STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

Potential Jurisdictional Conflicts Related to	)	
Authorization of Pilot Programs Under RSA	)	DE 23-026
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INITIAL BRIEF OF THE JOINT UTILITIES

June 23, 2023

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Pursuant to the May 16, 2023 Prehearing Order of the New Hampshire Public Utilities Commission ("Commission"), Public Service Company of New Hampshire d/b/a/ Eversource Energy ("PSNH"), Liberty Utilities (Granite State Electric) Corp. d/b/a/ Liberty ("Liberty"), and Unitil Energy Systems, Inc. ("UES") (collectively, the "Joint Utilities"), submit this joint Initial Brief on the issues identified by the Commission in the above-referenced order. The Prehearing Order stems from Senate Bill (SB) 321 of the 2022 legislative session, which modified certain sections of New Hampshire Revised Statutes Annotated ("RSA") Chapters 362-A and 362-F. The statute now requires the Commission to make several definitive determinations in connection with the Limited Electrical Energy Producers Act ("LEEP Act"), RSA Chapter 362-A. Only if the issues are successfully resolved may the Commission approve pilot programs as contemplated under the LEEP Act.[1] On March 16, 2023, the Commission ordered that the following issues be addressed in written briefs:

a. Whether any jurisdictional conflicts exist concerning the use of the distribution or transmission system.

[1] *See* RSA 362-A:2-b, III.

b. Whether the activities allowed by RSA chapter 362-A would require a utility to violate its transmission owner operator's agreement or require a recalculation of any Independent System Operator-New England (ISO-NE) open access transmission tariffs (OATT).[2]

I. INTRODUCTION

The LEEP Act, as amended by SB 321, may put the Joint Utilities in the untenable position of having to take actions inconsistent with federal law and policy in order to comply with state regulatory authority, in contravention of federal preemption principles rooted in the Constitution's Supremacy Clause. Thus, the Joint Utilities, in an effort to protect themselves from violating federal law and policy, and in compliance with RSA 362-A:2-b, III and the Prehearing Order, have carefully analyzed the statute at issue[3] and found: (1) jurisdictional conflicts concerning the use of the Joint Utilities' distribution and transmission systems; (2) certain activities that, if mandated by the Commission pursuant to RSA 362-A:2-b, would require the Joint Utilities to violate the Transmission

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[2] *Potential Jurisdictional Conflicts Related to Authorization of Pilot Programs Under RSA 362-A:2-b*, Prehearing Order at 1 (May 16, 2023) ("Prehearing Order").

[3] The Joint Utilities have used their best efforts to interpret what are, in some cases, unintelligible statutory provisions. Some jurisdictional conflicts are caused by the SB 321 legislation not using defined terms in the ISO New England Inc. ("ISO-NE") Transmission, Markets and Services Tariff ("ISO-NE Tariff"), using such terms incorrectly, or by allocating costs or credits to entities that the Joint Utilities cannot even identify with certainty.

Capitalized terms otherwise not defined herein have the meanings as set forth in Section I.2.2 of the ISO-NE Tariff. On April 21, 2023, the Join Utilities explained that the most recent effective version of *any* ISO-NE Tariff section can be viewed on FERC's Tariff Browser website. A recent version of ISO-NE Tariff § I.2 "Rules of Construction; Definitions" also can be located at: https://www.iso-ne.com/static-assets/documents/regulatory/tariff/sect_1/sect_i.pdf. Use of FERC's Tariff Browser is the best way to access the most recent effective section of any FERC-filed tariff or rate schedule such as the ISO-NE Tariff or the TOA.

Operating Agreement ("TOA"); and (3) certain activities that, if mandated by the Commission pursuant to RSA 362-A:2-b, would require "recalculations" under the ISO-NE Tariff.

The Joint Utilities' legal positions do not reflect an intent to thwart the development of limited electrical energy producers ("limited producers") or other forms of distributed energy resources ("DERs"). Rather, each of the Joint Utilities, to the extent it is a Market Participant and/or a Transmission Owner in ISO-NE as approved by the Federal Energy Regulatory Commission ("FERC"), as well as a Commission-regulated public utility, cannot serve two regulators that are issuing conflicting directives through regulations, orders, or tariffs. Today, the FERC-approved ISO-NE Tariff and TOA between ISO-NE and the Transmission Owners work seamlessly with the Joint Utilities' own retail tariffs, in a manner respective of each regulator's jurisdiction. The legislation at issue seeks to disrupt this long-standing cooperative federalism by trying to empower the Commission to override or interfere with matters within the jurisdiction of FERC. Ironically, while some in the state are seeking means to use DERs to avoid FERC's authority, FERC itself is welcoming DER participation with open arms and providing the state a substantial role in such efforts.[4]

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[4] *See, e.g., Participation of Distributed Energy Res. Aggregations in Mkts. Operated by Reg'l Transmission Orgs. & Indep. Sys. Operators*, Order No. 2222, 172 FERC ¶ 61,247 (2020), *subsequent history omitted.*

II. RELEVANT LEGAL PRECEDENT

In directing that the Commission evaluate the existence of possible "jurisdictional conflicts," the New Hampshire Legislature ("Legislature") is raising the federal preemption doctrine, which is rooted in the Supremacy Clause of the United States Constitution,[5] pursuant to which federal law is the supreme law of the land. Federal preemption of state law can raise two different types of legal questions. The first type of question arises "when a controversy concern[s] … the scope of the Federal Government's authority to displace state action."[6] The second type of question (and the type addressed here) is "whether a given state authority conflicts with, and thus has been displaced by, the existence of Federal Government authority."[7] The key question is whether the state is regulating in an area that the states have traditionally occupied and regulated, or whether there has been a history of significant federal presence. A state statute or regulation can be preempted based on either the doctrine of field preemption or the doctrine of conflict preemption.

Under the doctrine of field preemption, federal law overrides a state law when the scope of the relevant federal statute indicates that Congress intended federal law to fully occupy a particular field. Thus, "[i]f Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted."[8] In a field preemption case,

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[5] U. S. Const., art. VI, cl. 2.

[6] *New York v. FERC*, 535 U.S. 1, 17 (2002).

[7] *Id.* at 17-18.

[8] *E.g. Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (citations omitted). *See also Pac. Gas & Elec. Co. v. State Energy Res. Conservation Dev. Comm'n,* 461 U.S. 190, 212-

the inquiry is whether what Congress has done is sufficiently pervasive to constitute an implicit declaration that no other regulation of the area is to be allowed. The critical inquiry is what constitutes the "field."

The second form of preemption is conflict preemption, which exists when compliance with both state and federal law is impossible,[9] or when state law stands as "an obstacle to accomplishment and execution of the full purposes and objectives of Congress."[10] As the Supreme Court has explained: "If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress."[11]

As to FERC-regulated entities, under the *Nantahala*[12] doctrine, a state commission is preempted from trapping costs authorized by FERC to be collected. Cost trapping occurs when a state agency sets retail rates that prevent a utility from fully recovering its

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13 (1983) ("When the federal government completely occupies a given field or an identifiable portion of it, ... the test of preemption is whether 'the matter on which the state asserts the right to act is in any way regulated by the federal government.'" (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947))).

[9] *E.g., Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963) (finding conflict preemption where "compliance with both federal and state regulations is a physical impossibility").

[10] *E.g., Hines v. Davidowitz,* 312 U.S. 52, 67 (1941) (citation omitted).

[11] *Silkwood,* 464 U.S. at 248 (citations omitted); *see also California ex rel. Bill Lockyer v. Dynegy*, *Inc.*, 375 F.3d 831, 849 (9th Cir. 2004) (citation omitted) ("*Dynegy Inc.*").

[12] *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986).

costs at the FERC-approved rate.[13] In *Nantahala,* the Supreme Court held that the Supremacy Clause prohibited a state agency from allocating more low-cost power to a utility than that mandated by FERC and reflected in the utility's wholesale rates.[14] The state agency's allocation was preempted because it would have prevented the utility from fully recovering its costs of purchasing at the higher FERC-approved rate.[15]

Subsequently, in *Mississippi Power & Light Co.*, the Court cited *Nantahala* to hold that a state agency was preempted from examining the prudence of a utility's FERC-mandated allocation of power.[16] Preemption was found because "FERC's exclusive jurisdiction applies not only to rates but also to power allocations that affect wholesale rates."[17] Accordingly, the Supremacy Clause prohibited the state agency from setting retail rates that trap "reasonable operating expense costs incurred as the result of paying a FERC-determined wholesale rate for a FERC-mandated allocation of power."[18]

The same preemption principles relied on in *Nantahala* prevent utilities from being denied recovery of their transmission costs other than those costs authorized by FERC. Once authorized by FERC, those costs are recovered in rates set forth in tariffs,

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[13] *Id.* at 970 ("When FERC sets a rate between a seller of power and a wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate. Such a 'trapping' of costs is prohibited.") (citation omitted).

[14] *Id*. at 967.

[15] *Id*. at 970.

[16] *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 373 (1988).

[17] *Id.* at 355, 371.

[18] *Id.* at 355, 373.

which "[c]arry the force of federal law," in the same sense as ordinary federal regulations.[19]

III. ARGUMENT

A. Whether any jurisdictional conflicts exist concerning the use of the distribution or transmission system?

1. The Joint Utilities cannot allow a state authority to compel them to use their transmission or distribution systems for the purpose of accommodating ***intrastate*** wholesale sales that actually are ***interstate*** wholesale sales.

a. The wholesale sales contemplated are in interstate commerce.

It would be unlawful for the Joint Utilities to permit the use of their transmission and/or[20] distribution systems[21] for limited producers to make "wholesale power sales in *intrastate* commerce," because any *wholesale* use of those systems would be in *interstate* commerce and FERC-jurisdictional, as explained below. The LEEP Act, as amended by SB 321, permits limited producers to make both retail and wholesale sales (i.e., sales to load-serving entities ("LSEs")).[22] But, the relevant statute characterizes wholesale sales

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[19] *Old Dominion Elec. Coop. v. PJM Interconnection, LLC,* 24 F.4th 271, 275 (4th Cir. 2022) (quoting *Bryan v. BellSouth Commc'ns, Inc.*, 377 F.3d 424, 429 (4th Cir. 2004)).

[20] Not all of the Joint Utilities own transmission systems, as discussed *infra*.

[21] Although the "contract path" of the sale of power from a limited producer to a wholesale customer may not include transmission facilities, the transmission system is always relied upon in delivering power on the distribution system. *E.g., Pac. Gas & Elec. Co.,* 88 FERC ¶ 63,007 at 65,075 (1998) (holding that distribution service cannot be performed in isolation from an ISO grid) (*Pacific Gas*), *aff'd* 100 FERC ¶ 61,156*, reh'g denied*, 101 FERC ¶ 61,151 (2002), *vacated and remanded on other grounds*, *S. Cal. Edison Co. v. FERC*, 415 F.3d 17 (D.C. Cir. 2005).

[22] *See* RSA 362-A:2-b, VIII ("[P]urchasers may be any non-residential retail electricity customers located within the same New Hampshire electric distribution utility franchise area

by limited producers as being in *intrastate* commerce. For example, RSA 362-A:2-b, IX refers to "[i]ntrastate sales of electricity across the distribution grid . . . . ." Paragraph X also refers to "intrastate sales of electricity over the distribution grid." *Neither* Paragraph confines intrastate sales to retail sales.

"Intrastate wholesale" sales, by definition do not, and cannot, exist under federal law, if the relevant resource from which the energy is being sold operates in parallel with the distribution or transmission system of a utility connected to the Eastern or Western Interconnection.[23] There cannot be wholesale intrastate transactions (i.e., sales for resale) as contemplated in the statute because long-held precedent dictates that, when a generator and its wholesale customer(s) being served energy are both located on a distribution system, the transaction still constitutes an *interstate* wholesale sale. This legal principle is derived from a long line of cases, but originates with the 1927 Supreme Court decision in *Attleboro.*[24] In *Attleboro*, the Supreme Court held that a direct transfer of power across state lines was subject to the Commerce Clause, and therefore beyond the authority of either state to regulate.[25] The Federal Power Act ("FPA") was enacted in direct response to close the *Attleboro* regulatory "gap."

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where the limited producer is located, *or any electricity suppliers serving retail load* within such area.") (emphasis added).

[23] Hawaii, Alaska, and the ERCOT region of Texas are thus locations where *intrastate* wholesale power sales routinely occur.

[24] *Pub. Utils. Comm'n of Rhode Island v. Attleboro Steam & Elec. Co*., 273 U.S. 83, 84 (1927) (*"Attleboro"*).

[25] *Id.* at 91.

After Congress gave the Federal Power Commission (now FERC) jurisdiction over electricity sales for resale in interstate commerce, the issue became one of defining "interstate commerce." The Supreme Court next clarified federal jurisdiction over wholesale sales through its 1943 holding in *Jersey Central*, a case concerning Jersey Central Power and Light, a New Jersey company, which supplied power to another New Jersey company, PSE&G, which had exchange arrangements with a New York company.[26] The Court held that Jersey Central was engaged in *interstate* commerce, subject to Federal Power Commission jurisdiction, because PSE&G was essentially a mere conduit for Jersey Central's interstate sales.[27]

Expanding on *Jersey Central*, the Supreme Court in a 1972 case held that, once wholesale energy is placed on any part of the interstate grid, it is immediately within a reservoir of interstate electricity regulated under the FPA even if the buyer and seller are both in the same state.[28] In that case, a utility with no direct connections to any out-of-state utility, and that sold no power to out-of-state utilities, was found to be subject to FERC jurisdiction due to the fact that power supplied to a bus from a variety of sources was merged and commingled. The comingling theory was later expanded to the distribution system, such that wholesale transactions occurring on the distribution system also have been swept up into interstate wholesale sales. For example, in *Detroit Edison Co. v. FERC*, the D.C. Circuit explained that:

[26] *Jersey Cent. Power & Light Co. v. FPC*, 319 U.S. 66 (1943) (*Jersey Central*).

[27] *See id.* at 67-69.

[28] *FPC v. Fla. Power & Light Co.*, 404 U.S. 453, 461-63 (1972).

> [W]hen a local distribution facility is used in a wholesale transaction, FERC has jurisdiction over that transaction pursuant to its wholesale jurisdiction under FPA § 201(b)(1). In sum, FERC has jurisdiction over all interstate transmission service *and over all wholesale service*, but FERC has no jurisdiction over unbundled retail distribution service-*i.e.*, unbundled retail service over local distribution facilities.[29]

FERC has also rejected the argument that sales of power that take place over the state-regulated local distribution system are exempt from its FPA jurisdiction, finding that its authority to regulate sales for resale of electric energy and transmission in interstate commerce is not affected by the generator's location on the distribution system.[30] In that matter, a municipal utility argued that:

> [D]istribution-level facilities and distribution-level feed-in tariffs do not implicate [FERC] jurisdiction because FPA section 201(b)(1) explicitly excludes from [FERC] jurisdiction facilities used in local distribution and any unbundled retail service occurring over those facilities. [The municipal utility] also argues that sales of power under distribution-level feed-in tariffs cannot be interstate commerce because the power sold does not enter the bulk transmission system or interstate commerce, but remains on the state-regulated distribution system.[31]

FERC rejected that argument outright, finding that:

> The FPA grants [FERC] exclusive jurisdiction to regulate sales for resale of electric energy and transmission in interstate commerce by public utilities. [FERC's] FPA authority to regulate sales for resale of electric energy and transmission in interstate commerce by public utilities is not dependent on the location of generation or transmission

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[29] *Detroit Edison Co. v. FERC,* 334 F.3d 48, 51 (D.C. Cir. 2003) (citations omitted).

[30] *Cal. Pub. Util. Comm'n*, 132 FERC ¶ 61,047 at PP 71-72 (2010), *subsequent history omitted*.

[31] *Id.* P 56 (footnote omitted).

> facilities, but rather on the definition of, as particularly relevant here, wholesale sales contained in the FPA.[32]

That said, wholesale sales in interstate commerce can be subject to state jurisdiction *if* they are made under PURPA,[33] but wholesale sales under PURPA are still in *interstate* commerce. FERC has held repeatedly that wholesale PURPA sales are just wholesale sales in interstate commerce that happen to be exempt from FERC regulation.[34] The courts have agreed, as evidenced by the previously cited Vermont Supreme Court decision and other court decisions.[35]

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[32] *Id*. P 72 (citation omitted).

[33] Mr. Below, representing the Community Power Coalition of New Hampshire, claims at page 23 of the Prehearing Conference transcript that he knows of a Vermont program "purely under state jurisdiction." Both Vermont's Rule 4.100 and standard offer programs, the latter of which Mr. Below perhaps was describing, are PURPA programs that provide state jurisdiction over wholesale sales in interstate commerce. In examining both programs, the Vermont Supreme Court found "Vermont has no authority to compel wholesale sales of electricity other than as authorized by PURPA. The FPA grants exclusive power to FERC to regulate the wholesale sale of electric energy in interstate commerce, while PURPA creates a limited exception through which states may regulate *such* sales." *In Re Investigation to Review The Avoided Costs that Serve as Prices for the Standard-Offer Program in 2020,* 254 A.3d 178, 191 (Vt. 2021) (emphasis added).

[34] *Re Orange & Rockland Utils., Inc.*, 43 FERC ¶ 61,067 at 61,195 (1988) (emphasis added) ("FPA precludes the exercise of state authority to set wholesale rates in interstate commerce *independent of PURPA*."); *Medina Power Co.,* 72 FERC ¶ 61,224 at 62,039 (1995) (emphasis added) (holding that FERC "has its own statutory obligation to ensure that the rates for electric power sold at wholesale in interstate commerce, *if not exempt from Federal Power Act regulation* (such as by virtue of the seller's status as a PURPA QF), are just and reasonable"); *Conn. Light & Power Co*., 71 FERC ¶ 61,035 at 61,153 (1995) (emphasis added) ("PURPA gave the states a specific but limited role to set wholesale rates pursuant to the statute and the Commission's regulations – a role that in most instances they would not otherwise have had *since QF sales primarily are sales for resale in interstate commerce."*).

[35] *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n*, 471 N.Y.S.2d 684, 689 (N.Y. App. Div. 1983) (emphasis added) ("FERC, the agency which has historically regulated wholesale sales of electricity in interstate commerce, did not announce any change in its policy of exclusive jurisdiction over such wholesale sales, *but merely acquired additional statutory options under PURPA*. Moreover, PURPA itself, enacted against the backdrop of the FPA and FERC's exclusive jurisdiction, did not herald any changes in FERC's jurisdiction except those

The irony of the claim that sales by limited producers are not in interstate commerce is the fact that the Constitution's Commerce Clause (allowing federal regulation of interstate commerce) itself is why Congress' enactment of PURPA, providing the *only* exemption to FERC jurisdiction over wholesale interstate power sales for the states, was found lawful by the Supreme Court in *FERC v. Mississippi*.[36] The Court explained that, in 16 U.S.C. Section 2601, Congress found that the regulated activities (i.e., among them wholesale power sales) have an immediate effect on interstate commerce.[37] The Supreme Court found it "difficult to conceive of a more basic element of interstate commerce than electric energy, a product used in virtually every home and every commercial or manufacturing facility."[38] It reiterated that no "State relies solely on its own resources in this respect."[39]

b. The Joint Utilities must treat the wholesale sales of limited producers as if they are made in interstate commerce.

Requiring the Joint Utilities to allow the use of their respective electric delivery facilities for transactions labelled by a state authority as "intrastate wholesale" sales

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specifically provided in the statutory language, none of which transfers such jurisdiction to State regulatory agencies."), *aff'd as modified,* 472 N.E.2d 981 (N.Y. 1984); *Allco Fin. Ltd. v. Klee*, Civ. A. No. 3:15-CV-608 (CSH), 2016 WL 1069043, at *1 (D. Conn. Mar. 17, 2016) (emphasis added) (finding that while "the [FPA] gives the Federal Energy Regulatory Commission ('FERC') exclusive authority to regulate sales of electricity at wholesale in interstate commerce, PURPA contains an *exception* which permits states to regulate wholesale sales by qualifying facilities, in manners that comply with the federal statutory and regulatory scheme.").

[36] *FERC v. Mississippi,* 456 U.S. 742, 755 (1982).

[37] *Id.* at 755.

[38] *Id.* at 757.

[39] *Id.* (citation omitted).

results in a jurisdictional conflict if the state is asserting the authority to dictate the rates, terms, and conditions for both: (1) the use of the Joint Utilities' transmission and/or distribution systems for what are actually wholesale sales in *interstate* commerce; and (2) the wholesale power sales themselves.[40] If the Joint Utilities were compelled by any state authority to accommodate use of their distribution and transmission systems for "intrastate wholesale" sales, *knowing* that the intrastate wholesale sale label is legal error, they would have to ignore FERC's jurisdiction over such services. Because the wholesale transactions described in the LEEP Act, as amended by SB 321, are actually *interstate* in nature, the FPA expressly grants FERC "exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce."[41] Importantly, both the use of the Join Utilities' transmission *and/or* distribution systems by the wholesale seller or buyer are FERC-jurisdictional, as FERC has exclusive jurisdiction over wholesale distribution service.[42]

If a limited producer makes use of a Joint Utility's distribution and transmission system to make sales to a wholesale customer, the Joint Utility would need to provide any delivery service as if pursuant to FERC jurisdiction, file any requisite delivery contracts at FERC, and otherwise treat such sales as wholesale sales in interstate commerce for

[40] If the statute requires the Joint Utilities to acquiesce in a jurisdictional position that they know is legally incorrect, there exists a jurisdictional conflict as relates to use of the Joint Utilities' delivery systems, as the transactions require use of such facilities.

[41] *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982); *see also* 16 U.S.C. §§ 824–824m.

[42] *E.g., Tex-La Elec. Coop. of Tex., Inc.,* 69 FERC ¶ 61,269 (1994).

purposes of the use of its delivery system. The amended statute thus conflicts with FERC's exclusive jurisdiction over wholesale transactions, including wholesale distribution and transmission service.[43] Where FERC's jurisdiction is exclusive, i.e., over wholesale transmission and wholesale distribution service, a state may not regulate.[44] Here, the preempted state action would be requiring the Joint Utilities to provide delivery service that they can only be compelled to provide by FERC at FERC-jurisdictional rates and on FERC-jurisdictional terms and conditions.

2. No state authority can compel wholesale sales (reassignments) of transmission under RSA 362-A:2-b, XI(b).

RSA 362-A:2-b, XI(b) states that "[m]onthly transmission charges incurred by the distribution utility as the transmission network customer may be *allocated to the load serving entity for payment by the LSE* for all or part of the retail meters within its retail metering subdomain, *under terms and conditions approved by the commission*." (Emphasis added). This provision requires that the Joint Utilities effectively reassign[45] the transmission service they purchase from ISO-NE (and any local network service purchased from another Participating Transmission Owner ("PTO")) to LSEs (for

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[43] *Detroit Edison Co.,* 334 F. 3d at 51 (holding that "when a local distribution facility is used in a wholesale transaction, FERC has jurisdiction over that transaction pursuant to its wholesale jurisdiction under FPA § 201(b)(1)") (citations omitted).

[44] *Dynegy, Inc.,* 375 F.3d at 851 ("[O]ur cases specifying the nature and scope of exclusive FERC jurisdiction make clear that the interstate 'transmission' . . . of wholesale energy pursuant to a federal tariff – not merely 'rates' – falls within FERC's exclusive jurisdiction."); *AEP Tex. N. Co. v. Tex. Indus. Energy Consumers,* 473 F.3d 581, 584 (5th Cir. 2006) (citation omitted) ("The Federal Power Act ('FPA') gives FERC exclusive jurisdiction to regulate the transmission and wholesale sale of electric energy in interstate commerce.").

[45] "Reassignment" is the FERC term for reselling/assigning transmission service from one wholesale customer to another wholesale customer.

payment), based on an allocation method set by the Commission.[46] As discussed below, FERC has exclusive jurisdiction over reassignments of wholesale transmission service to other wholesalers, such as LSEs, and thus this statutory provision, while permissive in nature, would be preempted if compelled. A jurisdictional conflict exists concerning which agency (FERC or the Commission) can compel reassignments of wholesale distribution and wholesale transmission service and which can set the rules and regulations governing such resales. It is clear, however, that only FERC can compel such wholesale reassignments, and thus any such usage of the Joint Utilities' transmission and distribution facilities compelled by state authority is preempted.

"Network Customers" under the ISO-NE Tariff, which includes Commission-regulated distribution utilities such as the Joint Utilities, incur FERC-jurisdictional transmission charges based on their Regional Network Load ("RNL") and local network load.[47] Today, the Joint Utilities purchase RNS for all retail customers in their franchise areas, no matter which entity supplies energy to those customers. The Joint Utilities do *not* reassign a portion of the transmission service they purchase from ISO-NE to other

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[46] Evidently, transmission charges would be allocated to an LSE for all or part of the retail meters within its "retail metering subdomain." RSA 362-A:2-b, XI(b). The Joint Utilities are unfamiliar with the concept of "retail metering subdomain" and do not believe that LSEs, *in their roles as LSEs*, would even have "metering domains," which term otherwise is a familiar concept, as applied to *distribution utility* service territories (i.e., franchise areas). *See ISO New England Inc.*, 182 FERC ¶ 61,137 at P 19 (2023) ("ISO-NE states that it settles its energy market based on metering domains, which correspond with distribution utility service territories").

[47] For simplicity, only Regional Network Service ("RNS") will be discussed in this brief to demonstrate jurisdictional conflicts; in most cases, the same jurisdictional conflict would exist for Local Network Service.

LSEs, such as competitive electric power suppliers ("CEPS") and community power aggregators ("CPAs"), that are serving load in their franchised service areas.

If the Joint Utilities did engage in such a reassignment of RNS procured under the ISO-NE Tariff, assuming reassignment of such service were permitted,[48] that wholesale transmission transaction would be FERC-jurisdictional and the Joint Utilities could only engage in such a transaction in accordance with FERC-filed tariffs and rules.[49] As previously discussed, FPA Section 201 grants FERC exclusive jurisdiction over transmission in interstate commerce. No state authority has lawful authority to *compel* a state-regulated utility to reassign RNS to a wholesale LSE because the state would be ordering such public utility to engage in a FERC-regulated transaction requiring a FERC filing.[50] Given the existence of ISO-NE, the Joint Utilities would not even be an appropriate entity from which to seek RNS.

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[48] There is no reassignment provision in the Service Agreement for Regional Network Service in the ISO-NE OATT. *See* ISO-NE Tariff, Att. B.

[49] For example, in Order No. 890-A, FERC reiterated its jurisdiction over reassignment transactions involving point-to-point transmission by explaining that all "assignments of capacity be conducted through or otherwise posted on the transmission provider's [Open-Access Same-Time Information System] on or before the date the reassignment commences" and also required that "assignees of transmission capacity execute a service agreement [with the transmission provider] prior to the date on which the reassigned service commences." *Preventing Undue Discrimination & Preference in Transmission Serv.*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at PP 408-409 (2007), *subsequent history omitted*.

[50] A state commission may not order a public utility to make a FERC filing under Section 205. *Massachusetts v. FERC*, 729 F.2d 886, 888 (1st Cir. 1984).

3. RSA 362-A:2-b, XI(c) could present a jurisdictional conflict as a result of cost trapping.

RSA 362-A:2-b, XI(c) indicates that, if avoided transmission charges are found to exist, the limited producer or its LSE may receive credit or payment, presumably from its distribution utility,[51] which utility is the provider of transmission service to retail customers in its franchise area.[52] Under this statutory provision, the possibility exists that a distribution utility would have to pay either a transmission credit or cash to: (1) the limited producer;[53] (2) itself, if it is the LSE of the limited producer; or (3) a third-party LSE that is the LSE of the limited producer.[54] If such amounts had to be paid by the

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[51] Under 362-A:2-b, XI(a), "costs shall be allocated to the distribution utility as transmission network customer are reduced from what they otherwise would be absent the electricity exported to the distribution grid by the limited producer," and, although this sentence is difficult to parse, it appears that the source of possible payments related to avoided transmission charges would be the distribution utility, as the Network Customer taking RNS.

[52] Restructuring required the unbundling of the price of transmission from other services provided by the distribution utility. "Retail electric service" includes "the delivery of electric power through the provision of transmission and/or distribution service by an electric utility to a retail customer, regardless of such retail customer's source of electric power, and shall include any back-up, maintenance, emergency, and other delivery service provided to a retail customer by an electric utility." RSA 369-B:2, XII.

[53] Whether a credit could be "cashed out" is unclear, but presumably the limited producer would opt for a payment rather than a credit it has no use for.

[54] It is unclear how the identity of the "LSE of a limited producer" is determined. Is the LSE of a limited producer the LSE that supplies station power service to the limited producer's retail station power load? Is the LSE of a limited producer the LSE to which the limited producer is physically interconnected? Is the LSE of a limited producer the LSE to whom it sells power (and what if it sells power to multiple LSEs)? Is the LSE of a limited producer somehow related to the LSE associated with a retail customer if the limited producer sells some power at retail to that customer?

The statute references in Paragraph X the "load serving entity serving the limited producer for load settlement in the ISO New England wholesale electricity market," but limited producers do not settle *anything* in the ISO-NE market. *Market Participants with registered Load Assets* settle *load* with ISO-NE. And a limited producer's energy would not be settled in "the ISO New England wholesale electricity market," engendering more confusion. This distribution utility to the limited producer or a third-party LSE, the *Nantahala* doctrine would create a potential jurisdictional conflict regarding use of the distribution utility/PTO's transmission system, given that such entities, such as PSNH, may be one and the same. PTOs have a right to recover their FERC-authorized costs for providing RNS in the form of an annual transmission revenue requirement.[55] Specifically, under the TOA[56] and ISO-NE Tariff, in exchange for allowing the use of its transmission system, a PTO is entitled to recover its transmission revenue requirement based on a formula rate on file with FERC.

A distribution utility, as a Network Customer, must be permitted to recover the costs for transmission imposed by ISO-NE under a FERC-approved tariff. At the May 16, 2023 Prehearing Conference, the Community Power Coalition of New Hampshire representative conceded this point, stating that "we would stipulate and agree with the utilities that this Commission has no authority whatsoever to increase or decrease the transmission rates under a FERC tariff."[57] He indicated that there is an obligation of state

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reference to the LSE of a limited producer, which is used several times, is just one example of how the statute's misuse of terminology renders it unimplementable. The Joint Utilities also note that this subsection renders it quite unclear from what pool of money any such credits or payments would be made.

[55] ISO-NE determines a rate for RNS for all ISO-NE transmission customers that should result in each Transmission Owner recovering its transmission revenue requirement, but a true-up mechanism allows each Transmission Owner to adjust its transmission revenue requirement in future years to ensure that its full transmission revenue requirement is recovered for any given year.

[56] In addition to being posted in the FERC Tariff Browser (in the ISO New England Inc.'s Agreements and Contracts database), the TOA may be located at: https://www.iso-ne.com/static-assets/documents/regulatory/toa/v1_er07_1289_000_toa_composite.pdf.

[57] Prehearing Conference Transcript, at 20:8-11, May 16, 2023.

commissions to allow a distribution utility to recover the costs for transmission from its retail customers.[58] He similarly noted that "[i]t's true [the Commission has] to allow the utility to recover the full cost of transmission under FERC rates."[59]

If the PTO is the same entity as the distribution utility and the distribution utility must provide a transmission credit or a payment to a limited producer or to a third-party LSE, as could be ordered by state authority under Paragraph XI(c), the direct result would be cost trapping, which is preempted. That is, if the PTO must pay (through its role as distribution utility) a share of the FERC-authorized revenues that it is supposed to collect, as a credit or payment provided to a third party, the PTO would be deprived of some portion of the revenue that FERC authorized it to collect in exchange for turning over control over such facilities.[60] The Joint Utilities that are PTOs[61] only authorized the use of their transmission systems in exchange for the assurance that they could recover their costs as authorized by the TOA, which provides that the "ISO OATT will be designed to provide for the payment by transmission customers for Transmission Service at rates

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[58] *Id.* at 20:15-19.

[59] *Id*. at 21:9-21.

[60] Attempts to separate the same single corporate entity into different roles such as PTO, Network Customer, etc., does not impact the end result: cost trapping. Indeed, even if a Joint Utility, such as Liberty, is not a PTO, the provision could result in a legal issue. For example, if a Joint Utility, as a Network Customer for all retail load in its franchise area, had to pay both the FERC-mandated transmission rate to ISO-NE, but then also had to make a payment to a third party in addition to the amount paid ISO-NE, if the Commission did not allow both payments to be passed through to retail customers, the retail rate would then not permit it to collect its cost of service. Under this scenario, the distribution utility and Commission would need to develop a new retail rate mechanism to recover both the FERC- and state-mandated costs.

[61] PSNH owns both local and regional transmission facilities and Unitil owns local transmission facilities in ISO-NE. Thus, this argument is limited to these two Joint Utilities.

designed to recover the revenue requirements of the PTOs and in supporting the provision of such transmission service by [ISO-NE] under the [ISO-NE] OATT."[62]

That said, the Joint Utilities note that this preemption problem *only* would exist if a credit or payment were owed by the distribution utility/PTO that in turn deprived it of its FERC-authorized transmission revenue requirement. If this proceeding moves forward, the Joint Utilities will address this issue.[63]

4. As ISO-NE Market Participants, the Joint Utilities cannot allow use of their transmission or distribution systems in a manner that violates the ISO-NE Tariff.

Each of the Joint Utilities is a Market Participant[64] and has signed a Market Participant Service Agreement ("MPSA"), pursuant to the ISO-NE Tariff, § IV, Att. A.[65] As such, each has accepted service under the ISO-NE Tariff as a participant in the New England Markets and has agreed to be bound by the terms of the ISO New England Operating Documents and to make timely payment of all amounts due under the ISO

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[62] TOA Recital No. 4. This issue thus may also run afoul of the second question to be briefed, as it appears that the transmission revenue requirements authorized by FERC to be collected may not be collected; that is, the state is causing a recalculation of the amount of the total transmission revenue requirement that may be collected.

[63] The statute does not reflect an understanding of the interrelationship of transmission costs (reflected in transmission revenue requirements), load (i.e., Monthly RNL), and transmission charges (i.e., rates), which interrelationship ensures that, with periodic true-ups, "charges" recover "costs," leaving no funds to then pay any customer for "avoiding" costs.

[64] A "Market Participant is a participant in the New England Markets (including a FTR-Only Customer) that has executed a Market Participant Service Agreement, or on whose behalf an unexecuted Market Participant Service Agreement has been filed with [FERC]." ISO-NE Tariff § I.2.2.

[65] In addition to being posted in the FERC Tariff Browser (ISO New England Inc. Transmission, Markets And Services Tariff database), the MPSA is located here: https://www.iso-ne.com/static-assets/documents/regulatory/tariff/attach_a/att_a_mar_part_serv_agree.pdf.

New England Operating Documents.[66] The Joint Utilities thus are prohibited from allowing third parties to use their transmission or distribution systems in a manner that is contrary to the *entire* ISO-NE Tariff. If a state authority compelled the use of a Joint Utility's transmission or distribution systems, i.e., to permit limited producer power sales to occur, in a manner that requires a recalculation under the *ISO-NE Tariff*, not just under the *ISO-NE OATT*, the state dictate would be a preempted. The discussion of possible recalculations under the ISO-NE Tariff is left to Section II.B.2 of this Initial Brief, rather than this Section I.A.4, as the *exact* preemption issue raised by one provision of the statute is unclear due to the failure to use ISO-NE Tariff-defined terminology in a coherent manner.

B. Whether the activities allowed by RSA chapter 362-A would require a utility to violate its transmission owner operator's agreement or require a recalculation of any Independent System Operator-New England (ISO-NE) open access transmission tariffs (OATT)?

The question posed requires, in part, the identification of activities that cause a recalculation of any ISO-NE OATT[67] and, as demonstrated above, the TOA violation portion of the question would expand this recalculation prong of the question to the entire ISO-NE Tariff. The Joint Utilities understand a "recalculation" to include *any* activity that would cause an amount or numerical figure derived from or calculated under the Tariff to be changed from what it otherwise would be in the absence of the "activity."

[66] MPSA, § 3.2. The "ISO New England Operating Documents are the Tariff and the ISO New England Operating Procedures." ISO-NE Tariff § I.2.2.

[67] Although the Joint Utilities are aware of only one ISO-NE OATT, because it does change with some frequency over time, there are innumerable *versions* of the single OATT.

1. Use of the Joint Utilities' transmission systems outside the ISO-NE OATT violates the TOA.

The statute presumes that limited producers can use the transmission system of those Joint Utilities with transmission systems to engage in both retail and so-called "intrastate" wholesale transactions. As discussed *supra,* the contract path to move energy from a limited producer to a load may not include the transmission system, but the transmission system would still be used in any such delivery of power.[68] FERC has indicated that an ISO must be the *sole* provider of transmission service in the region it serves.[69] The TOA ensures this result. For example, the TOA explains that ISO-NE "will be the transmission provider under the [ISO-NE OATT] of non-discriminatory, open access transmission services over the transmission facilities of the PTOs

[68] The Presiding Judge in *Pacific Gas* explained that the [California] ISO *must* use the transmission system in acquiring capacity and energy to balance loads and satisfy reliability requirements, regardless of whether the load is served off of transmission facilities or off of distribution facilities. Any use of the distribution system by an unbundled retail customer would similarly entail unbundled retail transmission service. FERC may determine such service should be provided free of charge, but the service still exists and would be subject to the terms and conditions of a FERC-jurisdictional tariff.

[69] *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Servs. by Pub. Utils.; Recovery of Stranded Costs by Pub. Utils. &Transmitting Utils.*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,731 (1996) ("An ISO should provide open access to the transmission system and all services under its control at non-pancaked rates pursuant to a single, unbundled, grid-wide tariff that applies to all eligible users in a non-discriminatory manner."), *subsequent history omitted*; *see also Reg'l Transmission Orgs.,* Order No. 2000, FERC Stats. & Regs. 31,089 at 31,108 (1999) (cross-referenced at 89 FERC ¶ 61,285) ("With the RTO the sole provider of transmission service, transmission customers have a nondiscriminatory and uniform access to regional transmission facilities."), *subsequent history omitted. See also Mich. Elec. Transmission Co.,* 115 FERC ¶ 61,105 at P 16 (2006) (citation omitted) (holding that FERC "ultimately required that the Midwest ISO OATT be revised to require that all transmission service over the Midwest ISO system, even transmission service under grandfathered contracts, be provided by the Midwest ISO under the Midwest ISO OATT in the first instance, in order that the Midwest ISO satisfy Order No. 2000's requirement that it be the sole transmission provider for facilities over which it has operational control").

('Transmission Service')."[70] Similarly, under TOA Section 3.01, the Joint Utilities have authorized ISO-NE "to exercise Operating Authority over the Transmission Facilities, including provision of Transmission Service over the Transmission Facilities under the [ISO-NE] OATT." Thus, the compelled usage of a Joint Utility's transmission system outside of the ISO-NE OATT would violate the TOA.

2. RSA 362-A:2-b, X could require a recalculation of load under the ISO-NE Tariff.

RSA 362-A:2-b, X states that "[t]o participate in such intrastate sales of electricity over the distribution grid a limited producer must be equipped with a revenue grade interval meter that can accurately measure hourly imports from and exports to the distribution grid and report such meter data to the distribution utility for daily load settlement purposes. Exports to the distribution grid by a limited producer *shall be accounted for as reductions or offsets to the load obligation of the load serving entity* serving the limited producer for load settlement in the ISO New England wholesale electricity market." (Emphasis added.) The Joint Utilities initially note that "load settlements" in ISO-NE involve ISO-NE and Market Participants with registered Load Assets. The Joint Utilities doubt that the state is *demanding* that the ISO-NE review, edit, and refile its entire tariff such that the term "load serving entity" is used rather than "Market Participant" as applicable.[71]

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[70] TOA at Recital No. 3. The ISO-NE Open Access Transmission Tariff ("OATT") is Section II of the ISO-NE Tariff.

[71] Section III of the ISO-NE Tariff, which addresses the ISO-NE energy and capacity markets, uses the term "load serving entity" or "LSE" only once, in discussing Demand Response Asset Registration and Aggregation. Section I of the ISO-NE Tariff defines "LSE" as

Even assuming this error in terminology was an inadvertent drafting error, the fact remains that LSEs and Market Participants are not necessarily one and the same. For example, two CPAs could hire the same Market Participant to represent their entirely separate sets of Load Assets. Affiliated utilities may use a single service company as the Market Participant to represent multiple affiliated LSEs' sets of Load Assets in ISO-NE. The error in terminology causes an illegal "recalculation" by requiring load obligation values/amounts to be assigned to LSEs rather than to Market Participants in the ISO-NE market. That said, the Joint Utilities, for purposes of providing a substantive analysis, will assume that the statute is using "load serving entity" as shorthand for the Market Participant with registered Load Assets for a *specific* LSE, but they are not waiving their legal argument that the statute is preempted based on the failure to use correct terminology.

The Joint Utilities cannot definitively determine what "load obligation" means as used in the paragraph.[72] As drafted, the sentence seemingly instructs how *ISO-NE* will treat "exports to the distribution grid by a limited producer," for *ISO-NE* settlement

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"load serving entity," but provides no further description. No other ISO-NE Tariff Sections appear to define the term based on a computer-based search. In a May 9, 2023 FERC filing, ISO-NE confirmed that "LSE is not a defined term in the ISO-NE Tariff." *ISO New England Inc.,* Transmittal Letter, Docket No. ER22-983, at 7 (filed May 9, 2023).

[72] The terms defined in the ISO-NE Tariff with "load obligation" in the title are as follows: "Capacity Load Obligation"; "Capacity Load Obligation Acquiring Participant"; "Capacity Load Obligation Bilateral"; "Day-Ahead Adjusted Load Obligation"; "Day-Ahead Load Obligation"; "Estimated Capacity Load Obligation"; "Marginal Loss Revenue Load Obligation"; "Monthly Real-Time Load Obligation"; "Real-Time Adjusted Load Obligation Deviation"; "Real-Time Load Obligation"; "Real-Time Load Obligation Deviation"; and "Real-Time NCP Load Obligation."

purposes of some undefined load obligation. This raises the question "which" load obligation settlement is intended to be covered. No matter which load obligation is being discussed, a state authority cannot dictate to the ISO-NE that *it* must reduce (i.e., recalculate) any load obligation of the LSE that "serves" the limited producer. The ISO-NE determines which, if any, load obligations will be reduced and the basis for allowing such a reduction and recalculation. That said, the Joint Utilities would agree that a state statute compelling a recalculation of load might not be *deemed* to be preempted to the extent that ISO-NE itself has determined that an activity would reduce a load obligation in the same exact manner as would the state authority.[73]

Whether or not the exports to the distribution grid under a pilot program are or are not reductions or offsets to *any* load obligation of a Market Participant for actual settlement purposes is a matter within FERC's exclusive jurisdiction because the statutory provision is clearly discussing the load obligation of a *wholesale* entity (i.e., an LSE) and thus ISO-NE wholesale rules control. And, as discussed below, the statute could be read to be *requiring* a recalculation no matter what type of load obligation is being discussed. The three most obvious load obligations that may be the subject of the statutory provision are discussed below.

[73] If ISO-NE, however, then changed how load obligations were calculated and a conflict were created, the doctrine of preemption could nullify the state statute or related state authority directive.

a. Transmission Load Obligation

If "load obligation" refers to an obligation to obtain transmission service for a load under the ISO-NE Tariff, FERC has exclusive jurisdiction over how transmission load obligations of wholesale customers are calculated under the ISO-NE Tariff. Under the current ISO-NE Tariff, a Network Customer would *exclude* load served by energy from a limited producer as part of its transmission load obligation (Monthly RNL) in reporting load data to ISO-NE, because the limited producer cannot be an ISO-NE registered Generator Asset and still be eligible to be a limited producer.[74] A requirement to *reduce* a Network Customer's Monthly RNL to reflect a load obligation that does not exist in the first place would cause a recalculation under the ISO-NE Tariff and violate the FERC-approved method for calculating Monthly RNL. "Excluding" load and "reducing" load are not one in the same: "excluding" load impacts the method for calculating the relevant number of MW, while "reducing" load lowers the number of MW already calculated.

b. Energy Load Obligations

Paragraph X could be addressing LSEs'[75] obligation to obtain energy to serve their wholesale loads, of which energy is obtained in any given franchise area by use of the distribution utility's transmission and distribution systems. It may be that Paragraph X is not intended to dictate anything to the ISO-NE, but rather a recognition that the "energy

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[74] That is, the quantity of load served by the limited producer would never be included in any load obligation measurement. Another way to say this would be that there is a gross and net load amount and the "load obligation" is the net amount.

[75] Again, for clarity, use of the term "LSE" in this section of the Section II.b.2 Brief is not a concession that the term is the correct term.

load obligation" of an LSE *would* be reduced as a result of energy from a DER, such as a limited producer, being deemed to serve load for which the LSE is responsible under the current ISO-NE Tariff settlement process relating to energy. It is the Joint Utilities' understanding that, under the ISO-NE Tariff, there would be an energy load obligation reduction. It is possible that the statutory provision is merely instructing how accounting should be performed *by the LSE*, and therefore does not really conflict with the manner in which ISO-NE energy markets settle and would require no recalculation.

The problem with the above interpretation is that, under Paragraph X as drafted, if a limited producer is served by LSE A but sells its power to LSE B, the statutory provision seems to require a recalculation of load obligations in a nonsensical manner. LSE A's energy load obligation must be reduced per the statute and LSE B's energy load obligation is untouched, even though the limited producer sold its energy to LSE B to serve some of LSE B's load. Thus, in order to implement Paragraph X, a recalculation under the ISO-NE Tariff *would be* required, albeit one that is nonsensical because the statute does not require that the load obligation of the LSE *buying* the energy be reduced.

If ISO-NE refused to perform such a recalculation, as the Joint Utilities would expect, LSE A still must "account for" the export from the limited producer as a load obligation reduction even if no such reduction in LSE A's load actually occurred because of the state mandate that was ignored by the ISO-NE. Another preemption issue could arise if LSE A is somehow prevented from recovering the costs of energy it had to purchase through the ISO-NE market because of the New Hampshire law requiring it to "account for" a load reduction that never occurred. The Joint Utilities should not be compelled to allow their transmission and distribution systems to be used in a manner that is disruptive to wholesale energy market settlements and may even impact their own books and records, given the blatant flaw in the wording of this statutory provision.[76]

c. Capacity Load Obligations

A third possibility is that Paragraph X refers to the capacity obligation of LSEs to the extent they have registered Load Assets as Market Participants. If that were the case, the Paragraph would suffer from the same defect described above regarding the energy load obligation, as the LSE "serving" the limited producer may differ from the LSE required to procure capacity for the retail loads served directly or indirectly by the limited producer.

Another recalculation concern is that, unlike the energy load obligation of an LSE/Market Participant, which continually varies and can be offset on a kWh-kWh basis by distributed generation not participating in the ISO-NE market, the capacity obligation of a load-serving Market Participant is determined quite differently under the ISO-NE Tariff. Capacity obligations of such LSEs are a construct that exists under the ISO-NE

[76] The statute requires in Paragraph VIII that limited producers and purchasers be located in the same distribution utility franchise area, but such franchise areas define where distribution service is provided and there are only four distribution utilities with franchise areas (not including municipal utilities). "Four electric distribution companies operate in New Hampshire, each serving a mutually exclusive franchise territory. They include: Eversource Energy (Eversource) (formerly PSNH), Liberty Utilities (Liberty) (formerly National Grid and Granite State Electric Company), Unitil Energy Systems, Inc. (UES) (formerly Concord Electric Company and Exeter and Hampton Electric Company), and the New Hampshire Electric Cooperative, Inc. (NHEC)," https://www.puc.nh.gov/electric/electric.htm. It thus is likely that a limited producer's LSE may not be the same as the LSE the limited producer sells to, or the LSE of the retail customer that otherwise sells power to the retail customer that is instead buying energy directly from the limited producer.

Tariff and thus are controlled by such tariff (for example, the energy from capacity resources must be deliverable). When FERC's jurisdiction over capacity requirements was challenged, the D.C. Circuit explained that "nothing in the Federal Power Act expressly proscribes requiring LSEs to pay for a certain amount of capacity."[77] The amount of capacity that must be procured is addressed in ISO-NE Tariff Section III.13.7.5.2. which is entitled "Calculation of Capacity Load Obligation and Zonal Capacity Obligation."[78] Because ISO-NE determines what a capacity load obligation is (i.e., a MW figure), it also determines whether such capacity load obligation has been reduced, as well as if, and to whom, the reduction is then assigned. And those determinations by ISO-NE must be made free from interference by or direction from any state authority, under applicable federal preemption doctrines.

The Joint Utilities note that RSA 362-A:2-b, XIII does *not* discuss the capacity load obligations of LSEs (or more accurately Market Participants with registered Load Assets), which is why the possibility exists that such capacity load obligations are the topic addressed in Paragraph X.[79] Paragraph XIII discusses an entirely different topic – Capacity Supply Obligations, as defined in the ISO-NE Tariff.[80] LSEs do not have

[77] *Conn. Dep't of Pub. Util. v. FERC*, 569 F.3d 477, 483 (D.C. Cir. 2009). The court went on to say that, even if federal statutes "could be read to prohibit [FERC] from requiring LSEs to make adequate capacity purchases, and even if that is what [FERC] is doing, this particular camel has long since entered–indeed, ransacked–the tent." *Id*.

[78] *See* ISO-NE Tariff § III.13.7.5.2.

[79] Again, the specific "load obligation" being addressed is not discernible on the face of the legislation.

[80] The statute states in Paragraph I that "the terms 'capacity commitment period,' 'capacity supply obligation,' 'coincident peak demand, and 'load serving entity (LSE)' shall

"Capacity Supply Obligations" in their role as LSEs; instead, qualified *resources* (i.e., the Market Participants representing such capacity resources, which are most often registered Generator Assets) have such obligations. But Paragraph XIII is conditional and would only come into play if a "Capacity Supply Obligation" (of a qualified resource) is reduced by ISO-NE – and only ISO-NE could reduce that obligation, thereby triggering the provision.[81]

3. Paragraph XI(a) would require a recalculation under the ISO-NE OATT.

RSA 362-A:2-b, XI(a) states that:

> The sponsors of a pilot, including the participating electric distribution utility, may petition the commission to determine, through an adjudicated proceeding, how credits for actual avoided transmission charges are to be made for exports to the distribution grid by limited producers during hours of coincident peak on which transmission costs are allocated to reduce the retail load measured at the point of interconnection between the distribution system under state jurisdiction and transmission facilities under federal jurisdiction. Said costs shall be allocated to the distribution utility as transmission network customer are reduced from what they otherwise would be absent the electricity exported to the distribution grid by the limited producer. Such credit shall be made pursuant to either subparagraph (b) or (c) as proposed and determined by the commission to be for the public good.

have the meanings as used by ISO New England, Inc. (ISO-NE)." The term "Capacity Supply Obligation" is defined as "an obligation to provide capacity from a resource, or a portion thereof, to satisfy a portion of the Installed Capacity Requirement that is acquired through a Forward Capacity Auction in accordance with Section III.13.2, a reconfiguration auction in accordance with Section III.13.4, or a Capacity Supply Obligation Bilateral in accordance with Section III.13.5.1 of Market Rule 1." ISO-NE Tariff § I.2.2.

[81] The Joint Utilities cannot fathom why the "Capacity Supply Obligation" of a particular resource is even relevant to the pilot programs contemplated by the amended statute and subject to legal analysis in this brief.

The statute therefore provides that a state authority – the Commission – may determine how exports by limited producers during hours of coincident peak (on which transmission costs are allocated) would reduce retail load measured at a specific point and how related "credits" should be allocated. The provision appears to be an attempt to mandate how ISO-NE measures Monthly RNL by *requiring* that at least the retail customer-caused portion of the Monthly RNL to be measured at all transmission/distribution ("T/D") points of interconnection for purposes of credits and allocations. But Monthly RNL clearly *includes* load served by distribution-connected Generating Assets participating in the ISO-NE market that are *behind* points where the transmission and distribution systems interconnect.[82] If this statutory provision represents an attempt to change how Monthly RNL is determined under the ISO-NE OATT, by dictating *where and how* Monthly RNL must be measured, it would be mandating a recalculation of RNL and would therefore be preempted.

IV. CONCLUSION

The exercise required by the LEEP Act as amended by SB 321 has resulted in the Joint Utilities discovering that RSA 362-A:2-b is fraught with so many problems that the

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[82] *See ISO New England Inc.,* 178 FERC ¶ 61,086 at P 54 (2022) (holding that load served by behind-the-meter Generator Assets can be treated differently than load served by unregistered generators). FERC explained: "We find that behind-the-meter Generator Assets and unregistered behind-the-meter generators are not similarly situated for the purposes of the inquiry at hand, namely the Monthly RNL calculation and corresponding charges for Regional Network Service, which is the focus of the proposed Tariff revisions. Moreover, while Filing Parties' proposal treats unregistered behind-the-meter resources differently from behind-the-meter Generator Assets that do not serve load located behind the same retail customer meter as the Generator Asset, we find that Filing Parties have justified such treatment and that it is not unduly discriminatory." *Id.*

mandate of Paragraph III will provide the Commission greatly needed relief from an otherwise impossible task. In light of the discussion above, the Commission should not move forward with any pilots, as the likely result not only would be challenges under federal law, but litigation over the meaning of nearly every material statutory provision. The Joint Utilities remain willing to work with the Commission – and with the Legislature – to achieve legitimate goals relating to power procurement and distributed energy resources, but the statutory provisions under review will not and cannot achieve *any* such goals when they cannot even be understood by the very distribution utilities who would need to implement them.

Wherefore, the Commission should find that jurisdictional conflicts exist concerning the use of the distribution or transmission system, activities allowed by the amended statute would require the Joint Utilities to violate the TOA, and such activities would require recalculations under the ISO-NE Tariff and in particular the OATT. As a result of such findings, no pilot programs should be approved.

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Respectfully submitted on behalf of the Joint Utilities,

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CERTIFICATE OF SERVICE

I hereby certify that, on the date written below, I caused the attached document to be served pursuant to N.H. Code Admin. R. Puc 203.11.

David K. Wiesner

Date: June 23, 2023

David K. Wiesner