with

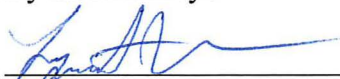
SRH, those issues have no bearing on the PUC's jurisdiction or Ashland's purchase obligations under PURPA.

There is no reason to require this small NH-based qualifying facility that has a dispute with a small NH-based utility to incur the additional expense and inconvenience of taking this dispute to Washington. This Commission has jurisdiction and should exercise it in this case.

Respectfully submitted,

Squam River Hydro, LLC

By Its Attorneys



Douglas L. Patch, Esq.

Lynnette V. Macomber, Esq.

Orr & Reno, P.A.

45 South Main Street

PO Box 3550

Concord, NH 03302

(603) 223-9161

dpatch@orr-reno.com

lmacomber@orr-reno.com

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Certificate of Service

I hereby certify that a copy of the foregoing petition has on this 30th 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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