

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

**DOCKET NO. DE 23-009
SQUAM RIVER HYDRO, LLC**

**Petition for Reconnection of Qualifying Facility,
Payment of Avoided Costs and Payment of Lost Revenues**

Objection to Squam River Hydro, LLC's Motion for Rehearing

The Town of Ashland and the Ashland Electric Department (collectively "Ashland"), by and through their attorneys, McLane Middleton, Professional Association, object to Squam River Hydro, LLC's ("Petitioner" or "SRH") Motion for Rehearing of Order No. 26,937 ("Rehearing Motion"). SRH fails to establish good reason for the New Hampshire Public Utilities Commission ("PUC" or "Commission") to grant rehearing. In support of its Objection, Ashland states as follows:

I. Summary of Objection

The Commission got it exactly right in Order No. 26,937 ("Jurisdictional Order") when it found that it had "no discretion to accept jurisdiction" in this case. Nevertheless, SRH continues to plead with the Commission to "take" or "assert" jurisdiction. The fundamental flaw in SRH's plea is that the Commission either has jurisdiction or it does not; it cannot just "take" jurisdiction.

SRH appears to believe that if it alleges that Ashland committed bad acts (which Ashland denies) those allegations somehow put the Commission in a position to exercise jurisdiction over Ashland, but allegations do not equate to, or confer, jurisdiction. SRH's various unfounded allegations belong in forums with the appropriate jurisdiction, where Ashland will vigorously

defend itself, whether it is the Federal Energy Regulatory Commission (“FERC”), the Board of Tax and Land Appeals, or Superior Court.

II. Standard of Review

A successful motion for rehearing “must do more than merely restate prior arguments and ask for a different outcome.” *Freedom Energy Logistics*, Order No. 25,810 at 4 (September 8, 2015). Rather, pursuant to RSA 541:3, a petitioner must establish “good reason” for rehearing by (1) showing that there are matters that the Commission “overlooked or mistakenly conceived in the original decision,” *Dumais v. State Pers. Comm’n*, 118 N.H. 309, 311 (1978) (quotations and citations omitted), or (2) presenting new evidence that was “unavailable prior to the issuance of the underlying decision.” *Hollis Telephone, Inc. et al.*, Order No. 25,088 (April 2, 2010).

III. Discussion

SRH fails to establish good reason for rehearing. It restates the same arguments previously raised before the Commission, seeks to introduce new evidence that is not relevant to the legal question of jurisdiction, which it should have introduced prior to issuance of Order No. 26,937, and identifies legal authority not raised in its briefing before the Commission. Accordingly, SRH’s Rehearing Motion should be denied.

A. The Commission correctly found that it lacks discretion to take jurisdiction in the absence of express statutory authority.

The Commission begins its Analysis by pointing out that its authority is limited to that “expressly granted” or “fairly implied” by statute and that “[s]ettled rules of statutory construction require statutes to be interpreted, whenever possible, as consistent with other statutes dealing with a similar subject matter, so that the legislative purpose behind each statute is effectuated and statutes do not contradict each other.” Jurisdictional Order at 5 (citing *Appeal of Pub. Serv. Co. of N.H.*, 122 N.H. 1062, 1066 (1982); *In re J.S.*, 174 N.H. 375, 380-81 (2021)).

These well-established legal standards are in sharp contrast to SRH's approach in this case to isolate statutory language and excerpt select provisions to support its positions. The Commission, however, followed New Hampshire Supreme Court precedent that "[a] statutory provision should not be interpreted in isolation, but should be construed within the context of the overall statutory scheme." Jurisdictional Order at 5 (citing *Appeal of Pennichuck Water Works*, 160 N.H. 18, 27-28 (2010)).

The Commission addressed each of SRH's arguments in turn. Among other things, the Commission noted that RSA 374 "contain[s] no reference to municipal entities." Jurisdictional Order at 6. In addition, the Commission noted that RSA 362-A does not mention municipal entities other than in a discrete, inapplicable circumstance. *Id.* at 7. Similarly, the Commission concluded that RSA 362-A:5's limited grant of authority to adjudicate claims does not extend to claims against "municipal electric utilities operating within their corporate boundaries." *Id.* Furthermore, the Commission cited two of its prior orders to explain that RSA 362-F does not apply, inasmuch as municipal utilities as defined by RSA 38 are excluded. *Id.* Finally, the Commission cited its own precedent to dispose of SRH's claim that RSA 125-O does more than provide limited jurisdiction to determine Regional Greenhouse Gas Initiative rebates. *Id.*

B. SRH fails to show that the Commission overlooked or mistakenly conceived anything.

SRH continues to ignore the unambiguous language of New Hampshire statutes that exempt municipal utilities from the jurisdiction of the PUC. It relies on the same cases and orders that it raised previously, and which relate only to the Commission's authority to

implement and/or enforce PURPA and/or LEEPA (RSA 362-A) against public utilities – a question of law settled by the Commission’s Order. Jurisdictional Order at 5-7.¹

SRH complains that the Commission’s Order is an “unnecessarily narrow and limiting” interpretation of RSA 362-A:8,II(a) and a “strained and overly narrow interpretation of RSA 38:17” (Rehearing Motion at 4-6), but it fails to establish that the Commission overlooked or mistakenly conceived anything.² The Commission considered both RSA 362-A:8 and RSA 38:17 in its Order. *See* Jurisdictional Order at 6, 10-11. Moreover, the Commission thoroughly considered the limits of its delegated statutory authority of these and other statutes and concluded that

[w]hen the various statutes relating to the Commission’s authority are interpreted in relation to one another and in a manner that avoids contradictory results, it is apparent that the Commission’s authority to regulate municipal utilities operating within their municipal boundaries is limited and does not include ratemaking authority.

Jurisdictional Order at 11. The Commission considered SRH’s arguments and rejected them, citing appropriate authority for doing so. SRH has not identified anything new here that would disturb the Commission’s decision.

SRH’s renewed argument concerning federal law fares no better. As in its earlier briefing, SRH misapprehends PURPA’s clear definitional scheme distinguishing “State regulated electric utility” from “nonregulated electric utility” – a distinction that the Commission fully considered through reference to PURPA, other federal statute, and Texas³ and New Mexico

¹ Ashland previously addressed SRH’s flawed reliance on DE 80-246, *Appeal of Public Service Co. of New Hampshire* 130 N.H. 285 (1988) and *Appeal of Granite State Elec. Co.*, 121 N.H. 787 (1981) in its Reply Brief and does not repeat those arguments here. *See* Ashland Reply Brief at 3-4.

² In fact, SRH misconceives RSA 362-A:8, which pertains to the payment obligations of public utilities and rates established in orders by the Commission.

³ The Texas Public Utility Commission’s (“Texas PUC”) decision in *Re Arrangements Between Qualifying Facilities and Electric Utilities* has no bearing here. The Texas PUC concluded that it had jurisdiction to implement PURPA with respect to providers of last resort (“POLR”) and retail electric providers with the price to beat obligation (“PTB REP”) based on the particulars of Texas state law. The Texas PUC’s decision describes the nature

Commission precedent. Jurisdictional Order at 8-10. Instead, it repeats the argument that because Ashland is an “electric utility” as a matter of federal law, it should be subject to the PUC’s jurisdiction over public utilities. This position, however, ignores the language in PURPA differentiating between “State regulated electric utility” and “nonregulated electric utility” and delegating to the Commission only the authority to implement PURPA over electric utilities for which the Commission “has ratemaking authority.” Jurisdictional Order at 8.

There can be no reasonable dispute that the Commission does not exercise ratemaking authority over Ashland and that it is not a public utility. *See* Jurisdictional Order at 6; *see also In re Pennichuck Water Works, Inc.*, 160 N.H. 18, 33 (2010) (“A municipal corporation, however, that operates solely within its corporate limits, is not a ‘public utility’ subject to the PUC’s jurisdiction.”); *see also New Ipswich Elec. Lighting Dept. v. Greenville Elec. Lighting Co.*, 108 N.H. 338 (1967) (holding that municipal lighting department is “not subject to the jurisdiction of the Commission as to operations within the corporate limits of the town.”).

C. The Commission correctly concluded that RSA Chapter 38 does not provide it ratemaking authority over Ashland.

SRH repeats that RSA 38:17 is sufficient to confer ratemaking authority over Ashland. Here again, the Commission’s Order thoroughly analyzed and rejected SRH’s argument that a singular provision in RSA 38, “the purpose of which is to empower municipal utilities to take privately owned utilities by eminent domain so that municipalities can maintain and operate these facilities”, should be construed to confer ratemaking authority for purposes of

of its ratemaking authority over such entities, which is inapplicable to the situation here because the Commission does not exercise any ratemaking authority over Ashland.

implementing PURPA. Jurisdictional Order at 10. For the reasons set forth in the Commission's Order, SRH's argument is unavailing.⁴

SRH uses its argument about RSA 38:17 as a jumping off point to allege various bad acts on Ashland's part, including spinning out a theory about Ashland running "small hydroelectric utilities out of business while it seeks to take over hydroelectric operations for itself" as a basis for the Commission to "assert" jurisdiction.⁵ Rehearing Motion at 5 & 6. In addition, SRH repeats its allegation that Ashland "tripled the local property tax assessment" but fails to mention that SRH filed an appeal for abatement with the Board of Tax and Land Appeals, which was denied. *See Squam River Hydro, LLC v. Town of Ashland*, Docket No.: 29990-19PT (June 2, 2022). All of Ashland's actions, including terminating its PPA with SRH, disconnecting SRH, increasing SRH's assessment, and exploring alternative sources of power were undertaken in good faith. Ultimately, Ashland's goal is to provide safe and reliable service to its customers at reasonable prices and its actions were taken in furtherance of that goal.

D. RSA 374:57 does not confer PUC jurisdiction over Ashland.

In its Rehearing Motion, SRH cites, for the first time, to RSA 374:57. SRH's new argument is untimely, but even if SRH had made its argument in a timely manner, it would be unavailing. SRH relies on excerpted language from RSA 374:57 concerning purchases of capacity. It states that "[t]his statute does not use the term 'public utility'" and, therefore, the use of the term "electric utility" should be construed to include municipal utilities. SRH is wrong. In fact, the Commission has already considered the applicability of RSA Chapter 374, titled

⁴ SRH also contends that the Commission "overlooked Ashland's bad faith disconnection" which implicates RSA 38:12 and 38:15. In the first place, the disconnection was not made in bad faith and, in the second place, the Commission does not have the jurisdiction to adjudicate SRH's claim. Moreover, the Commission considered RSA 38:12-16 in determining that RSA Chapter 38 does not provide it ratemaking authority over Ashland. *See* Jurisdictional Order at 10-11.

⁵ On this point, SRH attaches certain communications that (1) are not relevant to the question of jurisdiction, (2) should have been provided prior to the issuance of Order No. 26,937, and (3) do not prove SRH's allegations.

“General Public Utility Duty”, pointing out that “[i]ts provisions contain no references to municipal entities” and finding that it “concern[s] the Commission’s authority to regulate ‘public utilities’.” Jurisdictional Order at 6. SRH has not shown that the Commission overlooked or mistakenly conceived RSA 374:57.

E. There is no reason to transfer this question of law to the New Hampshire Supreme Court.

Despite the Commission’s well-reasoned decision, SRH ventures to propose that, to the extent the Commission “has concerns about its ability to exercise jurisdiction” it should consider transferring the question of law to the New Hampshire Supreme Court pursuant to RSA 365:20.⁶ The Commission’s decision followed extensive briefing by the parties and roughly three hours of oral argument held on November 7, 2023. In reaching its decision, the Commission analyzed all relevant New Hampshire statutes together with the federal statutes, properly concluding that it has no jurisdiction.

The Commission’s determination aligns with well-established principles of statutory construction, the Department of Energy’s November 17, 2023 position statement, and the New Hampshire Supreme Court’s 2010 decision that municipal corporations acting within their corporate boundaries are not “public utilities” as determined in *Appeal of Pennichuck Water Works*, 160 N.H. 18, 27-28 (2010). The Commission’s analysis and conclusion are not in doubt. To the extent that SRH disagrees, it may seek an appeal.

F. Order No. 26,937 does not deny SRH due process.

SRH’s argument that Order No. 26,937 will deny it due process is without merit.

Rehearing Motion at 3. To the contrary, were the Commission to assert jurisdiction over Ashland

⁶ SRH mentions RSA 365:19 prior to discussing RSA 365:20 but it is not clear for what purpose. Certainly, the public good does not require an investigation in a matter over which the Commission has determined it lacks jurisdiction.

in the absence of any legal authority conferring jurisdiction, that would violate Ashland's due process rights. SRH had a full opportunity to be heard on the matter of the PUC's jurisdiction, thus it has been afforded the process it is due.

IV. Conclusion

SRH has failed to establish good reason for rehearing. Regarding state law, the Commission thoroughly considered the extent of its jurisdiction, addressing the numerous statutes cited by SRH, and determined that it lacks jurisdiction over Ashland in this matter. Regarding federal law, the Commission analyzed its authority under PURPA and determined that its authority to implement PURPA is limited to utilities over which it has ratemaking authority. Because Ashland is a municipal utility exempt from the Commission's general ratemaking authority, and because no other statute confers such authority on the Commission, there is no jurisdiction over this matter.

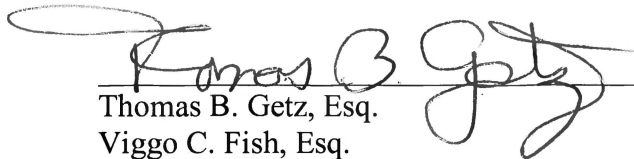
For these reasons, SRH's Rehearing Motion should be denied.

WHEREFORE, Ashland respectfully requests that the Commission:

- A. Deny the Motion for Rehearing; and
- B. Grant such further relief as it deems appropriate.

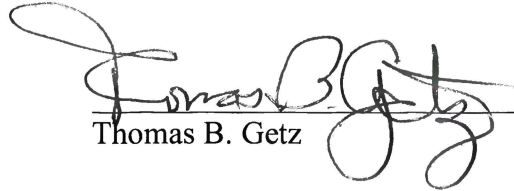
Respectfully submitted,
Town of Ashland, New Hampshire and Ashland
Electric Department
By Their Attorneys

Date: March 1, 2024


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Certificate of Service

I hereby certify that a copy of the foregoing Objection to Motion for Rehearing has on this 1st day of March, 2024, been sent by email to the service list in DE 23-009.


Thomas B. Getz