STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

Docket No. DE 24-032

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE d/b/a EVERSOURCE ENERGY

Burgess Plant Bankruptcy Settlement Review Pursuant to RSA 365:28 and Allied Statutes

MOTION FOR DISMISSAL OR, IN THE ALTERNATIVE,

CONSOLIDATION OF DOCKET

Public Service Company of New Hampshire d/b/a Eversource Energy ("Eversource," "PSNH," or the "Company") hereby requests that the New Hampshire Public Utilities Commission ("Commission") dismiss this proceeding or, in the alternative, consolidate it with Docket No. DE 23-091, Eversource's Petition for Adjustment of Stranded Cost Recovery Charge ("SCRC"). There are critical factual inaccuracies in the Commencement of Adjudicative Proceeding and Notice of Hearing issued on February 28, 2024 (the "Notice"), affecting the central premises for the proceeding, which the Company addresses in this motion.

The scope of this proceeding and issues presented, as stated in the Notice, are based on an inaccurate set of factual premises and therefore fail to provide adequate notice of the issues to be decided. On the other hand, if the Commission concludes that the factual premises were accurately stated (even though they were not), there would be no basis for any modification of previous orders under RSA 365:28 or any other statute cited in the Notice. The Commission has an understandable interest in learning more about recent developments in the bankruptcy proceedings involving Burgess BioPower, LLC and Berlin Station, LLC (collectively, the "Debtors" or "Burgess"), including rejection of the PPA and Option Agreement[1] as approved

[1] The "PPA" is the Amended and Restated Power Purchase Agreement between the Company and Berlin Station, LLC dated as of May 18, 2011, as amended on November 19, 2019 and August 18, 2022. The "Option Agreement" is the Purchase Option Agreement by and between the Company and Burgess dated as of November 25, 2013.

by the United States Bankruptcy Court for the District of Delaware (the "Court") on February 21, 2024, and the Settlement Agreement entered into by Eversource, the Debtors, and certain secured lenders (the "Settlement"), as approved by the Court by order dated February 28, 2024. The Settlement salvaged as much value as possible for customers in light of the fact that the Court had already approved rejection of the PPA.

However, considering that the PPA has been rejected under applicable law with approval of a Court of competent jurisdiction, and consequently is no longer in effect, and the rejection and ensuing elimination of the PPA were not within the Company's discretion or control, any questions about those issues and their effect on rates are most relevant in the context of the Commission's evaluation of potential adjustments to the SCRC rate in Docket No. DE 23-091. These issues are not, however, appropriately reviewed in a separate proceeding the scope of which is improperly delimited, given that the Notice seems rooted in the incorrect premise that the Company voluntarily negotiated the end of the PPA. Because the Court's decision approving the Debtors' rejection of the PPA resulted in its effective termination, neither RSA 362-F:9 nor RSA 374:57 are invoked. Accordingly, there is no Commission jurisdiction over the Settlement, except to the extent that it impacts amounts the Company is authorized to recover through the SCRC.

This filing is organized as follows. Section I, below, describes the Notice the Commission issued to initiate this proceeding. Section II, below, provides relevant background information, including the fact that the net near-term benefits of the Settlement to Eversource customers are estimated to total approximately $10 million and Eversource also retains the right to file (on behalf of its customers) a claim for damages in the Debtors' bankruptcy for $164 million arising out of the PPA that was rejected as approved by the Court.

Section III, below, demonstrates that the Commission should terminate this adjudicative proceeding or, in the alternative, consolidate it with and into the pending SCRC proceeding in

Docket No. DE 23-091. the Commission does not have jurisdiction to initiate this stand-alone adjudicative proceeding because the stated basis for its exercise of jurisdiction (the PPA) has already been rejected under applicable law with approval by the Court. Section III also demonstrates that the Commission will have ample opportunity to evaluate the Court-approved Settlement in the pending SCRC proceeding, and it is more efficient for the Commission and all stakeholders to have one state administrative proceeding (not two) evaluating the Settlement.

I. THE NOTICE

With respect to the Settlement, the Notice states that it "appears to contemplate the severance of the [PPA] . . ., which was originally approved, with conditions, by the Commission in 2011. The settlement agreement also has other provisions, such as a $3,350,000 severance payment made to Burgess Plant by Eversource." The Notice goes on to state that:

> The settlement agreement between Eversource and Burgess Plant, by terminating the Commission-approved agreement more than 9 ½ years early, abrogating the CRF refund mechanism, and providing a $3.35 million severance payment to Burgess Plant from Eversource, among other provisions, could implicate the need by the Commission to modify the terms of the Original Order and subsequent Commission Orders, including the Divestiture Order [Order No. 25,920 (July 1, 2016)[2]]. Therefore, the Commission will convene an adjudicative hearing proceeding pursuant to RSA 365:28 to assess the settlement agreement pursuant to all relevant Commission Orders and statutes, including RSA Chapters 374, 374-F, and 378, and to engage in factual inquiries related thereto.

As demonstrated below, these factual statements included in the Notice are incorrect and accordingly fail to provide adequate notice to parties and potential intervenors regarding the proper scope of the proceeding and the Commission's jurisdiction in this matter. Based on the insufficiencies in the Notice, including the lack of a legal or factual basis for the proceeding, the proceeding should be dismissed or, in the alternative, consolidated with the SCRC docket, DE 23-091.

II. FACTUAL BACKGROUND

[2] The Notice incorrectly references Order No. "26,920."

The factual background of the Commission's approval of the PPA and subsequent amendments to it are generally set forth in sufficient detail in pages 2-3 of the Notice and will not be repeated here.[3] Following the end of the Burgess PPA Operating Year on November 30, 2023, Eversource began netting against payments otherwise due to Burgess as provided for under the PPA. In particular, on January 23, 2024, the Company netted an amount equal to one-twelfth of the Excess Cumulative Reduction ("ECR") balance as of November 30, 2023 against payments due to Burgess for energy and capacity production during December 2023 and for renewable energy certificates ("RECs") produced by the Burgess power plant during the third quarter of 2023. That netting was implemented pursuant to PPA Sections 6.1.4(c) and 10.3.

As recounted in the Company's bankruptcy update filing on February 29, 2024, Burgess filed Chapter 11 bankruptcy petitions on February 9, without notice to the Company. The Debtors' motions and other papers filed on that date made it clear that they had been planning for the bankruptcies, including rejection of the PPA and the Option Agreement, for a number of months. Over the February 10-11 weekend, a team of Eversource attorneys and outside counsel drafted opposition papers, including an objection to the Debtors' motion to reject the PPA and Option Agreement, and a motion to change venue to New Hampshire which were filed on February 13. The Debtors were surprised and frustrated that they could not just have their motions granted without objection. An initial hearing was authorized by the Court for February 13, only two business days after the filing, and the Company appeared at that hearing in Delaware. The Court set February 21, 2024 for a full hearing on all motions.

On February 21, only seven business days after the bankruptcy filings, the Court, over Eversource's objection, granted the Debtors' motion to reject the PPA and Option Agreement.

[3] Eversource does, however, take issue with use of the terms "refundable" and "refund" in reference to the netting mechanisms under the PPA for recoupment for customers' benefit of "Excess Cumulative Reduction" balances. *See, e.g.,* PPA Sections 6.1.4(c) and 10.3. Netting against payments otherwise due to Burgess under the PPA does not create any monetary recovery that can be passed along to customers as a "refund," so use of such terminology is inaccurate.

The Judge, however, saved for a later date a final determination of the effective date of such rejection.[4] The Debtors were seeking a February 9 rejection date to impair certain of Eversource's rights and the Company argued for a later effective date for PPA rejection to preserve certain rights and to seek to maximize customer value.

Under applicable bankruptcy law, the Court had the discretion to grant the rejection effective as of the February 9, 2024 petition, if it concluded that the equities weighed in favor of such retroactive rejection. *See* 11 U.S.C. §365(a) (debtor in possession permitted to reject any executory contract of the debtor, subject to bankruptcy court approval). It seems likely that the Judge would have granted such retroactive relief, based on an apparent pro-debtor perspective and the lack of opposition (other than from Eversource) on such short notice.[5]

Burgess also sought to force Eversource out of the Lead Market Participant ("LMP") role with ISO New England ("ISO-NE") it holds to operate under the PPA with respect to regional wholesale market participation and related market settlements. In that LMP role, the Company is credited for energy production and capacity value for the Burgess power plant. The Court did not grant that motion, for technical reasons, on February 21, but advised the Debtors to refile it and would likely have granted that relief on an emergency basis in the absence of the Settlement.[6]

The Debtors also stated in pleadings and on the record that they would be seeking return of the $3.6 million portion of the recoupment/netting taken in January 2024 by Eversource (for the sole benefit of New Hampshire customers) against payment for RECs produced by the

[4] *See* Transcript of Continued First Day Hearing Before The Honorable Laurie Selber Silverstein United States Bankruptcy Judge, February 21, 2024, at pages 103-106 (in particular, on page 106, the Judge states "I will authorize rejection of the contract based on the unrebutted evidence. We save *nunc pro tunc* for another day and we form the order to the ruling I just made."). This hearing transcript is attached to this motion as Exhibit 1.

[5] *Id.* at 105 ("The real issue is, can I compel on this motion to [order] (*sic*) Eversource to cooperate with the debtors to effectuate the rejection of the contract and I see no basis in the Code for me to grant that relief. I find it unfortunate that I can't do it on this motion, but I don't think I can.").

[6] *Id.*

Burgess power plant during the third quarter of 2023, and that they would contest the recoupment/netting of the ECR against January 2024 energy and capacity charges—comprising the entire 1/12th of the ECR balance collected by Eversource pursuant to the PPA's terms. They also stated they would challenge the recoupment/netting of the Excess Cumulative Reduction against (1) February 1-8, 2024 (pre-petition) energy and capacity charges, and (2) February 9-29, 2024 (post-petition) energy and capacity charges.[7]

In the absence of a decision by or guidance from the Court as to date it would set as the specific effective date of the approved PPA rejection, Eversource sought to push out to February 29 the effective date for PPA rejection and the related transfer of the LMP role to the Debtors' affiliate or designee. The Settlement addresses a number of transitional issues regarding the timing and process for Eversource to turn over market administration of the Burgess power plant to Burgess affiliates.

In addition, the Debtors' various claims and actions, in light of indications from the Court to side with the Debtors' attempts to reorganize their business,[8] represented significant risks that the Company would have been unable to retain – and Burgess would have been able to recapture for the bankruptcy estates – the additional ECR recoupment/netting that Eversource took against pre-petition capacity and REC charges, and potentially even its netting against energy charges -- effectively everything netted by the Company based on the ECR under the PPA. While the Company believed it had (and has) strong legal arguments supporting its actions in connection with all such netting and recoupment for the benefit of customers, any unfavorable ruling would require substantial litigation and probably an appeal to the U.S. District Court in Delaware, with unlikely ultimate success in retaining the benefits obtained by Eversource for its customers.

Under the Settlement, the Company will: (1) retain and secure (for the benefit of New

[7] In addition, the Debtors threatened potential actions against the Company on other grounds.

[8] *Id.* at 103-108.

Hampshire customers) all of the approximately $9.87 million in amounts netted or to be netted against prepetition (i.e., prior to February 9) energy, capacity, and third quarter 2023 REC charges;[9] (2) be released from all further obligations to purchase overmarket RECs under the PPA, including those for December 2023[10] and January and February 2024; and (3) be permitted to file a rejection damages (unsecured) claim in the Debtors' bankruptcy for the remaining $164 million in Cumulative Reduction, with respect to the rejected PPA and Option Agreement.

In return, Eversource agreed to: (1) continue serving as LMP for the power plant under the PPA through February 29, 2024; (2) cooperate with transferring the LMP role to an affiliate or designee of Debtors, effective March 1, 2024; (3) continue purchasing energy and pro rata capacity at PPA contract prices (without any netting or recoupment against any portion of those payments, in view of automatic bankruptcy stay concerns), in the estimated amount of $2,208,233 for the period February 9-29, 2024 (the "February Payment"); and (4) pay an additional amount to the Debtors equal to the difference between the February Payment and $3,350,000, in full and final settlement of any and all claims the Debtors and/or their senior secured lenders may have against the Company, including all avoidance/clawback actions to undo the significant benefits the Company had already obtained for its customers.

Through the Debtors' release of all such claims, the Company will avoid potential losses and damages that would have the effect of significantly decreasing net customer benefits. Eversource will also be able file an unsecured claim for prepetition utility service provided to the Debtors, in addition to an unsecured claim for unpaid prepetition charges, if any, under the Interconnection Agreement with Burgess, the latter of which must be paid in full if the Debtors

[9] This total amount includes approximately $5.96 million netted in January against payments for December energy and capacity and third quarter 2023 RECs, $3.28 million netted against payments for January energy and capacity, and $630,000 netted against payments for energy and capacity produced during the period February 1-8, 2024.

[10] RECs produced during October and November 2023 would not be subject to any purchase obligation under the PPA because the 400,000 annual cap on REC purchases was exceeded during August 2023 and the applicable PPA Operating Year ended on November 30, 2023.

assume the Interconnection Agreement, as they currently intend. The near-term benefits to Eversource customers of having entered into the Settlement are described in the bankruptcy update filing submitted on February 29, and are summarized in Section III below.

III. DISCUSSION AND ANALYSIS

Under RSA 541-A:31, III, state agencies such as the Commission are required to provide reasonable notice of their adjudicative proceedings, which notice must include the following:

(a) A statement of the time, place, and nature of the hearing;

(b) A statement of the legal authority under which the hearing is to be held;

(c) A reference to the particular sections of the statutes and rules involved; and

(d) A short and plain statement of the issues involved. Upon request an agency shall, when possible, furnish a more detailed statement of the issues within a reasonable time.

The Notice fails to provide such reasonable notice regarding the issues to be addressed in this proceeding. As demonstrated in Section II above, the Settlement does not represent Eversource's agreement to "sever" the PPA nor to make any "severance payment" to Burgess. Nor is the Settlement an agreement to "[terminate] the Commission-approved [PPA] more than 9 ½ years early, abrogating the CRF refund mechanism, and provid[e] a $3.35 million severance payment to Burgess." In stark contrast to that mischaracterization, in fact, the Settlement was entered into only after the Court had authorized the Debtors to reject the PPA and the Option Agreement under applicable bankruptcy law, effectively eliminating the PPA over Eversource's objections.

Accordingly, the Settlement does not effect a termination or any amendment of the PPA, because the PPA effectively had already been terminated pursuant to the Court's authority. Only the details of the transition from Eversource to Burgess of the administration of the power plant's market participation remained to be specified, and the Settlement covers those details, as well as providing for certain additional payments, netting, retention of funds, and mutual releases that

effectively remove the Company from active litigation in the Debtors' bankruptcy proceedings, while securing for customers substantial net benefits that would have been at risk in the absence of the Settlement. As a result, RSA 362-F:9 and RSA 374:57 do not apply, as discussed in further detail below.

As noted in the Company's bankruptcy update filing made on February 29, the near-term benefits of the Settlement include the Company's ability to retain (for the benefit of New Hampshire customers) amounts netted from payments otherwise due to Burgess for its energy and capacity production in December 2023, January 2024, and February 1-8, 2024, and for RECs produced during the third quarter of 2023, in the total amount of approximately $9.87 million. In addition, the Company has received the benefit of energy market settlements and prorated capacity market credit for the period from February 9-29, 2024, in the total amount of approximately $1.0 million. Eversource also avoids potentially having to purchase RECs at overmarket prices for other periods, with that avoidance having a value of approximately $2.3 million. All of those benefits to customers would have been at risk if bankruptcy litigation were to proceed in the absence of the Settlement. Accordingly, the net near-term benefits of the Settlement to Eversource customers are estimated to total approximately $10 million. There will also be long-term benefits of the PPA rejection and Settlement terms, resulting from avoidance of future ongoing overmarket purchases of energy, capacity, and RECs over the full term of the PPA, even if netting of current and future ECR balances against payments under the PPA were to have continued. Nonetheless, regardless the content of the Settlement terms, the Settlement is not within the Commission's RSA 362-F:9 or RSA 374:57 purview, and so the only potentially proper venue in which to discuss the Settlement terms would be the Company's SCRC docket, where matters of Burgess costs and credits to customers are at issue.

The Notice therefore has fatal factual errors and fails to provide reasonable notice of the matters to be addressed in this new adjudicative proceeding initiated by the Commission on its

own motion. The Notice also misstates the statutory provisions relevant to any potential Commission review of the Settlement. There is no need for, nor any possible basis for, the Commission to modify any previous orders that relate to the PPA, the Burgess power plant, or the right of the Company to fully recover from customers all above-market costs it has incurred under the PPA, as any and all such actions would require a PPA to exist, which is no longer the case between Eversource and Burgess.

RSA 365:28 authorizes the Commission to "alter, amend, suspend, annul, set aside, or otherwise modify any order made by it," after notice and hearing, except that a "hearing shall not be required when any prior order made by the commission was made under a provision of law that did not require a hearing and a hearing was, in fact, not held." The prior orders issued by the Commission approved the PPA under RSA 362-F:9; approved the Company's costs through the SCRC; implemented legislative suspensions of the PPA netting and recoupment mechanisms for ECR balances; and confirmed the Company's right to recover the full above-market costs of the PPA through rates charged to customers as dictated by the suspensions of ECR collection under the relevant New Hampshire laws.[11]

None of those prior orders must be modified as a result of the PPA rejection as approved by the Court and Settlement approval and implementation, and in fact there is no basis for any legally permissible modification. Under RSA 362-F:9, as in effect prior to amendment in 2021,[12]

[11] *See* Order No. 25,213 (April 18, 2011) (conditionally approving PPA as in the public interest); Order No. 25,239 (June 23, 2011) (denying rehearing and approving PPA as amended); Order No. 25,920 (July 1, 2016) (approving settlement providing for sales of PPA energy and capacity into wholesale market, with difference between PPA costs and associated market revenues recovered through the SCRC); Order No. 26,198 (December 5, 2018) (amending Order No. 25,213 per legislative directive to suspend for three years operation of the cap from date cumulative reduction reaches $100 million); Order Nos. 26,331(January 31, 2020) and 26,333 (February 18, 2020) (approving PPA amendment to implement three-year cap suspension and Eversource's recovery of all PPA costs from customers through the non-bypassable SCRC); Order No. 26,665 (August 11, 2022) (amending prior orders to effect legislative directive to extend for one additional year suspension of operation of cap on cumulative reduction factor and addressing recovery of costs in excess of cap during additional cap suspension period); and Order No. 26,705 (October 14, 2022) (approving PPA amendment to implement additional one-year cap suspension and Eversource's recovery of all costs of the PPA "from customers via a non-bypassable rate mechanism as directed by 2022 N.H. Laws, ch. 275"). *See also* 2018 N.H. Laws Chapter 340 and 2022 N.H. Laws Chapter 275.

[12] As amended in 2021, it is now the Department of Energy, and not the Commission, that makes the public interest determination and authorizes electric distribution companies to enter into such multi-year REC purchase agreements.

the Commission could authorize an electric distribution company to enter into a multi-year purchase agreement with a renewable energy sources for RECs, "in conjunction with or independent of purchased power agreements from such [source], to meet reasonably projected renewable portfolio requirements and default service needs to the extent of such requirements, if it finds such agreements or such an approach, as may be conditioned by the commission, to be in the public interest." In 2011, after an intensive adjudicative proceeding in Docket No. DE 10-195, the Commission found that the PPA was in the public interest and approved it, as amended, under that statutory provision.

It is also important to note that the PPA provisions for purchases of energy and capacity, as opposed to RECs, are wholesale power purchase obligations that are subject to federal and not state jurisdiction. This distinction was recognized by the Commission in Order No. 25,213 (April 18, 2011) at 98, where it noted that "the PPA is a wholesale power agreement subject to [Federal Energy Regulatory Commission ("FERC")] jurisdiction and will be filed as a FERC tariff."

The Commission had jurisdiction over the PPA's REC purchase provisions under RSA 362-F:9 at the time it approved the PPA, but not over the wholesale power purchase provisions of the PPA subject to FERC jurisdiction. And the Commission no longer has jurisdiction even over the REC purchase provisions following legislative amendment of that statute in 2021.

To the extent that RSA 374:57 gives the Commission authority over cost recovery for power purchase agreements, even FERC-regulated power purchase agreements, that authority is limited to "disallow[ing], in whole or part, any amounts paid by such utility under any such agreement if it finds that the utility's decision to enter into the transaction was unreasonable and not in the public interest." And here, the Commission has found multiple times that both the PPA and recovery of costs incurred under the PPA are reasonable and in the public interest.[13] To go back and modify an

See 2021 N.H. Laws Chapter 91:241 (effective July 1, 2021).

[13] *See* Order Nos. 25,213; 26,198; 26,333; 26,665.

order to "undo" the finding that entering into the PPA was reasonable and in the public interest would be equivalent to retroactive ratemaking, and therefore unconstitutional. *See Appeal of Pennichuck Water Works,* 120 N.H. 562, 566-567 (1980).

Moreover, to be legally permissible, any modification of an earlier order by the Commission, even if it were warranted under the circumstances, could have only prospective and not retrospective effect. Given that the PPA no longer exists because the Court authorized its rejection by the Debtors, any such potential Commission order modification would pertain to a non-existent PPA and would be moot. Nor is there any basis for retroactive modification of any related order approving full recovery by the Company of all costs incurred under the PPA, and any such modification would constitute an unconstitutional taking. *See, e.g., Pennichuck,* 120 N.H. at 566-567 (inadequate rates may result in an unconstitutional confiscation from the utility, citing *Public Service Co. v. State,* 102 N.H. 66 (1959)).

Simply put, RSA 365:28 does not authorize the Commission to rewrite history or to engage in impermissible retroactive ratemaking, nor to supersede the legislature's authority.[14] And as stated by the Commission in Order No. 26,333, "the Amended PPA is contingent on an order from the Commission approving recovery by Eversource of over-market costs from customers through a non-bypassable rate mechanism . . . [w]e . . . find that cost recovery by Eversource of the over-market costs during the three-year suspension period through a non-bypassable equal cents per kilowatt-hour charge is reasonable and in the public interest." (at page 4, footnote 3 and page 8 (internal citations omitted)).[15] The only question properly before the Commission is how and when the Company will recover from its customers the full amount of any remaining costs it has incurred

[14] 2022 N.H. Laws Chapter 275 states that all costs of suspension of collecting the ECR and continuing over-market payments would be collected from customers.

[15] "The Commission hereby amends our Order No. 25,213 and Orders Nos. 26,198 and 26,333 issued in Docket Nos. DE 10-195 and DE 19-142 to extend the suspension of the operation of the cap on the cumulative reduction factor as set forth on page 97 of Order No. 25,213 for an additional period of one year from the date the operation of the cap would have otherwise taken effect under Order No. 25,213 and Order No. 26,198 and Order No. 26,333 in Docket No. DE 19-142 regarding cost recovery for costs in excess of the cap to apply during the additional period in which the cap is extended. See 2018 N.H. Laws, ch. 340:2, I, as revised by 2022 N.H. Laws, ch. 275:1." (Order No. 26,665).

under the PPA, and that question is best addressed in the existing SCRC docket, DE 23-091. There is no foundation for a separate adjudicative proceeding conducted under RSA 365:28, RSA 362-F:9, RSA 374:57, or any other statutory authority, notwithstanding the Notice.

IV. CONCLUSION AND PRAYER FOR RELIEF

Based on the foregoing, the Company respectfully moves the Commission to dismiss this proceeding or, in the alternative, consolidate it with the SCRC docket, DE 23-091, and to grant such other and further relief as may be just and equitable given the circumstances.

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE d/b/a EVERSOURCE ENERGY

Dated: March 6, 2024

By: ***/s/ David K. Wiesner***

David K. Wiesner
Senior Counsel
Eversource Energy
780 North Commercial Street
Manchester, NH 03101
603-634-2961
David.Wiesner@eversource.com

CERTIFICATE OF SERVICE

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

March 6, 2024

/s/ David K. Wiesner
David K. Wiesner