

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

Docket No. DE 24-087

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

Petition for Exemption from Town of Bethlehem Zoning
Ordinance, Art. II, Part D, under RSA 674:30, III

**EVERSOURCE SUR-REPLY TO PARTIES' OBJECTION AND REPLIES TO
MOTION FOR CLARIFICATION OF SCOPE OF PROCEEDING**

NOW COMES Public Service Company of New Hampshire d/b/a Eversource Energy ("Eversource" or the "Company"), pursuant to Puc 203.07, and submits this Sur-Reply¹ to: (1) the Department of Energy's ("DOE") Objection to Eversource's Motion for Clarification of Scope of Proceeding ("Motion"); (2) the Office of the Consumer Advocate's ("OCA") Reply to Eversource's Motion; and (3) the Town of Bethlehem's ("Town") Reply to Eversource's Motion. The Company will not address every issue that might be covered with respect to the parties' Objection and Replies; instead, the Company will focus on the key points covered therein.² The Company addresses each of the parties' filings separately below.

1. DOE Objection

In its Objection, the DOE appears to recognize that the inquiry in this proceeding should be limited to structures located in the Town, but it nevertheless relies on an overly broad interpretation of RSA 673:30, III to argue for a scope of inquiry that includes "the current condition of the structures proposed for replacement, lifespan of the current and proposed structures, materials and telecommunications proposed for the rebuild, environmental impacts, the cost of the proposed

¹ Although the limited procedural schedule approved to date in this proceeding does not provide for any such Sur-Reply, the Company believes this Sur-Reply will serve to clarify relevant points in the record and assist the Commission in considering the issues raised in the Motion, and respectfully requests that the Commission accept and consider this Sur-Reply and grant any waivers deemed necessary to include it in the administrative record.

² The fact that an issue is not addressed in this Sur-Reply does not indicate that the Company concedes that the parties are correct in that position and should not be deemed a waiver regarding any rights with respect to any such issues.

replacements, height, and alternatives.” DOE Objection at 2, 6, 8, 9, and 10. In particular, the DOE emphasizes its reading of the phrase “the proposed situation of the structure,” arguing that “plain language does not limit the inquiry to the height of the structure, its location, or other aesthetics,” but instead includes the many different factors it wants to investigate. But in this context, however, “situation” means “the way in which something is placed in relation to its surroundings” (i.e., its location), as opposed to “a relative position or combination of circumstances at a certain moment.”³ Accordingly, the scope of the inquiry should be on the locational “situation” of the proposed new electric transmission structures in the Town, with a focus on the greater height of the structures compared to those they would replace which causes them to violate the provisions of the ordinance from which the Company now seeks an exemption from the Commission.

The narrower reading of the statutory language is most appropriate, especially in the context of the proposed *rebuild* of an *existing* structure rather than the *siting* of a *new* structure in a *new* location in the Town. Many of the factors recognized in the *Milford Water Works* Supreme Court decision⁴ and considered by the Commission in its prior orders under this statute, or its predecessor statute, have little or no relevance where a structure already exists and is merely being replaced in the same right-of-way and proximate to the existing location, although at a different height. It is the greater height that is new and that is the issue under the Town zoning ordinance from which the Company has taken this “appeal” to the Commission under RSA 674:30, III.

In effect, the DOE, similar to the OCA, argues for a level of review by the Commission that would make it a “super” planning board and/or environmental regulator for public utility structures. But those are the provinces of the Site Evaluation Committee (“SEC”) and/or the Department of Environmental Services (“DES”), depending on the particular circumstances of the proposed

³ See <https://www.merriam-webster.com/dictionary/situation>.

⁴ See *Appeal of Milford Water Works*, 126 N.H. 127 (1985).

structure construction or installation. Moreover, neither the SEC nor the DES would investigate the *need* for a proposed project or its potential *cost* in considering matters of siting and environmental impact, but the parties in this docket would have the Commission do so, thereby exercising greater authority than the actual state siting authority and principal environmental regulator.

And cost and prudence are matters to be considered in *ratemaking* proceedings, but the Commission has no jurisdiction over interstate transmission rates, as it expressly recognized in Order No. 26,946 (February 12, 2024) issued in Docket No. DE 23-056. In that order, the Commission confirmed that it would be “futile” for it to review transmission rates approved by the Federal Energy Regulatory Commission (“FERC”), and any underlying determinations of prudence regarding transmission infrastructure investments, because “New Hampshire law is inapplicable to these rates.” Order No. 26,946 at 7. As noted in the Motion, the DOE effectively supported that jurisdictional conclusion in its Brief on Jurisdiction filed on August 8, 2023 in Docket No. DE 23-056. *See* Motion at 7, fn. 4. The broad scope of review advocated by the DOE effectively would circumvent that jurisdictional limitation.

The DOE states that the Commission should review its extensive list of relevant factors because “Eversource has not addressed these issues in alternate forums.” DOE Objection at 10. And the OCA has made similar arguments in this proceeding. But the fact that no other forum may be readily available to engage in the broad inquiry desired by the DOE (and the OCA) does not mean that the Commission must – or even legally can – serve as the default forum for such a broad scope of inquiry.

2. OCA Reply

According to the OCA, the “analysis under RSA 674:30, III is concerned with understanding what the public welfare requires and determining whether or how a proposed utility project will serve that need.” OCA Reply at 3-4. Based on its overly broad reading of the statutory

language, the OCA argues that the Company's proposed limitation of the scope of inquiry to impacts within the Town involving the taller structures proposed to replace existing structures within the same rights-of-way to continue providing safe and reliable transmission service to regional customers is too restrictive. But that more limited scope is precisely what the statute calls for in circumstances such as these, consistent with prior precedent, while respecting the constitutional limitations on the Commission's authority to review interstate transmission projects subject to FERC ratemaking jurisdiction.⁵

The OCA attempts to counter the Company's arguments in the Motion by distinguishing the *Milford Water Works* precedent, suggesting it somehow applies only in the circumstances where the regulatory agency seeks to "compel the utility to provide adequate service." OCA Reply at 5. But the Commission's prior orders applying the seven factors were not limited to such circumstances, and the OCA has provided no other support for the distinction it tries to draw. The OCA further asserts that the seven factors recognized in *Milford Water Works* are not exclusive or exhaustive. The Company does not dispute that the Commission is "not required to make findings of fact on the seven factors, nor is it required to analyze or weigh the factors in any particular fashion," as noted in the Motion on page 5. In fact, as noted on page 2 above, many of the seven factors have little or no relevance to the replacement of existing infrastructure within existing rights-of-way. However, that in no way requires or even permits the broad and virtually unlimited scope of investigation advocated by the OCA, for the reasons stated in the Motion and augmented through herein.

The OCA also challenges the Company's argument based on the Commission's lack of jurisdiction over interstate transmission facilities, by implying that the Commission has not previously reached a conclusion regarding that issue. OCA Reply at 6-7. The OCA asserts that the

⁵ The Company acknowledges that the siting, permitting, and environmental impacts of proposed transmission projects may be subject to state and local governmental authorities. However, that type of regulatory review and approval is performed by other agencies, such as the SEC and the DES, and not by the Commission (as noted on pages 2-3 above).

Commission has the *discretion* to perform the type of review sought by the petitioner in Docket No. DE 23-056, and which the OCA effectively seeks to have performed in this proceeding with respect to the X178 and U199 transmission lines. OCA Reply at 7. The OCA quotes Order No. 26,946 to suggest that the Commission has determined only that it is not “compelled” to review Eversource’s transmission projects in New Hampshire, but it neglects to include in its quotation the key language found on page 7 of that order, shown in italics below:

no statute requires the Commission to ensure FERC-approved transmission rates, and any underlying determinations as to the prudence of investments in transmission infrastructure, are consistent with New Hampshire law and *doing so would be futile because New Hampshire law is inapplicable to these rates.*

The futility recognized by the Commission in that earlier order arises from its lack of jurisdiction over interstate transmission rates and the prudence determinations inherent in the FERC ratemaking process. The OCA (and the DOE) effectively seek to have the Commission engage in a *prospective* prudence review of the need for and cost of interstate transmission projects when that review could not be performed on a *retrospective* basis as a result of federal preemption. That is not permissible under the applicable federal law. And the proper jurisdictional line of demarcation exists regardless of whether the Commission had previously acknowledged it; notably, however, the Commission has acknowledged it in the passage quoted above.

Finally, the OCA implies that the Company seeks to revise the Commission’s description of the scope of the proceeding as stated in its Commencement of Adjudicative Proceeding and Notice of Prehearing Conference issued on August 20, 2024 at page 3. OCA Reply at 9-11. But the Company has made no such request, as that order of notice merely states what the statute requires for an exemption to be granted:

whether Eversource’s proposal to replace the existing wooden transmission poles in Bethlehem with steel poles that are greater than 40-feet in height is “reasonably necessary for the convenience or welfare of the public” under RSA 674:30, III; and, if so, whether the Commission should grant an exemption from the Ordinance.

The question is whether the scope of inquiry to determine that such an exemption is warranted is limited, as demonstrated in the Company's Motion, or is as broad and open-ended as asserted by the OCA and the DOE. The answer is that it cannot be so broad and unlimited, consistent with state and federal law, and so it must be restricted now in order to most efficiently move forward in this proceeding within the proper scope of the Commission's limited statutory authority.

3. Town Reply

In its Reply, the Town expresses its support for the OCA's filing and the nearly unlimited scope of investigation advocated by the OCA. Accordingly, the points raised above with respect to the OCA Reply apply as well to the Town's Reply. However, the Company will take this opportunity to correct two factual inaccuracies included in the Town's Reply.

First, the Town incorrectly stated that Eversource's Motion acknowledged that the Company had sought to "expand the needed rights of way to accommodate the new towers." Town Reply at 2. In fact, the Company stated during the Town Planning Board's public meeting that no new right-of-way easement rights were required to support the proposed transmission structure rebuild and related construction work within the Town.

Second, the Town's Reply also represents that, contrary to Eversource's assertions in its Motion, there was "lengthy discussion . . . both during the public hearing *and in its deliberations*." Town Reply at 2 (emphasis added). That is an inaccurate characterization of what transpired after the close of the public portion of the Planning Board's public meeting, following which there was no substantive deliberation before or after the motion for denial was made. *See* video recording of "Bethlehem Planning board hearing power line towers 5/22/24."⁶ The Town's characterization of the Board's deliberations is not reflected in that recording, the meeting minutes nor in the Board's denial decision.

⁶ Posted to Facebook at <https://www.facebook.com/reel/990958922664886>.

Based on the foregoing, the Company respectfully requests that the Commission accept and consider this Sur-Reply, and the Company reiterates its request that the Commission grant the Motion in mid-November, in order to properly limit the scope of discovery in this proceeding to matters consistent with the scope delineated in the Motion.

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

Dated: October 25, 2024

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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.

October 25, 2024

/s/ *David K. Wiesner*

David K. Wiesner