

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

Public Service Company of New Hampshire d/b/a Eversource Energy
Petition of Kris Pastoriza for Review of “Asset Condition” Transmission Projects
Docket No. DE 23-056

Initial Brief of the Office of the Consumer Advocate

NOW COMES the Office of the Consumer Advocate (“OCA”), a party to this docket, and submits the following brief in response to the procedural order entered by the Commission in this docket on July 14, 2023. Our brief requests that the Commission move forward with the subject investigation. In support of our position, the OCA states as follows:

I. Introduction

The Commission instituted this proceeding in response to a petition (tab 1) filed on May 30, 2023 by Kris Pastoriza, who resides in Easton. Ms. Pastoriza, then appearing *pro se*, asked the Commission “to examine the costly rebuilds and structure replacements by Eversource of its 115 kV and 345 kV transmission lines . . . as well as all other Eversource transmission line projects in the category of Asset Management from 2018 to the present.” Petition at 1. By procedural order entered on June 28, 2023, the Commission deemed the Petition to be deficient and ruled that it would not consider the Petition until such deficiencies were corrected. Ms.

Pastoriza filed a Corrected Petition (tab 6) on June 29, 2023 and counsel for Ms. Pastoriza entered an appearance on July 31, 2023. Meantime, without indicating whether it would actually consider the Corrected Petition, the Commission entered a procedural order on July 14, 2023 directing Public Service Company of New Hampshire d/b/a Eversource Energy (“Eversource”) and the Department of Energy (“Department”) to brief the question of whether the Commission has jurisdiction to review the petition (presumably in its corrected form). The Commission indicated that these briefs would be due on August 4, 2023 with reply briefs due on August 18.

The OCA had not entered an appearance prior to the July 14 procedural order but we did so on July 21, 2023. Because we are a statutory party to Commission proceedings pursuant to RSA 363:28, II, it is appropriate for us to file briefs alongside Eversource and the Department. For the reasons that follow, we contend that the Commission has jurisdiction to conduct the investigation requested by Ms. Pastoriza and we respectfully urge the Commission to do so.

II. Asset Condition Projects: Billions Recovered from New England Ratepayers; Little or No Regulatory Scrutiny

We commend Ms. Pastoriza for bringing to the attention of the Commission an issue about which the OCA and, indeed, our counterpart agencies throughout New England have been concerned for a significant period of time. A good place for the Commission to start would be the memorandum raising the alarm about Asset Condition Projects and transmitted to the region’s transmission owners (including Eversource), ISO-New England, and the ISO-New England Planning Advisory

Committee on February 8, 2023 by the New England States Committee on Electricity (“NESCOE”).¹ NESCOE represents the six New England states (independent of the ratepayer advocate in each state except possibly Vermont) at ISO-New England and its stakeholder ‘advisory’ body NEPOOL. NESCOE is governed by six “managers,” appointed respectively by the region’s governors; in New Hampshire the designated NESCOE Manager is the Commissioner of the Department of Energy.

As noted on February 28, by NESCOE, in ISO New England’s capacity as the regional transmission organization that oversees the region’s wholesale energy markets and operates the region’s bulk power transmission system, the regional transmission organization superintends a transmission planning process (laid out in Attachment K of the ISO New England Open Access Transmission Tariff, commonly referred to as the “OATT”) to determine when and how the region’s transmission owners develop new projects deemed necessary for reliability purposes. However, as NESCOE further pointed out, Asset Condition projects – which involve the maintenance and upgrade of existing transmission assets such as the specific ones described in Ms. Pastoriza’s petition – are “not subject to these requirements.”

February NESCOE Memorandum at 1. Rather,

the process is simply for NETOs [i.e., the New England Transmission Owners] to provide the PAC notice-style, informational presentations on Asset Condition Projects with an estimated cost of \$5 million or greater. NESCOE is not aware of any Asset Condition Projects with a cost estimate

¹ This document is available at https://www.iso-ne.com/static-assets/documents/2023/02/2023_02_08_nescoc_asset_conditions_letter.pdf. We refer to this document hereinafter as the “February 2023 NESCOE Memorandum.”

over \$5 million that have ever been withdrawn or materially modified based on PAC feedback.

Id. at 2. According to NESCOE’s February 2023 Memorandum, since early 2016 (when ISO New England first began tracking Asset Condition projects and “making them visible in a central location”), more than \$2.787 billion in Asset Condition Projects have been placed in service with an additional \$3.255 billion more that had been “proposed, planned, or under construction.” *Id.* at 2-3. NESCOE compared this \$6.02 billion in rate-based Asset Condition projects to the \$1.317 in reliability projects, receiving full scrutiny, that had as of February been proposed, planned, or under construction.

In its laudably and characteristically diplomatic fashion, NESCOE politely requested “to discuss integrating Asset Condition Project planning into the [ISO New England]-led regional planning process” and stated that it was “confident there will be shared interest in such process enhancements.” *Id.* at 4-5. The Office of the Consumer Advocate is, historically, not as diplomatic and polite as NESCOE and thus we are comfortable being more blunt. To those curious about why New England’s bloated transmission rates are the highest in the country – and we are confident the Commission is among the curious – looking into virtually unscrutinized and out-of-control spending on Asset Condition projects would be a great place to start.

As the Commission ponders whether and how to move forward with this docket, we respectfully request that the Commissioners keep in mind that, as a rule of thumb, New Hampshire pays somewhere in the range of 9 or 10 percent of the

region's transmission costs. Ten percent of \$6 billion is still a prodigious bill to send our state's electric customers without requiring the companies that incur these costs to demonstrate they have been prudently incurred. Moreover, the situation has actually grown even more dire since NESCOE issued its memorandum in February. According to a follow-up memorandum from NESCOE, addressed to the same parties,² since the February 2023 NESCOE Memorandum, the region's transmission owners "have presented to the PAC forty-two (42) asset condition projects totaling over \$1.6 billion. There are now almost \$5 billion in asset condition projects proposed, planned, or under construction. *This represents a nearly 50% increase since February 2023.*" February 2023 NESCOE Memorandum at 1 (emphasis added). NESCOE further noted that four of those 42 projects were already under construction and ten more are expected to be in service by the end of the year. *Id.* at 2. "As a result, ISO-NE, states, and stakeholders have no time to review the NETO's proposed project costs in even a cursory way, let alone [have] time to consider cost-effective right-sizing opportunities." *Id.*

We share each and every concern expressed by NESCOE in February and again in July. On July 25, 2023, my counterpart in Maine, Public Advocate William S. Harwood, wrote to the presidents of his state's two transmission-owning utilities (Central Maine Power and Versant Power) urging them to be proactive in reviewing Asset Condition spending, adding that "[r]atepayers expect you to work with other [New England] Transmission Owners to find ways to minimize or delay this

² A copy of the July 2023 memorandum from NESCOE is appended to this brief.

spending.” Added Mr. Harwood, “[c]onsumer advocates throughout New England will be watching Transmission Owners closely over the next few months to see if these massive capital expenditures receive the level of scrutiny they deserve. Ultimately, [transmission owners] will be held accountable for this spending.” We have not dispatched such a letter because we consider the instant proceeding to be a convenient and suitable vehicle for addressing these concerns as they apply to New Hampshire. Indeed, we are aware that National Grid plc, through one or more of its subsidiaries, and possibly other entities (including but not limited to NextEra Energy through one or more of its subsidiaries), also own transmission assets in New Hampshire. We believe it would be appropriate, and hereby request, to expand this docket by making all owners of transmission assets in New Hampshire mandatory parties.

III. The Commission’s Authority to Conduct this Investigation

By state law, the Commission has “the general supervision of all public utilities and the plants owned, operated or controlled by the same so far as necessary to carry into effect” the provisions of the Commission’s enabling statutes in Title 34 of the Revised Statutes Annotated. RSA 374:3. This statute contains no exception for transmission assets. Likewise, RSA 374:4 confers upon the Commission a “duty . . . to keep informed as to all public utilities in the state, their capitalization, franchises and the manner in which the lines and property controlled or operated by them are managed and operated.” Again, there is no exception for transmission assets. And of course, there is the Commission’s prime directive, to

assure that “[a]ll charges made or demanded by any public utility for any service rendered by it” to be “just and reasonable.” RSA 374:1 (emphasis added).

These statutory responsibilities, originally vested by the General Court in the Commission in 112 years ago, antedate the adoption by Congress of the Federal Power Act and the establishment of what is now known as the Federal Energy Regulatory Commission (“FERC”) to regulate (*inter alia*) wholesale power and electric transmission when these things occur in interstate commerce. We nevertheless assume and expect that Eversource, and possibly others, will argue that the Commission is preempted by the Federal Power Act (and the Supremacy Clause of the U.S. Constitution) from acting on the concerns raised by Ms. Pastoriza’s petition and this brief. *See, e.g., New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982) (noting that the Federal Power Act vests in FERC “exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce”).

The Commission should reject such arguments as either unpersuasive or, at most, premature. We decline to argue against ourselves by presenting the Commission with case law and argument at this time in quest of a determination that this investigation is preempted. Should the utilities, or any other party, make a preemption argument in their initial brief, we will respond. At this juncture it suffices for us to note that (1) merely gathering information about Asset Condition projects by the Commission could not possibly raise preemption issues and, indeed, it would be inappropriate to assume the Commission would attempt to reign in or

otherwise regulate federally approved transmission rates as opposed to litigating or causing the Department (and/or the OCA) to litigate issues related to Asset Condition projects at FERC or in federal court, (2) there may be an argument against preemption insofar as FERC has authorized so-called “formula” rates for the region’s transmission owners and may have waived any preemption arguments by not assessing the justness and reasonableness of Asset Condition expenditures.³

IV. Conclusion

For the reasons stated above, the Commission should move forward with the investigation requested by Ms. Pastoriza and reject any arguments that such an investigation is preempted or *ultra vires*. The lack of scrutiny of Asset Condition transmission projects is a serious problem across the region, including New Hampshire most particularly. The OCA looks forward to participating in any such investigation.

WHEREFORE, the OCA respectfully request that this honorable Commission:

- A. Grant the petition of Kris Pastoriza to conduct an investigation of Asset Condition transmission projects;
- B. Direct that National Grid plc, through its appropriate subsidiary or subsidiaries, and any other owner of transmission assets in New Hampshire, be added as mandatory parties; and

³ Formula Rates for transmission owners in New England are set pursuant to the protocol described in Appendix C to Attachment F of the ISO-New England OATT (section II of the ISO New England tariff) and can be found here: https://www.iso-ne.com/static-assets/documents/2021/07/sect_ii_att_f_app_c.pdf.

C. Grant such further relief as shall be necessary and proper in the circumstances.

Sincerely,



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August 4, 2023

Certificate of Service

I hereby certify that a copy of this pleading was provided via electronic mail to the individuals included on the Commission's service list for this docket.



Donald M. Kreis