STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DOCKET NO. DE 23-026

POTENTIAL JURISDICTIONAL CONFLICTS RELATED TO AUTHORIZATION OF PILOT PROGRAMS UNDER RSA 362-A:2-B

JOINT UTILITIES' RESPONSE TO SUPPLEMENTAL LETTER

Pursuant to the September 12, 2023 *Procedural Order Re: Denying Motion to Strike and Rescheduling Oral Argumen*t, 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"), respond to the "Supplemental Letter on Additional Federal Power Act Jurisdictional Rulings" ("Supplemental Letter") filed by the Community Power Coalition of New Hampshire ("CPCNH") on September 7, 2023 in the above-referenced docket.

I. SUMMARY

CPCNH filed the Supplemental Letter purportedly because it had just recently "identified additional precedent for two facets of the jurisdictional issue for which the Commission requested briefing and argument, namely: (1) the jurisdiction of the [Commission] over intrastate wholesale sales; and (2) the criteria for determining intrastate wholesale transactions subject to state jurisdiction." Supplemental Letter at 1. CPCNH represented that such additional precedent "includes case law that postdates CPCNH's reply brief." As demonstrated below, the Supplemental Letter provides no additional precedent or arguments relevant to the jurisdictional issue of whether a limited

producer's wholesale sales, if any, would occur in *intrastate* commerce, as the statute states, or would be in *interstate* commerce.

Rather than presenting relevant precedent on this threshold jurisdictional issue, the Supplemental Letter first presents repetitive, uncontested, and tautological statements on the scope of Federal Energy Regulatory Commission ("FERC") jurisdiction. Then, the Supplemental Letter presents a discussion of preemption cases that all involve state actions that *relate* in some fashion to *interstate* wholesale power sales. None of these cases cited by CPCNH relates to the existence of wholesale sales in *intrastate* commerce outside of "islanded" states such as Alaska, Hawaii, or the ERCOT region in Texas. CPCNH concludes 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." Supplemental Letter at 5. But CPCNH has put the cart before the horse, effectively *assuming* the wholesale sales are "intrastate" and then finding no preemption - based on a myriad of irrelevant federal preemption cases. This response demonstrates the unsupported nature of that assumption.

II. CPCNH HAS NOT PROVIDED ANY ADDITIONAL PRECEDENT ON WHOLESALE SALES IN *INTRASTATE* COMMERCE

Before discussing the substance of the Supplemental Letter, a reminder of the wording of the Federal Power Act ("FPA") as regards sales of electric energy is helpful. FPA Section 201 provides that (emphasis added):

> The provisions of this Part shall apply …. *to the sale of electric energy at wholesale in interstate commerce,* but

> except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line.

In short, sales of electric energy at wholesale may be made: 1) in interstate commerce; or 2) in intrastate commerce. The Joint Utilities *agree* that wholesale sales of energy in *intrastate* commerce, which the Supreme Court shorthands in *EPSA*[1] as "within-state wholesale sales" are not FERC-jurisdictional. And, the Joint Utilities agree that such sales do occur (e.g., in Hawaii, Alaska, ERCOT). But the question of whether a wholesale sale is in *interstate* commerce or *intrastate* commerce is not a question of whether the sale takes place wholly "within the state."[2] An electric law practitioner would unquestionably know that the concept of a "wholesale sale in interstate commerce" is far broader than only wholesale sales occurring across state lines, as the Supreme Court first pointed out more than *eighty* years ago.[3]

Thus, to resolve the "wholesale sale" jurisdictional issue raised in this case, the Commission must decide whether a wholesale sale by a limited producer is or is not in

[1] *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 267 (2016) (*EPSA*).

[2] For example, the famed Mount Washington Hotel does not sell hotel rooms that are located anywhere but in Bretton Woods, New Hampshire. But the sales of such rooms occur in *interstate* commerce, even if the guest lives in New Hampshire. Because such a sale is in *interstate* commerce, not *intrastate* commerce, the hotel is subject to a host of federal laws rooted in the Constitution's Commerce Clause. A finding that any activity that occurs wholly within New Hampshire *necessarily* does not involve interstate commerce is legally indefensible. *See, e.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964); *FERC v. Mississippi*, 456 U.S. 742, 758 (1982).

[3] *E.g.*, *Jersey Cent. Power & Light Co. v. FPC*, 319 U.S. 61 (1943).

interstate commerce based on precedent, including FERC precedent.[4] The additional case law cited by CPCNH in the Supplemental Letter sheds no light on whether a wholesale sale "within the state" by a limited producer is or is not in interstate commerce.

A. The "Precedent" that Postdates the Reply Brief Adds Nothing to the Record

The relevance of the precedent that postdates the reply brief – *Advanced Energy United, Inc. v. FERC*, 77 F.4th 719 (D.C. Cir. 2023) (*Advanced Energy*) – is best described by the word "none." In *Advanced Energy*, the D.C. Circuit, as it often does, started its analysis of a FERC case by setting forth FERC's jurisdiction. In doing so, the court quoted a jurisdictional statement from a fairly recent Supreme Court case – *EPSA*, a case fully addressed in the filed briefs in this case. The Supreme Court in *EPSA* stated that FERC cannot regulate "within-state wholesale sales." That *EPSA* quote is apropos of nothing, as it has been eighty years since the Supreme Court indicated a wholly within the state wholesale sale was in interstate commerce.

After setting forth the scope of FERC's jurisdiction in Section I.A of its opinion, the *Advanced Energy* court moves onto the history of the electric industry (Section I.B), the history of the case (Section I.C), the court's jurisdiction (Section II), and finally turns to substance in Section III. When the court turns to the substance, it is revealed that the case is about whether tariff revisions filed to create and set the rules for a newly proposed

[4] As the Vermont Supreme Court held, where "the Legislature has incorporated a question of federal law into Vermont's statute, in considering the federal law question, we owe deference to the federal agency charged with enforcing the federal statute and regulations at issue." *In Re Investigation to Review The Avoided Costs that Serve as Prices for the Standard-Offer Program in 2020*, 254 A.3d 178, 188 (Vt. 2021).

market to trade wholesale electricity in the Southeast (the SEEM) are just and reasonable. *Advanced Energy* has *nothing* to do with whether a wholesale electricity sale is or is not in interstate commerce, one of several issues presented to *this* Commission.[5] The facts stated in the case – that there are 19 SEEM members located in 10 states seeking to sell one another power[6] – means that it is basically assured that sales at wholesale *where both parties are located in the same state* will occur. Yet, no one is claiming that such "within-state" wholesale sales would *not* be subject to the rules of the FERC-jurisdictional SEEM tariff.

B. The Remaining Additional Citations to Cases Citing to *EPSA* Similarly Are Irrelevant

The four additional CPCNH-cited cases quoting *EPSA* merely repeat the scope of FERC's FPA jurisdiction. Like *Advanced Energy,* each case then rules on one or more issues unrelated to distinguishing between wholesale sales in interstate and wholesale sales in intrastate commerce.[7]

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[5] This case would be relevant, if for example, the tariff provisions claimed that a SEEM sale between two participants located in the same state was a sale in intrastate commerce (and the court agreed) and not subject to the SEEM tariff rules. The SEEM tariff proposal, however, raises no such jurisdictional issues.

[6] *Advanced Energy,* 77 F.4th at 728.

[7] In contrast to the cases cited, the proponent of finding that a state *should* have jurisdiction over "within the state" sales occurring on distribution facilities under a state program in *Cal. Pub. Utils. Comm'n*, 132 FERC ¶ 61,047 (2010) (*CPUC*) described the issue it sought resolution of this way:

> While power sales made to utilities under distribution-level feed-in tariffs may constitute sales for resale, as a physical matter sales of power over lower voltage distribution wires are unlikely, on account of impedance, to enter the bulk power system. As discussed above, Order No. 888 implicitly recognized this with its declaration that the Commission will not regulate local distribution. Therefore, sales of

1. Entergy Tex., Inc. v. Nelson

In *Entergy Texas, Inc. v. Nelson*,[8] the court considered "bandwidth" refunds from pooled corporate expenses under FERC-approved tariffs received by multi-state utility operating companies, refunds which are passed through to retail customers.[9] Nothing in the opinion involves any intrastate wholesale sales. The court simply held that the Public Utilities Commission of Texas order regarding *retail* rates was consistent with FERC's order, and thus was not preempted.[10]

> power under distribution-level feed-in tariffs cannot be in interstate commerce because the power sold does not enter the bulk transmission system or interstate commerce, but instead remains on the state-regulated distribution system.

Amendment to Motion to Intervene of the Sacramento Municipal Utility District Docket No. EL10-64, at 4-5 (filed June 10, 2010). In short, the issue resolved by FERC in *CPUC* was the *exact* issue here, namely: is a wholesale sale that (arguably) does not enter the bulk power system in interstate commerce? The FERC resolved that issue by finding that such sales were in interstate commerce.

[8] 889 F.3d 205 (5th Cir. 2018).

[9] Bandwidth payments are payments within a group of affiliated utility companies "made by the low cost Operating Company(ies) to the high cost Operating Company(ies) such that, after reflecting the payments and receipts, [above or below] the Entergy System average." 889 F.3d at 208 (citations omitted).

[10] *Id.* at 217.

2. *Allco Fin. Ltd. v. Roisman*[11]

In its Motion to Strike, the Joint Utilities noted that the one other post brief case – *Allco Fin. Ltd. v. Roisman III*[12] – vacated an unpublished opinion that cited *EPSA* – *Allco Fin. Ltd. v. Roisman I*.[13] The "additional precedent," *Allco v. Roisman I*, merely quoted *EPSA*, but the opinion did not involve jurisdiction over wholesale sales; rather, it was an order involving whether Allco and related plaintiffs had exhausted administrative remedies and had provided sufficient credible evidence in support of their contention that they are "qualifying small power producers" in their challenge to the Vermont program formerly known as "SPEED" that is now known as the Standard Offer Program ("SPEED/SOP").[14]

On a highly relevant side note, the Joint Utilities have characterized both Vermont's SPEED/SOP and its Rule 4.100 programs as PURPA programs, i.e., programs under which wholesale sales would be in *interstate* commerce.[15] In a pleading just filed with FERC on September 14, 2023, Vermont's Public Utility Commission ("Vermont

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[11] Allco Finance, Ltd. and its affiliates have challenged numerous state laws and regulations through the years that involve state programs requiring procurement both from non-qualifying facilities ("QFs") and QFs as non-compliant with PURPA. None of those cases (that involved states/utilities in the Eastern or Western Interconnections), however, has resulted in a court or FERC ruling that a state program may regulate (including set the price for) a wholesale sale of electricity *outside of PURPA*.

[12] No. 22-2726, 2023 WL 4571965 (2d Cir. July 18, 2023) (*Allco v. Roisman III*).

[13] No. 2:20-cv-103, 2020 WL 6150971 (D. Vt. Oct. 20, 2020) (*Allco v. Roisman I*). Actually, The Joint Utilities note that *Allco v. Rosiman III* vacated the judgment in *Allco Fin. Ltd. v. Roisman*, No. 2:20-CV-103, 2022 WL 2528328 (D. Vt. July 7, 2022) (*Allco v. Rosiman II*).

[14] This is the same program raised by CPCNH before the Commission.

[15] Joint Utilities Initial Brief at 11 n.33.

PUC") had a slightly different take. The Vermont PUC views SPEED/SOP as a non-PURPA program.[16] The Vermont PUC explains that its SPEED/SOP program is *not* FPA preempted, namely because it is only regulating resource procurement and that any wholesale sales and rates would be FERC-jurisdictional. The Vermont PUC noted that, if a "seller chooses to participate in a utility's RFP – [l]ike any seller participating in a bidding program – it has the responsibility to have secured FERC market-based rate authority."[17]

3. Coalition for Competitive Elec. v. Zibelman

In *Coalition for Competitive Electric v. Zibelman*,[18] the court reviewed a state law requiring New York's EDCs to pay nuclear generators for Zero Emissions Credits ("ZEC") and allocate the costs of such payments proportional to their customers' share of the total energy consumed in New York.[19] Again, the issue presented did not involve characterizations of wholesale sales, but whether sales of ZECs by nuclear generators to distribution utilities *impacted* the wholesale sales of power in interstate commerce made by the generators. The court explained that while states cannot condition a state subsidy

[16] In the alternative, the Vermont PUC argues that SPEED/SOP would be PURPA-compliant if treated as a PURPA program. *See* *Allco Fin. Ltd.*, Answer of the Vermont PUC Opposing Petition for Enforcement under the Public Utility Regulatory Holding Company Act of 1978, Docket. No. EL23-92, at Sections III and IV (Sept. 14, 2023).

[17] *Id.* at 9-10 (the Vermont PUC later notes that, given the size of SPEED/SOP participants, they do not *actually* have to obtain market-based rates due to a PURPA-based exemption, but this fact does not mean the Vermont PUC can regulate such sales or declare they are intrastate in nature).

[18] 272 F. Supp. 3d 554 (S.D.N.Y. 2017), *aff'd*, 906 F.3d 41 (2d Cir. 2018) (*Zibelman*),

[19] *Zibelman*, 272 F. Supp. 3d at 562.

upon a generator's successful participation in the interstate wholesale market, states could act through "tax incentives, land grants, direct subsides, construction of state-owned generation facilities, or re-regulation of the energy sector."[20] No intrastate wholesale power sales were mentioned, only state-jurisdictional "sales" of ZECs.

4. Allco Fin. Ltd. v. Klee

Finally, *Allco v. Klee*[21] did not involve the issue of whether sales by renewable generators under a Connecticut-run request for proposals ("RFP") program were wholesale sales in intrastate commerce. As ultimately held by the Second Circuit, and discussed *infra*, the state-run RFP program involved FERC-jurisdictional wholesale sales in interstate commerce.

III. CPCNH MISTAKES PREEMPTION GUIDANCE FOR GUIDANCE ON INTRASTATE WHOLESALE SALES

As discussed under the misleading heading "[c]riteria for determining a state jurisdictional intrastate wholesale transaction," CPCNH argues that certain case "law provides guidance on what constitutes an intrastate wholesale sale permissibly subject to state jurisdiction and regulation." Supplemental Letter at 2. The cited case law does no such thing. The cited case law describes standards for distinguishing what state programs and practices *sufficiently* affect FERC-jurisdictional rates to be preempted by federal regulation. Each "standard" for what allegedly constitutes an intrastate wholesale sale,[22]

[20] *Id.* at 568-69 (S.D.N.Y. 2017).

[21] Nos. 3:16-cv-508 & 3:15-cv-608, 2016 WL 4414774 (D. Conn. 2016), *aff'd,* 861 F.3d 82 (2d Cir. 2017) ("*Allco v. Klee*"),

[22] CPCNH claims that the intrastate wholesale sales subject to state regulation: (1) are untethered to the interstate wholesale market administered by regional transmission

actually is a preemption standard or variation of such a standard, as demonstrated below.[23]

A. Intrastate Wholesale Sales Are Untethered From the Interstate Wholesale Markets

The first "standard" mentioned is that intrastate wholesale sales "are untethered to the interstate wholesale market administered by regional transmission organizations." Supplemental Letter at 2. The cases cited, however, do not involve *any* determinations that wholesale sales of electricity are intrastate in nature.

The Supplemental Letter states:

> In *Allco Fin. Ltd*. … 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. 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.[24]

In this paragraph, CPCNH appears to be claiming that the Second Circuit in the *Allco v Klee* case discussed above permitted the state of Connecticut to *directly* regulate wholesale power sales. Even if this implied claim was unintentional, CPCNH's omission

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organizations ("RTOs") and independent system 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. Supplemental Letter at 2-3.

[23] CPCNH's five standards actually boil down to only *two* principles: (1) states may not take actions that have a direct or targeted effect on FERC-jurisdictional rates; and (2) states must give effect to FERC's wholesale rates.

[24] Supplemental Letter at 3 (citations omitted).

of the fact that any wholesale sales contracts resulting from the state-run RFPs would be FERC-jurisdictional[25] is glaring.[26] The court explained that

> [A]ny bilateral contract that results from that [CT RFP] process [would] be subjected to review by FERC for justness and reasonableness. . . . Because FERC has the ability to review any bilateral contracts that arise out of Connecticut's RFPs, we hold that Connecticut's 2015 RFP – insofar as it allows the DEEP Commissioner to direct (but not compel) utilities to enter into agreements (at their discretion) with generators, including non-QFs – is not preempted by the FPA.[27]

Similarly, in *EPSA v. Star*, 904 F.3d 518 (7th Cir. 2018), the court was adjudicating a case focused on subsidies awarded for the mere *production* of power, not wholesale sales of such power. In that case, the producers – nuclear generators – received a fixed credit regardless of the market price so long as they produced power. Thus the subsidy payment was "untethered" from the producers' sales in the interstate wholesale market.[28] The state-authorized subsidy payment that was state-jurisdictional was *not* for a wholesale sale of power.

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[25] The relevant implementing regulations assume that the winning sellers are subject to FERC jurisdiction as opposed to being municipalities, cooperatives, wholesale power marketers, or the like.

[26] CPCNH's description of the Connecticut program is akin to the description of the very New Hampshire law that FERC preempted based on EPSA's holding that "[t]he FPA leaves no room either for direct state regulation of the prices of interstate wholesales or for regulation that would indirectly achieve the same result." *See New England Ratepayers Ass'n*, 168 FERC ¶ 61,169 at P 41 n.111 (2019) (citing *EPSA* at 780).

[27] *Allco v. Klee*, 861 F.3d at 99-100.

[28] *See* 904 F.3d at 523-24. The Second Circuit affirmed a similar production subsidy was state-jurisdictional in the *Zibelman* case, described *supra*. *Zibelman*, 906 F.3d at 55 ("As explained above, the ZEC program regulates production[.]").

B. Intrastate Wholesale Sales Do Not Directly Adjust, Alter, or Affect the Interstate Wholesale Rate

It is self-evident that *if* intrastate wholesale sales exist, they would not directly affect an interstate wholesale rate set by FERC for the obvious reason that the state would have the legal authority to set the wholesale rate for the intrastate sales. But none of the three cases cited involves intrastate wholesale sales. Two cases cited by CPCNH involve state-mandated subsidies that *did* have a direct impact on the interstate wholesale sales being made by the generators selling power.[29] In the other cited case, *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988), a state's practices as to gas pipeline securities regulation (i.e., absolutely nothing to do with intrastate power sales), which affected federally regulated rates were within FERC's authority since FERC had authority to "fix practices affecting rates … to address directly any … unduly capitalized investments."[30] In short, between "standards" (1) and (2), CPCNH has cited cases where state subsidies are not preempted by FERC and cases where state subsidies and another practice are preempted by FERC, but it has not cited any cases discussing state subsidies or practices that actually involve intrastate wholesale sales of electric energy.

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[29] In *PPL EnergyPlus, LLC v. Solomon*, the Third Circuit found that New Jersey's law "effectively sets capacity prices and therefore" was preempted by federal regulation. 766 F.3d 241, 250 (3d Cir. 2014). It is unclear how this case relates to intrastate rates which "do not directly adjust, alter, or affect the interstate wholesale rate," since the court determined that the state *was* impermissibly setting the interstate capacity prices "in the first place." *Id.* at 253. Similarly, *Hughes v. Talen* found state incentives preempted because they guaranteed a rate distinct from the interstate market rate. 578 U.S. at 165 ("States interfere with FERC's authority by disregarding interstate wholesale rates FERC has deemed just and reasonable, even when States exercise their traditional authority over retail rates or, as here, in-state generation.").

[30] 485 U.S. at 309.

C. Intrastate Wholesale Sales May Not Challenge or Seek to Redetermine the Reasonableness of Interstate Wholesale Rates

CPCNH correctly claims that states may not inquire into the reasonableness of a FERC rate or limit recovery of such rates in retail rates, as such actions are preempted, Supplemental Letter at 4, but that standard is a *preemption* standard, not a standard to identify state-jurisdictional intrastate sales. In *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, the Supreme Court addressed only retail rates' interaction with wholesale interstate rates.[31] In that case, the state was attempting to find a portion of FERC-approved generation costs imprudent and thus reduce the amount charged to retail customers. The *North Dakota v. Heydinger* case involved the dormant commerce clause[32] and whether wholesale power sales could be restricted by a state; again how it might be relevant here is unstated, as the relevant question is which level of government has jurisdiction over limited producers' wholesale sales.

D. Intrastate Wholesale Sales May Incorporate FERC's Wholesale Power Rates Into Retail Rates, So Long As They Do Not Alter Them

CPCNH's notion that the jurisdictional standard for identifying intrastate wholesale sales can be found in cases involving states' approval of clearly state-jurisdictional retail rates is mistaken. In *Rochester Gas & Electric Corp. v. Public Service Commission*,[33] the issue presented was whether an estimate of revenues from a

[31] 487 U.S. 354 (1988).

[32] *North Dakota v. Heydinger*, 825 F.3d 912, 919 (8th Cir. 2016) (finding that the dormant commerce clause prevented the state from restricting import of electricity from out of state).

[33] 754 F.2d 99 (2d Cir. 1985)

utility's FERC-jurisdictional interstate wholesale sales was reasonable to use in setting *retail* rates. The court found that a "reasonable estimate" by the utility of FERC jurisdictional sales revenues could be reflected in retail rates.[34] Again, the case did not involve in any manner a standard for identifying intrastate wholesale sales.

E. Intrastate Wholesale Sales May Indirectly and Incidentally Affect an Interstate Wholesale Rate

The difference between two of CPCNH's intrastate wholesale sale standards it has identified – (2) "not directly adjust[ing], alter[ing], or affect[ing] the interstate wholesale rate set by FERC" and (5) "indirectly and incidentally affect[ing] an interstate wholesale rate set by FERC" [35] – appears non-existent. "Not directly" and "indirectly" are synonymous. In fact, CPCNH cites mostly the exact same precedent for its second and fifth "standards." In any case, all of the electric cases cited discuss subsidies for the *production* of power; none of those cases addresses intrastate wholesale sales.[36]

F. Summary

The issues raised by usage of the words "intrastate wholesale sales" in the New Hampshire statute at issue here are unrelated to the issue of whether the relevant statute

[34] *Id.* at 102-03.

[35] Supplemental Letter at 3-4.

[36] *Compare Hughes*, 578 U.S. at 164 ("States may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rates, as Maryland has done here."); *with Zibelman*, 272 F. Supp. 3d at 571 ("[A] ZEC is available based on the environmental attributes of the energy production."); *see also Star,* 904 F.3d at 523.

contains state subsidies[37] that are lawful or the issue of preemption. Rather, if the wholesale sales by limited producers do *not* fall into that intrastate category, because New Hampshire is part of the Eastern Interconnection, then the Joint Utilities do not need to "facilitate" and "account" for the sales under Article IX of the statute, nor do they have to abide by any other provision of the statute that assumes any wholesale sales are intrastate in nature. Moreover, the Joint Utilities do not have to allow their systems to be used to facilitate what could be *unlawful* wholesale sales in interstate commerce, e.g., if a limited producer lacks qualifying facility status (or market-based rate authority) but sells power at wholesale notwithstanding that lack of status or authority under federal law. The issue of jurisdiction over wholesale sales by limited producers must be ruled on separately from the issue of preemption.

[37] Indeed, in their Reply Brief, the Joint Utilities argued that one potential preemption issue could be solved through state subsidies. Joint Utilities Reply Brief at 23-24.

IV. CONCLUSION

WHEREFORE, the Joint Utilities respectfully request that the Commission accept this Response and find that the Commission lacks jurisdiction over any wholesale sales made by limited producers under an RSA 362-A:2-b pilot program.

Dated: October 2, 2023

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 motion to be served pursuant to N.H. Code Admin. Rule Puc 203.11.

Date: October 2, 2023 David K. Wiesner