

September 7, 2023

Daniel C. Goldner, Chairman
New Hampshire Public Utilities Commission
21 South Fruit Street
Concord, NH 03301

**Re: Supplemental Letter on Additional Federal Power Act Jurisdictional Rulings
DE 23-026 Electric Distribution Utilities Potential Jurisdictional Conflicts Related
to Authorization of Pilot Programs Under RSA 362-A:2-b**

Dear Chairman Goldner,

On July 10, 2023, Community Power Coalition of New Hampshire (“CPCNH”) submitted a Reply Brief with the New Hampshire Public Utilities Commission (“Commission” or “NHPUC”) in the above-captioned docket 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’s Reply Brief addressed whether the limited producers pilot programs authorized under RSA 362-A:2-b creates any jurisdictional conflicts between the Federal Energy Regulatory Commission (“FERC”) and the NHPUC.² In reviewing the briefs and preparing for the oral arguments in this proceeding scheduled for September 14, 2023, CPCNH identified additional precedent for two facets of the jurisdictional issue for which the Commission requested briefing and argument, namely: (1) the jurisdiction of the NHPUC over intrastate wholesale sales; and (2) the criteria for determining intrastate wholesale transactions subject to state jurisdiction. This additional precedent, which includes case law that postdates CPCNH’s reply brief³, provides guidance for the jurisdictional issues the NHPUC may find beneficial to consider. Rather than cite to and discuss this relevant case law for the first time during oral arguments, CPCNH is submitting this letter to notify the Commission and the parties in this proceeding about this additional case law in advance of oral arguments, thereby providing the Commission and the parties time to review and analyze the case law. CPCNH

¹ Docket No. DE 23-026, State of New Hampshire Public Utilities Commission, *Reply Brief of the Community Power Coalition of New Hampshire*, filed July 10, 2023.

² *See id.* at 5-8.

³ [*Advanced Energy United, Inc. v. FERC*, 2023 U.S. App. LEXIS 17894, *3 \(D.C. Cir. 2023\) decided July 14, 2023.](#)

believes this case law serves to inform and enhance the Commission’s decision-making process and respectfully requests any leave required for the Commission to consider this case law as it analyzes the arguments presented in this proceeding.

State jurisdiction over intrastate wholesale sales

In the years following *Elec. Power Supply Ass’n (EPSA)*, in which the U.S. Supreme Court clarified the scope of FERC’s jurisdiction under the Federal Power Act (“FPA”), recognizing that states retain jurisdiction over retail sales and intrastate wholesale sales, federal courts have consistently upheld and applied this statutory interpretation of the FPA. [*FERC v. Elec. Power Supply Ass’n*, 577 U.S. 260, 267 \(2016\)](#); *see, e.g., Advanced Energy United, Inc. v. FERC*, 2023 U.S. App. LEXIS 17894, *3 (D.C. Cir. 2023) (“The FPA does not, however, authorize [FERC] to ‘regulate either within-state wholesale sales or...retails sales of electricity (i.e., sales directly to users)’...Instead, ‘[s]tate utility commissions continue to oversee those transactions.’” (quoting *EPSA*, 577 U.S. at 267)); [*Entergy Tex., Inc. v. Nelson*, 889 F.3d 205, 207, 212 \(5th Cir. 2018\)](#) (explaining that “at the intrastate level, state regulatory bodies have sole jurisdiction,” as the Federal Power Act establishes “a zone of exclusive state jurisdiction” for both “within-state wholesale sales” and “retail sales of electricity” (citing and quoting *EPSA*, 577 U.S. at 265-67)); [*Allco Fin. Ltd. v. Roisman*, 2020 U.S. Dist. LEXIS 194269, *6-7 \(D. Vt. 2020\)](#) (noting that while the Federal Power Act gives FERC exclusive authority to regulate wholesale sales in interstate commerce, “[t]his exclusive authority is not without limits because the FERC ‘may not regulate either within-state wholesale sales or...retail sales of electricity’ because ‘[s]tate utility commissions continue to oversee those transactions’” (quoting *EPSA*, 577 U.S. at 267)), *vacated*, [*2023 U.S. App. LEXIS 18179 \(2d Cir 2023\)*](#); [*Coalition for Competitive Elec. v. Zibelman*, 272 F. Supp. 3d 554, 568 \(S.D.N.Y. 2017\)](#) (“Within the zone of exclusive state jurisdiction are ‘within-state wholesale sales’ and ‘retail sales of electricity (i.e., sales directly to users).’” (quoting *EPSA*, 577 U.S. at 267)), *aff’d* [*906 F.3d 41 \(2d Cir. 2018\)*](#); [*Allco Fin. Ltd. v. Klee*, 2016 U.S. Dist. LEXIS 109786, *6 \(D. Conn. 2016\)](#) (“Accordingly, the [Federal Energy Regulatory] Commission may not regulate either within-state wholesale sales, or more important here, retail sales of electricity (i.e., sales directly to users). State utility commissions continue to oversee those transactions.” (quoting *EPSA*, 577 U.S. at 267)), *aff’d* [*861 F.3d 82 \(2d Cir. 2017\)*](#).

The case law establishes that the NHPUC’s exercise of authority over intrastate wholesale sales is distinct from, and does not violate federal jurisdiction over, wholesale sales in interstate commerce.

Criteria for determining a state jurisdictional intrastate wholesale transaction

As discussed in CPCNH’s Reply Brief,⁴ under the FPA, states retain jurisdiction over “within-state wholesale sales,” otherwise known as intrastate wholesale sales, whereas FERC was granted jurisdiction over the sale of electric energy at wholesale in interstate commerce. [*16 U.S.C. § 824\(b\)\(1\)*](#); [*EPSA*, 577 U.S. at 267](#). States also retain jurisdiction over distribution and generation facilities. *16 U.S.C. § 824(b)(1)*. Case law provides guidance on what constitutes an intrastate wholesale sale permissibly subject to state jurisdiction and regulation. Specifically, intrastate wholesale sales subject to state regulation: (1) are untethered to the interstate wholesale market administered by regional transmission organizations (“RTOs”) and independent system

⁴ *See id.*

operators (“ISOs”); (2) do not directly adjust, alter, or affect the interstate wholesale rate set by FERC; (3) do not challenge, set, or seek to re-determine the reasonableness of the interstate wholesale rates set by FERC; (4) may reflect, consider, or incorporate FERC-set interstate wholesale rates; and (5) may indirectly or incidentally affect an interstate wholesale rate set by FERC.

First, an intrastate wholesale sale is one that is “untethered to a generator’s wholesale market participation.” [*Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 166 \(2016\)](#). In *Hughes*, the U.S. Supreme Court found that Maryland’s Generation Order was impermissible because it *required* the generator to participate in the PJM Interconnection LLC (“PJM”) capacity auction but guaranteed the generator a capacity price different and independent from the capacity auction. *Id.* at 158-59, 166. By requiring generators to participate in the PJM capacity auction but guaranteeing a different capacity price regardless of the results of the capacity auction, Maryland “disregard[ed] an interstate wholesale rate required by FERC.” *Id.* at 166. The Third Circuit struck down a similar New Jersey program because it required generators to participate in and clear PJM’s annual capacity auction but guaranteed a separate capacity price regardless of the outcome of the PJM capacity auction, thereby effectively setting capacity prices—an interstate wholesale rate regulated by FERC. [*PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241, 250, 252 \(3d Cir. 2014\)](#).

The Court in *Hughes*, however, recognized that states may continue to “encourage[e] production of new or clean generation through measures ‘untethered to a generator’s wholesale market participation.’” *Hughes*, 578 U.S. at 166. Courts have upheld such measures. In *Allco Fin. Ltd.*, for instance, the Second Circuit upheld Connecticut’s program that solicited proposals for renewable energy, selected winners, and directed Connecticut’s utilities to enter wholesale energy contracts with selected generators for a term up to 20 years. [*Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 86 \(2d Cir. 2017\)](#). The Second Circuit explained that, unlike the Maryland program in *Hughes*, the Connecticut program was not tied to or conditioned on PJM’s capacity auction but were traditional negotiated bilateral contracts. *Id.* at 99. The Second Circuit also affirmed the Southern District of New York’s decision upholding New York’s renewable energy credit program for nuclear generators because the program did not require nuclear generators to sell into the New York Independent System Operator’s (“NYISO”) auction, meaning the program did not tether the generators’ receipt of credits to their participation in the NYISO auction. [*Coalition for Competitive Elec. v. Zibelman*, 906 F.3d 41, 57 \(2d Cir. 2018\)](#); *see also* [*Coalition*, 272 F. Supp. 3d at 570](#). The Seventh Circuit reached the same conclusion in upholding a similar Illinois program. [*Elec. Power Supply Ass’n v. Star*, 904 F.3d 518, 523 \(7th Cir. 2018\)](#) (finding the Illinois program was not tied to or conditioned on participation in the PJM auction).

Second, an intrastate wholesale sale permissibly regulated by states is one that does not directly adjust, alter, or affect the interstate wholesale rate set by FERC. By being tethered directly to their respective RTO/ISO capacity auctions, the Maryland and New Jersey programs, respectively, in *Hughes* and *PPL EnergyPlus* effectively altered and set an interstate wholesale capacity price different from that set in the RTO/ISO capacity auctions. [*Hughes, LLC*, 578 U.S. at 163](#); [*PPL EnergyPlus*, 766 F.3d at 250](#). *See also* [*Schneidewind v. ANR Pipeline Co.*, 485 U.S. 294, 308 \(1988\)](#) (holding Michigan’s securities law was preempted because it directly affected

interstate pipeline wholesale rates subject to FERC jurisdiction).⁵ This interfered with FERC's exclusive jurisdiction over interstate wholesale sales. Intrastate wholesale sales, thus, do not directly adjust, alter, or affect the interstate wholesale rate set by FERC.

Third, an intrastate wholesale sale does not challenge or seek to re-determine the reasonableness of the interstate wholesale rates set by FERC. In *Mississippi Power*, for instance, the Supreme Court held that the FPA preempted Mississippi's inquiries into the reasonableness of FERC-approved prices for interstate wholesale sales (which led to higher retail rates). [*Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 375 \(1988\)](#). Cf. [*Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 389 \(2015\)](#) (finding the state's antitrust laws did not seek to challenge the reasonableness of the rates expressly approved by FERC). Similarly, the Eighth Circuit held North Dakota's import statute banning contracts for power from new large out-of-state power plants was preempted by the FPA because this represented a direct challenge to FERC's exclusive jurisdiction over wholesale sales of electric energy in interstate commerce. [*North Dakota v. Heydinger*, 825 F.3d 912, 926-27 \(8th Cir. 2016\)](#). In *Hughes*, Maryland adopted its generation development program directly in response to FERC's rejection of its proposal to increase generation development. See [*Hughes*, 578 U.S. at 158](#) (FERC rejecting Maryland's proposal to extend the duration of the New Entry Price Adjustment ("NEPA")). While not directly challenging FERC interstate wholesale rates, Maryland impermissibly attempted to circumvent and re-determine FERC's interstate wholesale rates through its own means. See *id.* at 162 (explaining that Maryland's program provides a 20-year price guarantee to new entrants "even though FERC refused Maryland's request to extend the duration of the NEPA past three years").

Fourth, an intrastate wholesale sale may reflect, consider, or incorporate FERC-jurisdictional interstate wholesale rates in rate-setting for a state-regulated activity without altering such FERC rates. In *Rochester Gas*, for instance, the Second Circuit held that states may account for and contemplate FERC-jurisdictional interstate wholesale rates in setting state-jurisdictional rates. [*Rochester Gas & Electric Corp. v. Public Serv. Comm'n*, 754 F.2d 99, 104-05 \(2d Cir. 1985\)](#); see also [*Coalition for Competitive Elec.*, 272 F. Supp. 3d at 569](#) (stating the Supreme Court in *Hughes* did not "impl[y] . . . that a State program's incorporation of the [FERC] wholesale market price would provide a basis for preemption").

Lastly, an intrastate wholesale sale may indirectly and incidentally affect an interstate wholesale rate set by FERC. The Supreme Court has held that states "may regulate within the domain Congress assigned to them even when their laws incidentally affect areas within FERC's domain." [*Hughes*, 578 U.S. at 164](#). In interpreting this, courts have upheld state regulations increasing the generation supply because any effect they have on the interstate wholesale market managed by RTOs and ISOs is incidental and indirect. [*Coalition for Competitive Elec.*, 906 F.3d at 54](#); [*Star*, 904 F.3d at 523-24](#); [*Allco Fin. Ltd.*, 861 F.3d at 101](#); [*Coalition for Competitive Elec.*, 272 F. Supp. 3d at 572](#). See also [*Northern Natural Gas Co. v. State Corporation Comm'n of Kan.*, 372 U.S. 84 \(1963\)](#) (holding the NGA did not preempt state regulation concerning the timing of gas production from a gas field in the state even though the regulation might affect the

⁵ While *Schneidewind* relates to the Natural Gas Act ("NGA"), the Supreme Court has stated that "the relevant provisions of [the NGA and FPA] are analogous [and the Supreme Court] has routinely relied on NGA cases in determining the scope of the FPA, and vice versa." See [*Hughes*, 578 U.S. at 164 n.10](#).

costs of and prices in interstate wholesale sales because the regulation was aimed primarily at protecting producers' rights, which is within the states' police powers).

In addition to the reasons advanced in CPCNH's Initial and Reply Briefs, CPCNH submits that, under the precedent cited above, the intrastate wholesale sales contemplated by the New Hampshire limited producers pilot program do not interfere with FERC jurisdiction. The intrastate wholesale sales contemplated by the limited producers pilot program are not tethered to or dependent on participation in the interstate wholesale market administered by the New England Independent System Operator ("ISO-NE") as in *Hughes* and *PPL EnergyPlus*. Further, the intrastate wholesale sales will not directly adjust, alter, affect, or challenge the interstate wholesale rates set by FERC. Any impact on FERC-jurisdictional interstate wholesale rates from the increase in supply for generation resources, if any, will be indirect or incidental.

Accordingly, CPCNH reiterates that the Commission's exercise of jurisdiction over the intrastate wholesale sales contemplated by the limited producers pilot program does not create a conflict with federal jurisdiction over wholesale sales in interstate commerce.

CPCNH provides the above rulings to facilitate the Commission's consideration of the jurisdictional issue under consideration for the limited producers pilot program, which CPCNH submits will serve to inform and enhance the Commission's decision-making process. CPCNH moves and requests any leave required for the Commission's consideration of this letter and the case law cited. Consistent with current Commission policy, this letter is being filed only in electronic form.

Please direct any questions to the undersigned counsel.

Dated: September 7, 2023

Respectfully submitted,

Community Power Coalition of New Hampshire
By their Attorneys

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cc: Docket Related Service List

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 7th day of September 2023.

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