BEFORE THE
NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DOCKET NO. DE 23-026

Electric Distribution Utilities

Potential Jurisdictional Conflicts
Related to Authorization of
Pilot Programs Under RSA 362-A:2-b

REPLY BRIEF OF THE

COMMUNITY POWER COALITION

OF NEW HAMPSHIRE

July 10, 2023

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REPLY BRIEF OF THE COMMUNITY POWER COALITION OF NEW HAMPSHIRE

Pursuant to the May 16, 2023 Prehearing Order of the State of New Hampshire Public Utilities Commission ("NHPUC" or "Commission"), the Community Power Coalition of New Hampshire ("CPCNH" or "Coalition") submits for filing this Reply Brief in Commission Docket DE 23-026 regarding Potential Jurisdictional Conflicts Related to Authorization of Pilot Programs Under RSA 362-A:2-b. The Coalition submits this Reply Brief to respond primarily to the arguments raised in the Initial Brief of the Public Service Company of New Hampshire d/b/a Eversource Energy, Unitil Energy Systems, Inc., and Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty (collectively, the "Joint Utilities").[1]

CPCNH reasserts that RSA Chapter 362-A does not present jurisdictional conflicts between the Commission and the Federal Energy Regulatory Commission ("FERC") and would not require utilities to violate their transmission owner operator's agreement ("TOA") or the Independent System Operator-New England ("ISO-NE") open access transmission tariff ("OATT") if certain activities under the statute were mandated by the Commission. As

[1] The Coalition notes that this Reply Brief responds to the arguments raised in the Joint Utilities' Initial Brief and narrowly focuses on certain issues raised in the Joint Utilities' Initial Brief. The Coalition's decision not to respond to certain positions taken by the Joint Utilities, or any other party to this proceeding, should not be construed as consent to any of the other parties' positions. Nor should the Coalition's decision not to respond to certain positions be construed as a waiver of any argument with respect to any such issue.

discussed further below, the Joint Utilities' Initial Brief omits reference to pertinent provisions of the text of the Federal Power Act ("FPA") and recent, relevant case law distinguishing between interstate wholesale (subject to FERC jurisdiction) and intrastate wholesale sales (subject to state jurisdiction). The Joint Utilities' Initial Brief cites transmission cases—not wholesale sales cases—that are not persuasive or applicable to the issues raised in this proceeding. Moreover, the cases do not support a finding that the pilot programs authorized under RSA 362-A:2-b create jurisdictional conflicts between FERC and the NHPUC. Finally, the issues raised by the Joint Utilities in their Initial Brief amount to nothing more than hypothetical, speculative scenarios that the Commission can and should resolve in a final determination in this proceeding, in furtherance of the pilot programs.

I. RELEVANT BACKGROUND

The Commission opened this proceeding in Docket DE 23-026 on March 9, 2023 to assess the potential jurisdictional issues related to recently enacted changes to RSA chapter 362-A.[2] The recent changes to RSA chapter 362-A include amending the definition of "limited producer" and "limited electrical energy producer;" adding a new definition of "qualifying storage system;" and authorizing the Commission to allow certain pilots for limited producers to sell power locally over the distribution system.[3] In this proceeding, the Commission is examining the following issues regarding the New Hampshire limited producers pilot program: (1) whether any jurisdictional conflicts exist concerning the use of the distribution or transmission system; (2) whether the activities allowed by RSA chapter 362-A would require a

[2] Docket DE 23-026, State of New Hampshire Public Utilities Commission, *Commencement of Adjudicative Proceeding and Notice of Prehearing Conference*, rel. March 9, 2023.

[3] *See* N.H. Rev. Stat. Ann. § 362-A:2-b. For further discussion on the recently enacted changes to RSA chapter 362-A, please see the Coalition's Initial Brief at 1, 5.

utility to violate its TOA or require a recalculation of any ISO-NE OATT; and (3) whether such projects produce avoided transmission cost savings.

The Commission designated the Joint Utilities as mandatory participants in this proceeding. On April 28, 2023, the Coalition submitted a Petition to Intervene[4] in this proceeding, which the Commission granted during its May 16 prehearing conference. The Commission's May 16, 2023 Prehearing Order established June 23 as the deadline for initial written briefs and July 10 as the deadline for written reply briefs.[5]

The Coalition submitted its initial brief on June 23, 2023.[6] In its initial brief, the Coalition argued that the New Hampshire limited producers pilot program does not present any jurisdictional conflicts concerning the use of the distribution system or transmission system and would not require a utility to violate its TOA or require a recalculation of the ISO-NE OATTs. The Coalition explained that interconnections to the distribution grid and intrastate wholesale sales located entirely within the State of New Hampshire are within the Commission's regulatory authority and not subject to the jurisdiction of FERC. *See* CPCNH Initial Brief at 9-27. The New Hampshire Office of the Consumer Advocate's ("OCA") initial brief also demonstrated that the New Hampshire limited producers pilot program presents no federal-state jurisdictional

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4 Docket DE 23-026, State of New Hampshire Public Utilities Commission, *Community Power Coalition of New Hampshire Petition to Intervene*, filed April 28, 2023.

5 Docket DE 23-026, State of New Hampshire Public Utilities Commission, *Prehearing Order*, rel. May 16, 2023.

6 Docket DE 23-026, State of New Hampshire Public Utilities Commission, *Community Power Coalition of New Hampshire Initial Brief* ("CPCNH Initial Brief"), filed June 23, 2023, but docketed as filed on June 26, 2023. The Coalition timely submitted for filing its Initial Brief at approximately 11:56 PM EST on Friday, June 23, prior to the Commission's deadline. However, because some of the attachments to the Coalition's Initial Brief were submitted shortly after the midnight filing deadline, the Coalition's Initial Brief is docketed as received on Monday, June 26. The Joint Utilities have informed the Coalition that the Joint Utilities do not intend to raise the June 26 late filing time stamp as an issue in this proceeding.

conflict, does not *per se* require any New Hampshire utility to violate its TOA, and does not require revisions to or recalculations of ISO-NE's OATT.[7] The Joint Utilities' initial brief erroneously and without reasonable justification argues that the limited producers pilot program presents jurisdictional conflicts between the Commission and FERC and would require the Joint Utilities to violate the their TOA and the ISO-NE OATT if certain activities were mandated by the Commission.[8]

II. ARGUMENT

As discussed further below, the Joint Utilities' Initial Brief omits reference to pertinent provisions of the text of the Federal Power Act and recent, relevant case law distinguishing between interstate wholesale (subject to FERC jurisdiction) and intrastate wholesale sales (subject to state jurisdiction). Both the text of the Federal Power Act and this precedent support a finding that the pilot programs authorized under RSA 362-A:2-b do not create jurisdictional conflicts between FERC and the NHPUC. Further, the Joint Utilities' Initial Brief cites cases on transmission issues—not wholesale sales—that are not persuasive or applicable to the issues raised in this proceeding. The Joint Utilities' discussion of these cases also omits pertinent context that distinguishes the cases from the jurisdictional issues in this proceeding. Even if the cases were applicable, which they are not, they do not support a finding that pilot programs authorized under RSA 362-A:2-b create jurisdictional conflicts between FERC and the NHPUC.

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[7] Docket DE 23-026, State of New Hampshire Public Utilities Commission, *OCA Initial Brief* ("OCA Initial Brief"), at 2-10, filed May 23, 2023.

[8] Docket DE 23-026, State of New Hampshire Public Utilities Commission, *Joint Utilities Initial Brief* ("Joint Utilities Initial Brief"), filed May 23, 2023.

Furthermore, while the Joint Utilities purport to identify *potential* jurisdictional conflicts, violations, and recalculations of the ISO-NE OATT under RSA chapter 362-A, the Coalition emphasizes that the issues are merely speculative and can be resolved by the Commission in furtherance of the pilot programs. The activities allowed by RSA chapter 362-A do not require a utility to violate its TOA or require a recalculation of any ISO-NE OATTs. Instead, the activities set forth under the statute can be interpreted and implemented in a manner that does not conflict with the ISO-NE OATT. The Commission should employ the statutory interpretation canon of constitutional avoidance when resolving ambiguous language within the statute to avoid any constitutional issues of preemption when interpreting RSA 362-A:2-b. Doing so aligns with the New Hampshire legislature's expectation under RSA 362-A:2-b, III that the Commission "successfully" resolve the jurisdictional and tariff issues that may arise under the statute. Thus, the Commission can and should include, in its final determination under this proceeding, a successful resolution of such issues in a manner that enables the implementation of the pilot programs.

A. By statute, FERC's jurisdiction is limited to regulating interstate wholesale sales.

FERC is a creature of statute and thus only has the power and authority that is given to it by Congress through the Federal Power Act. Notably, the Joint Utilities' Initial Brief omits reference to the full text of section 201(b) of the Federal Power Act, the very starting point for determining the bounds of FERC's jurisdiction. The Federal Power Act limits FERC's jurisdiction to "the transmission of electric energy *in interstate commerce* and to the sale of electric energy at wholesale *in interstate commerce*." 16 U.S.C. § 824(b)(1) (emphasis added). The Federal Power Act provides that "electric energy [is] transmitted in interstate commerce if transmitted *from a State and consumed at any point outside thereof*; but only insofar as such

transmission takes place within the United States." *Id.* § 824(c). Congress explicitly reserved to the states jurisdiction over "any other sale of electric energy" and provided that FERC "shall not have jurisdiction, except as specifically provided in [the Federal Power Act], over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in *intrastate commerce*." *Id.* § 824(b)(1) (emphasis added). The Federal Power Act distinguishes between interstate and intrastate commerce, explicitly limiting FERC's jurisdiction to wholesale sales *in* interstate commerce and reserving jurisdiction to the states over all intrastate sales, which can be thought of as sales where the power is produced, transmitted, and consumed within a single state, such as the sales from limited producers functioning as load reducers relative to the FERC jurisdictional interstate wholesale electricity market administered by ISO-NE and its tariffs, regulations, and policies. States also retain jurisdiction over facilities used in local distribution. Thus, by statute, FERC's jurisdiction does not extend to include the interconnections to the distribution grid or intrastate sales, whether a sale for resale or for retail consumption, contemplated by the New Hampshire limited producers pilot program in RSA 362-A:2-b.

The U.S. Supreme Court clarified the scope of FERC's jurisdiction under the Federal Power Act, recognizing that states retain jurisdiction over retail and intrastate wholesale sales. In *FERC v. Elec. Power Supply Ass'n*, the Supreme Court explained that the Federal Power Act's reservation of jurisdiction to the states of "any other sale of electric energy" means that FERC "may not regulate either within-state wholesale sales or . . . retail sales of electricity (*i.e.*, sales directly to users). *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 267 (2016); *see id.* at 279 ("[Section] 824(b) [of the United States Code] 'limit[s] FERC's sale jurisdiction to that at wholesale,' reserving regulatory authority over retail sales (as well as intrastate wholesale sales)

to the States.").[9] Thus, New Hampshire retains jurisdiction over the retail and intrastate wholesale sales contemplated by the limited producers pilot program in RSA 362-A:2-b.

The Joint Utilities' Initial Brief erroneously concluded that FERC has jurisdiction over all wholesale sales. The Joint Utilities argue that intrastate wholesale sales do not exist and that, by virtue of being connected to the Eastern or Western Interconnection, *all* wholesale sales are *interstate* wholesale sales subject to FERC jurisdiction. Joint Utilities Initial Brief at 7-8. This claim, however, is unsupported and the Joint Utilities fail to cite any precedent where FERC or a court has held that every wholesale sale automatically constitutes an interstate wholesale sale. As discussed above, the text of the Federal Power Act itself distinguishes between interstate and intrastate sales and the Supreme Court has explicitly recognized states' jurisdiction over intrastate wholesale sales.

The Joint Utilities' reliance on the interconnectedness of the distribution and transmission systems to support its claim that wholesale sales naturally constitute interstate wholesale sales is similarly unpersuasive. The Supreme Court recognized the interconnectedness of the distribution and transmission systems in *Elec. Power Supply Ass'n*, noting that the "wholesale and retail markets in electricity . . . are not hermetically sealed from each other." *Elec. Power Supply Ass'n*, 577 U.S. at 281. Yet, nowhere did the Court state that this means all wholesale sales automatically constitute wholesale sales in interstate commerce. To the contrary, the Supreme Court did the opposite. Because this natural interconnectedness "could extend FERC's

[9] *See also Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 164, 166 (2016) (holding a Maryland program "intrud[ed] on FERC's authority over *interstate* wholesale rates" and noting that "[n]othing in this opinion should be read to foreclose Maryland and other States from encouraging production of new or clean generation through measures untethered to a generator's wholesale market participation") (emphasis added). As discussed in OCA's Initial Brief, the retail and intrastate wholesale transactions contemplated by the New Hampshire limited producers pilot program are untethered to the ISO-NE interstate wholesale market. OCA Initial Brief at 4-5.

power to some surprising places," *id.* at 277, the Supreme Court reinforced the Federal Power Act's jurisdictional boundaries between federal and state jurisdiction, explicitly stating FERC's jurisdiction is limited to interstate wholesale sales and that states retain jurisdiction over retail and intrastate wholesale sales. *Id.* at 267. Thus, the natural interconnectedness of the distribution and transmission systems provides no support for the Joint Utilities' position that wholesale sales naturally constitute interstate wholesale sales. Contrary to the arguments of the Joint Utilities, the Federal Power Act and the U.S. Supreme Court distinguish between interstate wholesale sales and intrastate wholesale sales.

B. The Joint Utilities' citations to cases about transmission—not wholesale sales—are unpersuasive and do not support the Joint Utilities' claims regarding jurisdictional conflicts.

The Joint Utilities rely on rulings concerning federal transmission jurisdiction—not wholesale sales jurisdiction—to support its claim that all wholesale sales are interstate wholesale sales subject to FERC jurisdiction. These cases are unpersuasive and do not support the Joint Utilities' claim.

The Joint Utilities reference *Jersey Cent. Power & Light Co. v. Fed. Power Comm'n*, 319 U.S. 61 (1943) and *Fed. Power Comm'n v. Florida Light & Power Co.*, 404 U.S. 453 (1972) for their claim that a wholesale sale automatically constitutes an interstate wholesale sale. These cases are distinguishable from the questions the Commission presented for briefing because they concern FERC jurisdiction over a particular utility, not whether a wholesale sale is in interstate commerce under the Federal Power Act. In both cases, the Supreme Court concluded that the respective utilities were "public utilities" under federal jurisdiction based on specific and substantial factual evidence that movement of energy across high-voltage transmission facilities demonstrated the utility was transmitting in interstate commerce within the meaning of the

Federal Power Act.[10] Neither case addresses or is relevant to sales of electric energy on low-voltage distribution facilities, as will be undertaken through New Hampshire's limited producer program.[11] Moreover, the Joint Utilities claim that "the wholesale transactions described in the [Limited Electrical Energy Producers Act], as amended by SB 321, are actually interstate in nature," Joint Utilities Initial Brief at 13, but provide no evidence to support this conclusory assertion.

That the facilities at issue in *Jersey Central* and *Florida Light & Power* are transmission facilities and not distribution facilities is an important distinction to make—and one for which the Joint Utilities fail to inform Commission. Indeed, the Joint Utilities claim that *Florida Light & Power* stands for the proposition that wholesale energy "placed on any part of the interstate grid [] is immediately within the reservoir of interstate electricity" subject to FERC jurisdiction. Joint Utilities Initial Brief at 9. The Joint Utilities' general use of the term "interstate grid" fails to specify what facilities (*e.g.*, transmission, distribution, generation, transformers, etc.) constitute the "grid." The Supreme Court in *Florida Light & Power*, however, did not use such general language. Rather, the Supreme Court found that Florida Light & Power Co. was a "public utility" subject to federal regulation because energy commingled at an interconnected *transmission* bus, and such finding rested on the testimony of expert witnesses that were questioned by the hearing examiner and subject to cross examination. *Florida Light & Power*

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[10] *Jersey Cent. Power & Light Co. v. Fed. Power Comm'n*, 319 U.S. 61, 63-64, 66-67 (1943) (discussing the 184 log readings demonstrating the flow of energy from Jersey Central to New York across high-voltage transmission facilities); *Fed. Power Comm'n v. Florida Light & Power Co.*, 404 U.S. 453, 456-57, 462-62 (1972) (discussing the expert witness testimony and hearing examiner findings and conclusions supporting the finding that Florida Light & Power Co. is subject to federal regulation).

[11] *See* N.H. Rev. Stat. Ann. § 362-A:2-b, VII–XI (discussing the electric distribution utilities that may propose pilot programs to participate in intrastate sales of electricity over the distribution grid).

Co., 404 U.S. at 463. *Jersey Central* also referred to interconnected transmission facilities. *Jersey Cent. Power & Light Co.*, 319 U.S. at 63-67. Accordingly, the "grid" facilities referred to in *Florida Light & Power* and *Jersey Central* are FERC jurisdictional transmission facilities. Here, however, New Hampshire's law refers to interconnections to the local distribution system, which, again, neither *Florida Light & Power* or *Jersey Central* discuss. Thus, Joint Utilities' reliance on *Jersey Central* and *Florida Light & Power* is misplaced and neither case casts doubt on the Coalition's argument that the New Hampshire limited producers pilot program does not present jurisdictional conflicts but is properly within the scope of the Commission's regulatory jurisdiction.

Joint Utilities' reliance on *Detroit Edison Co. v. FERC*, 334 F.3d 48 (D.C. Cir. 2003) is similarly unpersuasive. Notably, *Detroit Edison* predates the U.S. Supreme Court's ruling in *Elec. Power Supply Ass'n*, a case which the Joint Utilities' Initial Brief fails to address, and which addresses the specific issue presented in *Detroit Edison*. Indeed, as discussed above, the Supreme Court in *Elec. Power Supply Ass'n* explicitly acknowledged that states retain jurisdiction over retail and intrastate wholesale sales. *Elec. Power Supply Ass'n*, 577 U.S. at 267, 279. Further, as noted in the Coalition's Initial Brief, [12] since *Detroit Edison*, the D.C. Circuit Court of Appeals has expressly recognized that section 201(b)(1) of the Federal Power Act preserves states' jurisdiction over "within-state wholesale sales (i.e., sales for resale)."[13]

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[12] CPCNH Initial Brief at 16.

[13] *Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 964 F.3d 1186 n.5 (D.C. Cir. 2020). In *Nat'l Ass'n of Reg. Util. Comm'rs*, the D.C. Circuit also refers to interstate wholesale markets regulated by FERC as "federal markets" and noted that "[s]tates retain their authority to prohibit local [electric storage resources ("ESRs")] from participating in the interstate and intrastate markets simultaneously, meaning States can force local ESRs to choose which market they wish to participate in." *Id.* at 1181, 1183, 1185-89.

Even though *Elec. Power Supply Ass'n* addresses the issue presented in *Detroit Edison* and is controlling precedent addressing the jurisdictional issues being examined in this proceeding, the Coalition will still address the Joint Utilities' misapplication of *Detroit Edison*. Joint Utilities rely on *Detroit Edison* to support the proposition that wholesale transactions on the distribution system are part of interstate wholesale sales subject to FERC jurisdiction. Joint Utilities Initial Brief at 9-10. The D.C. Circuit's holding in *Detroit Edison*, however, reinforces the jurisdictional boundary between FERC and the states. Indeed, the D.C. Circuit in *Detroit Edison* held that FERC exceeded its jurisdiction by accepting the Midcontinent Independent System Operator's ("MISO") tariff provision that allowed unbundled retail customers to take distribution service under a FERC-approved tariff. *Detroit Edison Co.*, 334 F.3d at 53. The Court reached this decision because section 201(b)(1) of the Federal Power Act reserves to the states jurisdiction over local distribution facilities and any unbundled retail service over such facilities. *Id.*

To be sure, the Court observed that "FERC has jurisdiction over all interstate transmission service and over all wholesale service." *Id.* at 51. However, this language must be read in context of the Court's broader discussion in *Detroit Edison*. This quote from *Detroit Edison* is taken from a paragraph distinguishing FERC's and the states' jurisdiction under the Federal Power Act. The Court first explains that states retain jurisdiction over local distribution facilities and unbundled retail service. *Id.* The Court then states that FERC has jurisdiction "when a local distribution facility is used in a wholesale transaction," but the Court does not specify the type of wholesale transaction to which it refers (*i.e.*, interstate or intrastate wholesale). *Id.* Then, in the next sentence, the Court states: "FERC has jurisdiction over all interstate *transmission* service and over all wholesale service." *Id* (emphasis added).

The Joint Utilities suggest that, from this discussion, the D.C. Circuit meant to state that all wholesale transactions on the distribution system constitute interstate wholesale sales subject to FERC jurisdiction. *See* Joint Utilities Initial Brief at 9-10. However, the D.C. Circuit's language is not as clear as made out to be by the Joint Utilities because the D.C. Circuit refers to wholesale transactions generally and fails to distinguish between interstate and intrastate wholesale transactions. *See Detroit Edison Co.*, 334 F.3d at 51. Further, in the very sentence where the Court says FERC has jurisdiction "over all wholesale service," the Court is discussing specifically FERC's jurisdiction over *interstate* transmission service—not intrastate local distribution service. *See id.* at 53. Accordingly, the language the Joint Utilities quote in their Initial Brief from *Detroit Edison* is ambiguous at best and should not be read to mean that FERC has jurisdiction over all intrastate wholesale sales. This is especially so given the U.S. Supreme Court's subsequent acknowledgement in *Elec. Power Supply Ass'n* and the D.C. Circuit's subsequent acknowledgement in *Nat'l Ass'n of Reg. Util. Comm'rs* that states retain jurisdiction over retail and intrastate wholesale sales. *Elec. Power Supply Ass'n*, 577 U.S. at 267, 279, *Nat'l Ass'n of Reg. Util. Comm'rs*, 964 F.3d at 1186 n.5.

Finally, the Joint Utilities' reliance on FERC's 2010 Order in the California Public Utilities Commission ("CPUC") case is misplaced. The Joint Utilities rely on the CPUC case to argue that FERC has found it has exclusive jurisdiction over both interstate and intrastate wholesale sales, regardless of whether they occur over the transmission or distribution system. Joint Utilities Initial Brief at 10. A proper understanding of the CPUC case, however, requires context. The CPUC case originated with a petition for declaratory order filed by the CPUC, in which the CPUC requested that FERC find the Federal Power Act, Public Utility Regulatory Policies Act ("PURPA"), and FERC's regulations do not preempt the CPUC's decision to

require California utilities to offer a certain price to combined heat and power ("CHP") generating facilities of 20 MW or less that meet energy efficiency and environmental compliance requirements. *Cal. Pub. Utilities Comm'n*, 132 FERC ¶ 61,047 at P 1 (2010). In response to the CPUC's petition, the Sacramento Municipal Utility District ("SMUD") urged FERC "to focus its determination [on the CPUC's petition] narrowly" and not address unnecessarily FERC's authority to exercise jurisdiction over distribution-level facilities and distribution-level feed-in tariffs. *Id.* at PP 56, 72. FERC ultimately found that the CPUC program was not preempted by the Federal Power Act, PURPA, or FERC's regulations so long as certain requirements were met. *Id.* at P 2. FERC also declined to make a sweeping statement about its jurisdiction and instead stated its authority to regulate sales for resale in interstate commerce is dependent on definition of "wholesale sales" in the Federal Power Act. *Id.* at P 72. This statement merely reiterates FERC's long-standing position about its jurisdiction over wholesale sales in interstate commerce and should suggest FERC has jurisdiction over sales by a distributed energy resource, local sales on the distribution system, or intrastate wholesale sales, as these issues were beyond the scope of the CPUC proceeding.

C. The activities allowed by RSA chapter 362-A do not require a utility to violate its Transmission Owner Operator's Agreement or require a recalculation of any ISO-NE OATT.

The Joint Utilities identify *possible* conflicts between NHPUC and FERC jurisdiction but disregard the New Hampshire statute in accordance with the avoidance canon of statutory interpretation. The Joint Utilities raise concerns about potential issues which exist only as hypotheticals and acknowledge throughout their initial brief that these potential issues result from the ambiguity in the statute.[14] However, these potential issues can be avoided if the Joint

[14] *See, e.g.*, Joint Utilities' Initial Brief at 25 (inferring several possible issues deriving from various interpretations of "load obligations" which are not stated in the statue—these "issues" are purely

Utilities were to employ the statutory interpretation canon of constitutional avoidance. When statutory language is ambiguous, New Hampshire courts use the canon of constitutional avoidance to "resolve the interpretation of a statute in favor of its constitutionality." *Polonsky v. Town of Bedford*, 173 N.H. 226, 236 (N.H. 2020); *see also Clark v. Martinez*, 125 S. Ct 716 (2005). More specifically, if statutory language is ambiguous and may raise a constitutional issue—such as the jurisdictional issues being examined in this proceeding—"a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems." *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018). Consistent with the well-established practice by New Hampshire courts, the Commission should employ the statutory interpretation canon of constitutional avoidance to resolve any federal and state jurisdictional issues resulting from any ambiguity under RSA 362-A:2-b.

The possible jurisdictional conflicts the Joint Utilities identify are no reason to discard the limited producers pilot program as a whole as the Joint Utilities suggest. *See* Joint Utilities Initial Brief at 31-32. The Joint Utilities disregard statutory ambiguity in a manner that avoids raising constitutional problems—rather, the Joint Utilities suggest potential constitutional issues in several ways. The hypothetical issues argued by the Joint Utilities do not present an impediment that warrants interpreting the statute in a manner that nullifies the entire limited producers pilot program, especially when the Joint Utilities' initial brief throughout admits that none of these issues exist in the present and may not come to fruition.[15]

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hypothetical); *Id*. at 24 (attributing Joint Utilities' inability to definitively determine what "load obligation" means to the statute's lack of specificity and using conjecture to attempt to deduce a requirement from what they see as ambiguous language).

[15] *See, e.g.*, Joint Utilities' Initial Brief at 23 (stating RSA 362-A:2-b, X *could* require a recalculation, implying an understanding that this is not the current reality and may not become a reality) (emphasis added); *Id*. at 25 (using speculative language to indicate the Joint Utilities "*would* agree that a state statute compelling a recalculation of load *might not be deemed* to be preempted," conceding such an

Furthermore, the Commission should not end its inquiry in this proceeding based on the Joint Utilities' identification of *potential* jurisdictional issues that may arise under RSA 362-A:2-b. The fundamental purpose of this proceeding is for the Commission to examine and answer the questions posed under RSA 362-A:2-b, III and "upon successful resolution of these questions" approve the pilot projects as it sees fit. In other words, the statute empowers the Commission to *successfully* resolve such issues. As such, the Coalition urges the Commission to examine and resolve any potential jurisdictional issues to allow the pilot program to move forward, in accordance with the purpose of the legislation. In the subsections below, the Coalition addresses each of Joint Utilities' arguments in further detail.

i. A limited producer's delivery of power under RSA chapter 362-A would not compel usage of a utility's transmission system outside of the ISO-NE OATT.

Joint Utilities make the unproven assertion that "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."[16] Such reasoning is unfounded. To argue that use of the distribution system implicates use of the transmission system, thus invoking the terms and conditions of a FERC-jurisdictional tariff and raising issues of federal preemption, misconstrues the jurisdictional boundaries of the two systems. While distribution service and transmission service are inextricably linked, the thread that connects the two does not necessarily implicate a question of *law*, as the Joint Utilities so argue. The Supreme Court made this principle clear in *Elec. Power Ass'n*, when it explained:

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instance has not yet occurred); *Id*. at 25 (raising the potential issue that if the statute is read as pertaining to one of the load obligations discussed by Joint Utilities, it could require a recalculation, though use of the word "could" admits the statute does not specifically state as such and may ultimately not be interpreted that way).

[16] Joint Utilities' Initial Brief at 22.

> It is a fact of economic life that the wholesale and retail markets in electricity, as in every other known product, are not hermetically sealed from each other. To the contrary, transactions that occur on the wholesale market have natural consequences at the retail level too…When FERC sets a wholesale rate, when it changes wholesale market rules, when it allocates electricity as between wholesale purchasers – in short, when it takes virtually any action respecting wholesale transactions – it has some effect, in either the short of the long term, on retail rates. *That is of no legal consequence.*

Elec. Power Supply Ass'n, 577 U.S. at 281 (emphasis added). Furthermore, RSA 362-A:2-b does not *compel* usage of the transmission system. Pilot programs can readily be designed and implemented to take place exclusively at the distribution level,[17] without using or interacting with transmission facilities except as "load reducers" as permitted by the FERC approved ISO-NE OATT, and without participation in the ISO-NE wholesale market, except as a "load reducer" pursuant to ISO-NE market rules and operating procedures. Therefore, RSA 362-A:2-b does not violate any provision of or require any revisions to the ISO-NE OATT.

ii. Asserting RSA 362-A:2-b, X could require a recalculation of load under the ISO-NE Tariff is speculative and ignores the statutory interpretation canon of constitutional avoidance.

The Joint Utilities make the speculative assertion that RSA 362-A:2-b, X *could* require the recalculation of load under the ISO-NE tariff[18]—such speculation is not aligned with the constitutional avoidance canon. The Joint Utilities' section heading itself, in stating such recalculation *could* occur, concedes that the issues raised within the section are far from guaranteed. Further, potential issues identified by the Joint Utilities are avoidable through

[17] *See* N.H. Rev. Stat. Ann. § 362-A:2-b, VII–XI (discussing the electric distribution utilities that may propose pilot programs to participate in intrastate sales of electricity over the distribution grid).

[18] Joint Utilities Initial Brief at 23.

Commission implementation of pilot programs in a manner that avoids conflict with the ISO-NE tariff, and where direct reallocations can be made consistent with the ISO-NE tariff.

First, the Joint Utilities focus on nomenclature, attempting to distinguish the statute's use of the term "load-serving entity" rather than "market participant" where it states: "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."[19] It is important to recognize load-serving entities can be a type of Market Participant. The New Hampshire Administrative Code Puc Section 2202.14 defines load-serving entity as one that "is registered with ISO-NE *as a market participant* and secures and sells electric energy and related services to serve the demand of end-use customers at the distribution level."[20] Further, the ISO-NE itself defines load-serving entity as "an entity that secures and sells electric energy, transmission service, and related services to serve the demand of its end-use customers at the distribution level."[21] Given that the New Hampshire PUC Administrative Code defines load-serving entities as market participants within the ISO-NE, the terms can be viewed as interchangeable. Given an apparent understanding that entities may serve in both roles, the Coalition urges the Commission not to halt progress on the limited producer pilot programs based on a singular linguistic choice. The Commission can and should provide clarity as to the exact function the statute applies to and continue in its implementation of the limited producer pilot program on the merits.

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19 N.H. Rev. Stat. Ann. § 362-A:2-b, X (emphasis added).

20 N.H. Code Admin. R. Ann. Puc 2202.14 (emphasis added).

21 ISO New England, *Glossary and Acronyms* (July 7, 2023), https://www.iso-ne.com/participate/support/glossary-acronyms#j.

Joint Utilities contend they "cannot definitively determine what "load obligation" means"[22] as used in RSA 362-A:2-b, X. Joint Utilities state "the statute *could* be read" as requiring recalculation based on a variety of definitions of "load obligation."[23] Thus, even Joint Utilities concede, through the use of "could," that a degree of ambiguity exists as to whether or not recalculation would actually occur under the statute. Pursuant to the avoidance canon, where statutory language is ambiguous, it should be read to avoid placing the statute's constitutionality in doubt and a court may adopt an alternative interpretation which avoids constitutional issues. *See Polonsky*, 173 N.H. at 236. Despite this, Joint Utilities proceed to raise arguments built on assumptions about the intended meaning of "load obligation," each in a way that would require recalculation of load under the ISO-NE Tariff. Additionally, each of its load obligation scenarios employ permissive and speculative language,[24] the use of which both acknowledges the ambiguity of the term and assumes myriad layers of scenarios which may not come to fruition. Such speculative exercises create unnecessary constitutional issues and ignore the purpose of the avoidance canon. Pursuant to this canon of statutory interpretation, the provision should be read in a manner harmonious with the ISO-NE tariff and FERC jurisdictional boundaries.

Joint Utilities' initial brief is overly speculative, and implementation of the pilot programs would not conflict with ISO-NE tariff. The statute itself urges the Commission to successfully resolve any jurisdictional issues and makes clear the legislature's intent that the

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22 Joint Utilities Initial Brief at 24.

23 *Id.* at 25 (emphasis added).

24 *See id.* at 26 (speculating that an interpretation of load obligation as meaning transmission load obligation "would cause a recalculation" despite that interpretation being built on a foundation of cascading assumptions about the statute's language and legislative intent); *see also id.* at 26–27 (employing language like "may be" or "it is possible" in an attempt to derive meaning from an ambiguous term which Joint Utilities acknowledge is unclear yet glean an interpretation which implicates constitutionality problems).

potential for conflicts, even ones that might come to fruition, should not preclude the Commission from approving the pilot program so long as those issues are resolvable. *See* N.H. Rev. Stat. Ann. § 362-A:2-b, III. Clarifying the meaning of "load obligation" in a manner that does not conflict with the ISO-NE tariff or FERC's jurisdiction is possible and will facilitate the approval of these pilot programs. For instance, a straight-forward way to interpret RSA 362-A:2-b, X is to look at how RSA 362-A:9, II provides for exports to the grid by a supplier's customer-generators to "be accounted for as a reduction to the customer-generators' electricity supplier's wholesale load obligation for energy supply as a load service [sic] entity." *See* N.H. Rev. Stat. Ann. § 362-A:9, II. Alternatively, the Commission can interpret RSA 362-A:2-b, X by referring to New Hampshire Administrative Code Puc Section 2205.01, which provides that distributed generation or storage that function as "load reducers" by virtue of not participating in ISO-NE wholesale electricity markets can help supply the retail load requirements of community power aggregation ("CPA") customers with the balance procured from the ISO-NE wholesale market.

A simple example may help clarify how the statute can be interpreted to not cause a violation or require any recalculation or revision of ISO-NE tariffs, policies, or operating procedures. Assume a given CPA has a particular load asset consisting of 5,000 customers in one municipality (a metering subdomain of the electric distribution utility's ("EDU") overall metering domain) and 12,000 kWh of gross retail load in a given hour.[25] Assume also that customer-generators, and/or limited producers functioning as load reducers, are served by the same CPA (part of that CPA's metering subdomain or load asset) and export 4,000 kWh to the distribution grid in the same municipality during that same hour behind the same substation

[25] For simplicity this example ignores line losses, which would be factored in in practice.

connecting that part of the EDU distribution grid to the FERC jurisdictional transmission grid. In this scenario, approximately 1/3 of that CPA's retail load would be served or offset by the local generation, reducing the amount of power to be purchased through ISO-NE federal markets (and delivered over the transmission grid) to 8,000 kWh.

iii. RSA 362-A:2-b, XI(a) would not necessarily require a recalculation under the ISO-NE OATT.

In pointing to a specific provision of the statute, Joint Utilities merely raise a hypothetical scenario of potential concern, stating: "The provision *appears* to be an attempt to mandate how ISO-NE measures Monthly [R]egional [N]etwork L[oad] ["RNL"] … *If* [RSA 362-A:2-b, XI(a)] 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."[26] As explained *supra*, insofar the statutory language of RSA 362-A:2-b, XI(a) remains ambiguous, it should be read to avoid any issue of preemption. As stated in CPCNH's Initial Brief, "[t]here is no jurisdictional reason why the NHPUC could not approve use of the T[ransmission] C[ost] A[djustment] M[echanism] or a similar mechanism to account for payments to a limited producer for avoided transmission charges, as long as it ensures the ability of the utility to recover FERC authorized transmission charges as well."[27] The statutory provision ultimately addresses an issue of retail rate design under state jurisdiction.[28] The provision allows the sponsors of a pilot to petition the Commission to determine how credits are to be made for actual avoided transmission, which could include LSEs charging groups of retail customers for their actual share of transmission

[26] Joint Utilities Initial Brief at 30-31 (emphasis added).

[27] CPCNH Initial Brief at 18.

[28] *See id.* at 8.

costs based on their share of coincident peak. Such a reading of the provision would not require any recalculation under the ISO-NE OATT and would not raise any issues of preemption.[29] In short, the conflict Joint Utilities suggest is avoided by ensuring that reallocations are made consistent with the OATT.

[29] Note that the New Hampshire legislature recently adopted an amendment to RSA 362-A:2-b, XI(a) to clarify the statute's language and provide that such credits are to be made based upon "the extent to which such exports to the distribution grid reduce retail loads calculated at the point of interconnection between the distribution system, under state jurisdiction, and transmission facilities, under federal jurisdiction." S.B. 166-FN, An Act Relative to Electric Grid Modernization (NH 2023). This amendment is currently pending the Governor's signature and, if enacted into law, would resolve any potential jurisdictional issues claimed by the Joint Utilities. This pending legislation directly addresses the concerns raised in the Joint Utilities Initial Brief and deletes the sentence noted as difficult to parse in the Joint Utilities Initial Brief at 17 n. 51. However, if not enacted into law, the current statutory language can be read to not require any recalculation under the ISO-NE OATT and would not raise any issues of preemption, as discussed above.

III. CONCLUSION

WHEREFORE, for the aforementioned reasons, the Coalition respectfully requests the Commission:

1. Determine that RSA 362-A:2-b presents no unavoidable jurisdictional conflicts and is not preempted by the Federal Power Act;
2. Determine that RSA 362-A:2-b does not require a utility to violate or raise any issues with its transmission owner operator's agreement or the ISO New England Open Access Tariff; and
3. Grant such further relief as the Commission deems necessary and proper in the circumstances.

Dated: July 10, 2023

Respectfully submitted,

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By their Attorneys

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CERTIFICATE OF SERVICE

I hereby certify that I caused the attached document to be served pursuant to N.H. Code Admin. R. Puc 203.11 to the individuals included on the Commission's service list in this proceeding. Dated at Washington, D.C. this 10th day of July 2023.

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